The Ethical Obligation of the State to Hear and Address Indigenous Claims for Justice

by

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Abstract

> What are the implications of this profound power disparity in our struggles for land and freedom? Does it require that we vacate the field of state negotiations and participation entirely? Of course not. Settler-colonialism has rendered us a radical minority in our own homelands, and this necessitates that we continue to engage with the state's legal and political system. (Coulthard 2014, 179)

In the very last paragraph of his book *Red Skin White Masks: Rejecting the Colonial Politics of Recognition*, Glen Coulthard arrives at the problem of the necessity to engage with the state. It is at this location of the analysis that I begin my investigation.
How does the state listen to and engage with Indigenous peoples on issues of concern to them? How does the state respond in a relationship of profound power imbalance? What ethical moves can the state make to address the power imbalance in its relationships with Indigenous peoples? In this project, I listen to a range of Indigenous voices to begin to understand what justice means to them by listening to their experiences in seeking justice from the state as a structure that represents the majority of Canadians, who are non-Indigenous. I interview two senior government officials who largely understand the challenges of trying to address Indigenous justice claims within a large system. I also examine the state mechanisms of inquiries and commissions designed to listen to specific justice concerns and the state's reception of their recommendations and calls to action. Throughout, I apply Indigenous scholarship to better understand the nature of Indigenous justice, and feminist relational approaches as a tool to understand the relations of power within the structures that reinforce historical oppression, because those structures have not changed substantially from their original colonial design. With this approach, I begin the work of outlining the types of strategic moves that are necessary to shift the relations of power between Indigenous peoples and the state in Canada, such that Indigenous justice claims can be heard and ethically addressed.

Impetus: Who am I and what is my motivation?

My name is Seetal Kaur Sunga. I am a non-Indigenous woman whose family arrived in British Columbia around 1905 from Punjab, India, where British colonial powers had inflicted damage in an imperial-colonial setting. Both the migration and the political history of my ancestral family as activists against the British Raj are intertwined with imperial colonial history. My family arrived as labourers and fought racism to stay as settlers. We benefitted and continue to benefit from settler colonialism in Canada. My heart is connected to the lands where I have lived throughout Canada. I am committed to using my gifts to seek justice with Indigenous peoples in Canada who are co-constituted with the land, while acknowledging my position as a beneficiary of settler colonialism.

Acknowledgements

Many people have encouraged me and inspired me to complete my Ph.D. First, I would like to thank my supervisor in the Ethics and Public Affairs Program, Christine Koggel, who has provided ceaseless and valuable support, guidance and encouragement throughout the six years of my doctoral studies. I would also like to thank Kahente Horn-Miller, my supervisor in the School of Indigenous and Canadian Studies who provided invaluable kindness, advice and guidance, especially with respect to my field research and dissertation. I want to thank the members of my defence committee who reviewed the dissertation and asked important questions. The committee comprised Christine Koggel, Kahente Horn-Miller, Augustine Park, Katherine Minich, Karen Lawford, and chair Dominique Marshall. I would like to thank my colleagues within the Ethics and Public Affairs Program and the Director, Jay Drydyk for their good humour and robust discussions. I must mention the enormous influence of Sue Campbell in encouraging me to continue my graduate studies. I would like to thank Carleton University for the M. Gaulin Traveling Bursaries and the Bader Student Travel Award which enabled me to complete my field research. I thank feminist relational colleagues Timmy and Drew who were true compadres. Of the many friends who have encouraged me, I particularly thank Anita for reading my chapters and nourishing me with her optimism. I would also like to thank Department of Justice managers, including those in the Values and Ethics office, who helped me navigate government while completing my studies within academia. Thank you to the Department of Justice for also granting me education leave for one year. In the Department of Justice, thanks are due to Laurie, Marie, Michelle, Pamela and Duaine. I would also like to thank my cousin-in-law and proofreader, David for polishing this document. Big thanks to my brother Lyal for reviewing the final draft and making it better.

My family has encouraged, inspired and nurtured me throughout the process. First, I must thank Johan and Linnéa for their encouragement and love throughout the process. *Ni är de bästa barnen någonsin*. Members of my family, including in-laws, have inspired me in different ways: from a grandmother and her father's family who I never knew, but who I learned were tirelessly committed to education and anti-British Raj activism, to my youngest niece and all those in between. I must specially thank my mother and father who

always encouraged me to fulfill my potential. My mother still stands by my side, inspiring me and cheering me on.

I must thank all of those patient teachers along the way of my lifelong path of learning, including the research participants listed below. In addition to Bob Watts and his family, Dennis Nicholas and Kathy Skye and their family, the Kapashesit/Smalls-Cheechoos, Ashamock/Loons, Foxes and Michael Lane and his family have taught me many things over the years about justice for their families, communities and peoples.

Finally, and most importantly, I want to thank Pär Forslund. I could not have undertaken my doctoral project without his constant love and encouragement, his faith in me and his support through many long hours of effort. He was my first reader and is my best friend, my conversation partner and my mate. Thank you.

Biographies of research participants

Maggie Hodgson was the Executive Director of the Nechi Institute on Alcohol and Drug Education, an adult addictions counsellor training and research centre. She has worked in the area of addictions and advocacy in the court system since 1971, and on suicide prevention, sexual abuse, residential schools, family violence, communications, gambling addictions, Indigenous inmate aftercare and mental health. She sat on the Corrections Services international accreditation panel to accredit an alcohol and drug treatment for inmates, and advocated for an Indigenous sexual offender and drug offender program with Indigenous staff and design. Maggie Hodgson is responsible for the creation of the Angus Campbell Detoxification Centre, the Community Action Society that advocates on behalf of welfare recipients, the 1320 Car Club, the Moose Jaw Friendship Centre, and Moose Jaw Transition House for battered women. She was the driving force behind the National Addictions Awareness Week, which now boasts 700,000 participants annually; the First World Addictions Conference in 1992 that drew 3,200 Aboriginal people from around the world. When Ovide Mercredi went to Davis Inlet during the 1993 crisis, he chose Dr. Hodgson to accompany him due to her expertise. She sat on many boards and committees relating to the following: the Royal Commission on Aboriginal Peoples; the Edmonton Social Planning Council; the Canada Drug Strategy; the Minister of Health's Committee on Native Suicide; and Corrections Canada's Substance Abuse Task Force. Maggie Hodgson graduated with a Grade 12 education, received an Honorary Doctorate of Laws from the University of Alberta, and has taken numerous courses in various topics over the years including pre-law at the University of Saskatchewan to become one of the Aboriginal community's leading health care workers, trainers, organizers and advocates. She is married with three children, and lives in Edmonton.

Chief Dr. Robert Joseph, O.B.C., O.C. is a Hereditary Chief of the Gwawaenuk First Nation. Chief Joseph has dedicated his life to bridging the differences brought about by intolerance, lack of understanding and racism at home and abroad. His insights into the destructive impacts these forces can have on people's lives, families and cultures were shaped by his experience with the Canadian Indian Residential School system. As one of the last few speakers of the Kwakwaka'wakw language, Chief Joseph is an inspiring Ceremonial House Speaker. He shares his knowledge and wisdom in the Big House and as a Language Speaker with the University of British Columbia, an internationally recognized art curator and as co-author of "Down from the Shimmering Sky: Masks of the Northwest Coast".

In 2003, Chief Joseph received an Honorary Doctorate of Laws Degree from the University of British Columbia for his distinguished achievements in serving B.C. and Canada and many other awards in recognition of his influence and contributions to the country. He was a critical player in the development of the Truth and Reconciliation Commission mandate and provided leadership and vision for the reconciliation movement in Canada and elsewhere.

Chief Joseph is currently the Ambassador for Reconciliation Canada and a member of the National Assembly of First Nations Elders Council. He was formerly the Executive Director of the Indian Residential School Survivors Society and is an honorary witness to Canada's Truth and Reconciliation Commission (TRC). As Chairman of the Native American Leadership Alliance for Peace and Reconciliation and Ambassador for Peace and Reconciliation with the Interreligious and International Federation for World Peace (IFWP), Chief Joseph has sat with the leaders of South Africa, Israel, Japan, South Korea, Mongolia and Washington, DC to learn from and share his understanding of faith, hope, healing and reconciliation.

Stephen Kakfwi is Sahtu Dene from the K'asho Got'ine (Fort Good Hope) area in the Northwest Territories. He helped to organize the Dene Nation's northern presentations to the Berger Inquiry and as its commissioner travelled across the western territory to hear submissions. He also travelled across southern Canada speaking to the commission's southern hearings. Mr. Kakfwi was the president of the Dene Nation and participated in that capacity in the Dene Nation's comprehensive land claim against the Government of Canada. He was involved in several initiatives which embodied self-government, including the creation of Nunavut and efforts to establish a new form of government in the Western Arctic. Mr. Kakfwi was elected as a territorial politician in 1987. He became Premier of the Northwest Territories within a consensus-based governance system in January 2000.

Dennis Nicholas is Haudenosaunee from Kanesatake. He was one of the defenders of Mohawk territory at Kanesetake during the Oka Crisis along with Kathy Skye, his partner. He does outreach and counselling to help people with addictions, and he is a traditional healer. He and Kathy Skye are traditional people and language speakers and have raised their children in a traditional way.

Gord Peters is Lenape from the Delaware Nation Moravian of the Thames and is a member of the turtle clan. He has worked with First Nations both politically and non-politically for forty years. He previously served as the Ontario Regional Chief for twelve years, and held many other elected positions. He has owned and operated a successful negotiation and consulting business for the past fifteen years. His hobbies include cultural undertakings, public education, and enjoying a round of golf during his leisure time.

Yvonne Rigsby Jones is Snuneymuxw First Nation, Coast Salish. A sister, wife, mother, grandmother, and friend, she has dedicated twenty years of her professional life to leading Tsow-Tun Le Lum Treatment Center, retiring in June 2015. She has continued to be active in her work; currently as an Ambassador for Reconciliation Canada; and facilitating healing workshops on a contract basis. She is also a member of the Governing Council for the MSW Indigenous Trauma and Resiliency Program, University of Toronto.

She has worked with a proactive Board of Directors at Tsow-Tun Le Lum to develop leading edge treatment practices such as the pioneering Residential School Trauma Healing approach. She combined sound management with a caring and compassionate engagement with people as individuals, and within the organization. At the

point of her retirement, the organization largely reflected her character and commitment. Over her career she participated on many Regional and National Committees which enriched her life but also her work.

Yvonne understands that traditional practices and ceremony are the way home for many people. She has listened, encouraged, challenged and led. She believes in compassion because compassion works.

Murray Sinclair served the justice system in Manitoba for over twenty-five years. He was the first Indigenous judge appointed in Manitoba and Canada's second. He served as Co-Chair of the Aboriginal Justice Inquiry in Manitoba and as Chief Commissioner of the Truth and Reconciliation Commission (TRC). As head of the TRC, he participated in hundreds of hearings across Canada, culminating in the issuance of the TRC's report in 2015. He also oversaw an active multi-million-dollar fundraising program to support various TRC events and activities, and to allow survivors to travel to attend TRC events. Senator Sinclair has been invited to speak throughout Canada, the United States and internationally, including the Cambridge Lectures for members of the Judiciary of various Commonwealth Courts in England. He served as an adjunct professor of law at the University of Manitoba. He was very active within his profession and his community and has won numerous awards. Senator Sinclair has received Honorary Doctorates from a dozen Canadian universities. Senator Sinclair was appointed to the Senate on April 2, 2016.While in the Senate, he served on the Standing Committee on Aboriginal Peoples, the Standing Committee on Legal and Constitutional Affairs. He was a member of the Senate Ethics and Conflict of Interest for Senator's Committee as well as Vice-Chair of the Standing Committee on Rules, Procedures and Rights of Parliament. He was appointed Chancellor of Queen's University on July 1, 2021.

Kathy Skye is Haudenosaunee from Kahnawa:ke. She was one of the defenders of Mohawk territory at Kanesetake during the Oka Crisis along with Dennis Nicholas, her partner. She is a nurse who has worked in Kanesatake for the past twenty-seven years. She and Dennis Nicholas are traditional people and language speakers and have raised their children in a traditional way.

Bob Watts has been involved in many major Indigenous issues in Canada over the past twenty years and led the process, with support from across Canada and internationally, to establish Canada's Truth and Reconciliation Commission, which examined and made recommendations regarding the Indian Residential School era and its legacy. He was Interim Executive Director of the Commission and was a member of the team, which negotiated the historic Indian Residential Schools Settlement Agreement.

His current activities include working with Mediate BC to recommend ways for Indigenous communities to respond to changes to the *Canadian Human Rights Act* and working on the Siting Process with the Nuclear Waste Management Organization. He is an adjunct professor and fellow in the School of Policy Studies, Queen's University, and a frequent speaker on Indigenous issues.

Mr. Watts is also a former CEO of the Assembly of First Nations, served as the Chief of Staff to the Assembly of First Nations National Chief Phil Fontaine, and is a former Assistant Deputy Minister for the Government of Canada. He is a graduate of the John F. Kennedy School of Government, Harvard University and fellow at the Harvard Law School. Mr. Watts is of Mohawk and Ojibway ancestry and is a member of the Six Nations Reserve.

Marie Wilson, a Commissioner of the Truth and Reconciliation Commission of Canada (2009-2015), has been an award-winning journalist, trainer, federal and territorial executive manager, high school teacher in Africa, university lecturer, and consultant. Fluently bilingual in French and English, she is a prominent public speaker throughout Canada and internationally on the successes and challenges of advancing reconciliation. She has served as 2016 Professor of Practice at McGill University's Institute for the Study of International Development, a Mentor for the Pierre Elliott Trudeau Foundation, and on several prominent boards in Canada, including the Rideau Hall Foundation, and the national public broadcaster, CBC-Radio-Canada. Dr. Wilson holds several honorary degrees and professional awards, and is the recipient of the Order of the Northwest Territories, the Order of Canada, and the Meritorious Service Cross.

First Senior Official will remain unidentified at their request.

Second Senior Official will remain unidentified at their request.

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List of Abbreviations

AHF	Aboriginal Healing Foundation
ICC	Inuit Circumpolar Council
IRS	Indian residential schools
MMIWG	National Inquiry into Missing and Murdered Indigenous Women and Girls
OCAP	Ownership, Control, Access and Possession
RCAP	Royal Commission on Aboriginal Peoples
TRC	Indian Residential Schools Truth and Reconciliation Commission
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Chapter 1 The Inquiry, the Roadmap and the Research Methodology

My part of the story goes back when I was playing with my toys on the floor at my grandparents' place. The guys would come in and come visit my grandparents. What they talked about always focused on what was going on—why things were the way they were in our country, the hardships that built the people to really be strong and to thoroughly understand why things were the way they were.

. . .

In my belief of the language and the way they spoke and the historical parts that they talked about—not just in the day or in those times but the stories that they went and got from their grandparents and their great-grandparents and stuff that was done so.... This all came into the discussion that used to take place. I would say that that is the foundation of the teachings that I gathered way back.

And then when this whole story of what had happened … about what was to take place in the Pines and what they were considering on doing…the people, the families, said, "No. No, don't touch that graveyard. The people that are buried there.... It carries a lot of history. It carries a lot of hard-working people that have passed on the responsibilities, the knowledge, the language, everything that we have. We're not about to let anybody bother those people, because they're resting now and they've earned it."

That's the foundation of what helped me very easily say, "Sure, then we'll see to it that they're never molested or bothered because it isn't the thing to do. Neither will they start building—expanding—this project they had of this golf course and these houses—these mansions—that they had intention to build . . . around something as sacred as that cemetery and of course the answer was no. No, that's not going to happen."

. . .

The families came forward with their children and all of that because those children were brought into the school of history and reality of how things are in that moment in time. Those children saw first-hand what would be talked about, the sacred burnings that were going on continuously, giving thanks to the medicines and to the ancestors around us, and thanking them for leaving everything we had in terms of knowledge and strength and power to continue.

(In speaking about the reason for defending Mohawk territory during the Oka Crisis) (D. Nicholas, personal communication, September 2, 2020)

1.1 Introduction

In the research interview Dennis Nicholas explained to me the root of his obligation to defend Mohawk territory during the 1990 Oka Crisis in Kanesatake. He spoke of the lineage of knowledge in his community, kinship relations and, most importantly, the spiritual co-constitution of his people with the land. My understanding of the concepts he conveyed to me about his responsibility to Mohawk territory and his ancestors are very much limited by the use of the English language. English carries a legacy of imperialism, assimilation and colonialism whereas "Indigenous languages transmit unique ways of understanding and relating to the world" (Chiblow and Meighan 2021). Consequently, my capacity to convey the centrality of territory and the depth and breadth of relations to territory to the reader is limited by these linguistic constraints.

Though he and his wife Kathy Skye were two of only about thirty Mohawk defenders, facing first the police of Québec and then the Canadian army, there was no real option for them not to defend the land and the ancestors buried in the land against disruption by developers. The Oka Crisis, one of the biggest exercises of military force against a civilian population in Canada, showed Canadians the depths of Indigenous resolve while simultaneously showing the limitations of using force to address conflicts with Indigenous peoples. It also illustrated, in the starkest way, the oppressive power imbalance between Indigenous peoples who struggle to defend their land and the state.

> What are the implications of this profound power disparity in our struggles for land and freedom? Does it require that we vacate the field of state negotiations and participation entirely? Of course not. Settler-colonialism has rendered us a radical minority in our own homelands, and this necessitates that we continue to engage with the state's legal and political system. What our present condition does demand, however, is that we begin to approach our engagements with the settler-state legal apparatus with a degree of critical self-reflection, skepticism, and caution that has to date been largely absent in our efforts. (Coulthard 2014, 179)

In the very last paragraph of his book *Red Skin White Masks: Rejecting the Colonial Politics of Recognition*—which is an argument *for* Indigenous resurgence and *against* a role for the state in addressing Indigenous justice claims—Glen Coulthard arrives at the problem of the necessity to engage with the state. It is at this location of the analysis that I begin my investigation.

There is an obligation for non-Indigenous people in Canada to take responsibility for our part in a relationship that has historically been oppressive to Indigenous people by reason of dispossession, racism, inequality and colonization more generally. I also hold the state—as the structure that manifests ongoing structural inequality between Indigenous and non-Indigenous peoples in Canada—accountable for ethical action toward Indigenous peoples. I see that though there may be a desire for the state not to exist as a structure of oppression, the state still grapples with it. Consequently, I have focused my research question around the ethical responsibility of the state, and of those, like myself, who work within state structures, to address the injustices faced by Indigenous peoples.

1.2 Roadmap for the Dissertation

Chapter 1 explains my methodological approach and why there is an inclusion of extensive quotes from field research participants and includes an explanation of terminology in the dissertation and a note to institutional reviewers. In chapter 2, I outline the two bodies of scholarship that form the foundation of the dissertation: Indigenous scholarship and feminist relational approaches. In line with these bodies of work, I situate myself and describe my history working on issues concerning Indigenous justice. I also situate this dissertation within the moment in which it was written.

Moving on from the personal, chapter 3 explores what the individual can do within oppressive institutional structures to respond to Indigenous justice claims. Disorientation as conceptualized by feminist relational scholar Ami Harbin is an idea used to describe the moves that can be made to allow institutional actors to listen and properly hear Indigenous visions of justice even when they are unsettling or disorienting.

In chapter 4, I examine state mechanisms that are specifically tasked with listening to justice claims and reporting on them, where core government operations have failed to listen and where the legitimacy of government is at stake. In this chapter I introduce two related concepts: not being seen, as conceptualized by Dene scholar Glen Coulthard and Mohawk scholar Audra Simpson, who both critique recognition theory as discussed in chapter 6; and the ethical wrong of not being heard, as conceptualized by feminist relational scholar Jill Stauffer. I describe the Berger Inquiry and the Truth and Reconciliation Commission (TRC), their mandates, approaches to listening and their recommendations and Calls to Action.

Chapter 5 examines the legacies of the Berger Inquiry and the TRC and some of the successes and challenges associated with these efforts to listen. I develop a concept which I call the "field of justice", which provides a way to locate a justice claim in space through its location to land, and in time through its prospective or retrospective application. The "field of justice" as an analytical tool can help us understand the limitations or possibilities of addressing justice claims, depending upon where and when it is situated. I look at the role of litigation in hearing and responding to Indigenous justice claims. Chapter 6 examines the conceptual limitations of recognition theory through the lens of Glen Coulthard and Audra Simpson. I explore how vertical and binary recognition

practices can work to undermine Indigenous governance, which has been fractured through the imposition of colonial governance structures.

Chapter 7 examines the Royal Commission on Aboriginal Peoples (RCAP), its genesis in the aftermath of the Oka Crisis and the Meech Lake Accord, and its legacy. It is here that I explore some of the structural reforms that would address Indigenous justice claims at the foundations of Canada's existence. In this chapter, I examine relational and Indigenous ways of thinking about sovereignty, and how they might be used to re-conceptualize how we think of our obligations to Indigenous peoples and the land.

Chapter 8 comprises my conclusions and a summary of each chapter.

1.3 Research Methodology

1.3.1 Field Research

I sought to achieve several things in the dissertation project. First and foremost, I tried to listen and learn closely from the people I interviewed and to convey what I learned by reporting accurately what was said throughout the dissertation. I wanted to broaden my understanding, and the understanding of readers, of what justice looks like by listening to the perspective of a variety of Indigenous advocates. From the literature and the interviews, I identified some of the core conceptual and structural obstacles to listening and responding to visions of Indigenous justice and explored them throughout the chapters. My work situates the state vis-à-vis Indigenous peoples. In some instances, the state sees itself as an adversary, as in litigation—when that is not a desired or accurate positioning. In other instances, the state sees itself as on a common nation-state building project with Indigenous peoples, which is also not an accurate positioning. I identify a range of articulations of what justice looks like for different Indigenous peoples and

different leaders. This diversity must be heard, even when—especially when—it is unsettling (Regan 2010). There are many conflicting policy goals within government, as well as different approaches favoured by different Indigenous and non-Indigenous leaders. The project identifies important strategic pathways for non-Indigenous state institutions to take ethical and positive action, without perpetuating oppression and colonialism. I situate these different approaches and provide ethical guideposts to assist with navigating a path forward.

1.3.2 Indigenous Methodologies

Linda Tuhiwai Smith (2012) explores the role academic research has played in upholding Western intellectual superiority and as a platform for denying the existence of Indigenous knowledge (222). My work strives to avoid perpetuating the denial of Indigenous knowledge and methodologies, and instead engages with research methodologies and field research that centres listening and relationships.

I interviewed Indigenous people who have long-standing personal advocacy experiences on behalf of themselves and their communities. The term "Indigenous justice" is a broad term, and therefore it has deliberately been left open to research participants to explain to me what they mean by justice for Indigenous peoples. I use the term "Indigenous peoples" throughout the dissertation because of the common experience with colonization among various peoples of this land and not because of commonality or pan-Indigeneity among peoples of this land. The commonality arises from reactions to European incursions (Deloria Jr. 1973, 54-55). Accordingly, research participants localized their definitions of who they are based on their experiences among their own communities and those with whom they have relationships.

I have varying degrees of relationship with ten out of twelve of the participants, and I am mindful of how that impacts this project. My role in relation to some of the participants is as friend and/or former colleague. Because I have existing relationships with many of the participants, I had access to them for the research project. In addition, the existing relationship meant that the conversations during the interviews were often continuations of ongoing discussions we had been having for some time. As a result, I took pains to remind the participants of the fact that we were in a research project and to give them many opportunities to review what they shared with me. Self-reflection, an awareness that the conversations are being used for research and an ongoing consent process are important to ensure ethical, respectful and critical engagement (Smith 2012, 140). Every effort was taken in this regard.

Prioritizing the relationships that I have with the research guides how I interact with them. I respond to them rather than push them. Some research participants have been more engaged in the outcome of my work because of long-standing relationships of mutual support. Others have been less engaged for various reasons. I have shared the transcripts and draft dissertation with each of them as a basic requirement of my undertaking to give them control over their words. Out of respect, I have not insisted on full feedback given the demand this requires on their resources. Thus, I have tried to avoid perpetuating the type of extractive, unequal and disrespectful model of research that has occurred in the past in the colonial context.

Nine of the twelve research participants I interviewed are Indigenous advocates with between forty and fifty years of experience each. Two of them are TRC commissioners. One is the former premier of the Northwest Territories and a Dene

advocate. Two of them are senior government officials responsible for Indigenous issues, both at the assistant deputy minister level or above. To highlight their contributions, I have placed their biographies in the Acknowledgements section. Indigenous research methodologies require a "holistic use and transmission of information" that is aligned with storytelling as a means of sharing, rather than extractive research that is owned and manipulated by the researcher (Wilson 2008, 32). Indigenous research methodologies emphasize the importance of respect, relationality and reciprocity (58). In this research these three principles manifest in several ways. The research project was designed to respect the words of participants and not engage in aggressive critique. This methodology does not mean that their words were not thoughtfully considered; it only means that the composition of my analysis is not based upon a dialectical critique, but rather looked for where different points of view built a more holistic understanding of the issues at play. This approach to engagement employs a different and more integrative skill set than finding fault in an adversarial analysis, and it is connected with a consensus-based style of inquiry. Throughout the dissertation I provide full and lengthy transcriptions so that their words and their way of speaking are conveyed to the reader with minimal editing. I include their words to respect what they told me and to demonstrate how they have shaped the dissertation. This approach is more aligned with a storytelling methodology that acknowledges the knowledge content in stories (Kovach 2009, 96).

In 2016 I took a course offered by the Carleton University Institute on the Ethics of Research with Indigenous Peoples. The main message from these teachings, and also in designing my research project with the guidance of the Carleton University Ethics Research Board, is that research should not be extractive (Kovach 2009, 141-55). It

should be reciprocal in terms of benefiting the communities from which knowledge is gained, it should be designed to maintain relationships with research participants beyond the field research project, and it should offer whatever benefits might be possible flowing from the research project itself. Additionally, in an Indigenous research context, it is important that I situate myself in the research and my own connection to it to bring out my relationship to the work and the research project and its participants (Kovach 2009, 110). Therefore, at the beginning of the dissertation in particular, I explain my background and involvement, my motivation and my situation vis-à-vis the research participants and particular topics where I have had involvement.

The principles of Ownership, Control, Access and Possession (OCAP) (First Nations Information Governance Centre, n.d.) by Indigenous peoples of research relating to themselves and their communities is key. Of course, research is conducted for the purpose of the dissertation project, which benefits the doctoral candidate, and this fact is clearly disclosed to research participants. However, the OCAP principles guide the design and conduct in the field.

The research participants were chosen because of long-standing involvement and advocacy work they had undertaken. Their experience made it much less likely that they would experience harm from being interviewed. As well, the questions were focused on their perspectives on justice and not about their personal experiences of trauma. Lengthy advocacy experience and a focus on justice meant that research participants were more accustomed to sharing their views and less likely to be triggered and harmed throughout the interviews.

The research project process stipulated that the transcripts produced from the interviews would be provided to the participants. They own their words. At the end of this project, the transcripts and audio recordings will be destroyed. The participants were given full latitude to change or amend their transcripts if they felt that they had not properly expressed their thoughts. In terms of possession, a few of the interviewees had indicated that they may want to use the transcripts for their own writing or research purposes. The transcripts are theirs to do with as they see fit. In the spirit of maximizing Indigenous and participant control, the participants were given the full capacity to withdraw consent at various stages, up to and including within ten days of receiving a draft of the dissertation with highlights of where their words had been used or cited.

Given the history of extractive research conducted by colonial researchers upon Indigenous people with no reciprocal value provided to the Indigenous community, research methodologies must incorporate a decolonizing agenda (Kovach 2009, 81). An important aspect of conducting respectful research relating to Indigenous communities is to have guidance from a committee that represents the collective interests of the community in which the research is being conducted. One example is the Community Advisory Board for the Kahnawa:ke Schools Diabetes Prevention Project, which is a community-based participatory research project. In that ethics protocol, the Community Advisory Board represented Kahnawa:ke community members and has the role of granting approval of research proposals concerning the community (Kahnawa:ke Tsi Ionterihwaienstahkhwa Teiakonekwenhsatsikhe:tare Rotiiotatie' Tahati:tahste: Kahnawa:ke Schools Diabetes Prevention Project. n.d.).

The dissertation project was conducted with respect to a community of interest, those who have advocated for Indigenous justice, rather than a geographically bounded or linguistic community. As such, my Community Advisory Committee comprised members of the community of interest, Indigenous advocates. The committee provided me with guidance on how to engage with the community of interest, the nature of the interviews and the list of interviewees. More generally, they provided me with guidance on pursuing my work with respect in a way that connected my heart and integrity with my intellectual inquiry. My Community Advisory Committee comprised Dennis Nicholas from Kanesatake, Kathy Skye from Kahnawa:ke, and Bob Watts from Six Nations.

1.3.3 Feminist Methodologies

Feminist relational scholars such as Sue Campbell, in her work *Our Faithfulness to the Past: The Ethics and Politics of Memory* (Campbell et al. 2014), focus on relations of power for how we work with and understand various practices that are directly related to this research project. Feminist methodologies, as articulated by Liz Stanley, look to understand what is going on in the research project in five related sites: "in the researcher-researched relationship; in emotion as a research experience; in the intellectual autobiography of researchers and researched; in how to manage the different 'realities' and understandings of researchers and researched; and thus in the complex question of power in research and writing" (Stanley 1990, 23). In particular, my work considers the research participants to be what Campbell refers to as "rememberers" who are also advocates and political testifiers. Though Stanley identifies methodologies common to all feminist theories, in centring my account on relationships, as does Campbell, my focus throughout is on feminist relational approaches.

In two discussion papers that Campbell prepared for the TRC, she explores relational memory specifically in the context of the Canadian Indian residential schools Truth and Reconciliation Commission, and the significance of remembering for the future. As she states, "political testimony has considerable power as a language of forward-looking memory. First, testimony is remembering for the future." Referencing educator Roger Simon, Campbell states that testimony is to make sure we "keep specific events before [our] eyes thereby instantiating their significance for current and future generations" (Campbell et al. 2014, 172). The research participants spoke about their memories and knowledge to communicate key events and stories. They did this in order to continue to advocate for their communities and bring forward politically significant and meaningful memories that will impact the future. Indigenous research participants each reflected upon their experiences of many decades in relation both to me in the current moment, and for future readers in evolving political contexts. Their words were both personal recollections conveyed through their relationships with me, and remembrances for "current and future generations" (172) for the purpose of politically influencing the future.

Many of the participants articulated their experiences with disenfranchisement as someone who had either suffered through a particular type of vulnerability as a child in residential schools or suffered other kinds of violence. They spoke of their challenging experiences as well as the incredible places of strength that they come from in their families and communities, regardless of attempts to interrupt their identities. Each participant had significantly contributed to working toward justice on behalf of and with community members. Most participants had been involved or were currently involved in

leadership positions. Several were heavily involved in the daily work of seeking justice for community members who had suffered serious harm relating to residential schools, poverty and ill-health. They provided their insights and analysis of various forms of Indigenous justice. All participants were at the same time experts, advocates and testifiers.

Interviews highlight the contextual and relational nature of memory and knowledge. I rely heavily upon Campbell's conception of relational remembering as a way to reflect on the process of doing interviews. Campbell writes:

> …memory should be faithful to the past…. To learn is to understand from a position of present need and through what else we have come to know. It is to re-experience our past selectively, as shaped by the demand of an always new present, through the determinations of a history that itself shifts in significance. And of course, we remember with and in response to other people and their needs and histories. (2)

The research interviews allow us to re-visit together the research participants' past through the lens of the present, and for a future purpose. In turn, I respond with this doctoral assessment on articulations of Indigenous justice.

This project relied on my own professional experience and what I learned through the preparatory research undertaken before the interviews. Additional learning took place within the sphere of my relationship with these rememberers who spoke with me, conscious of the project and our relationship. The participants spoke to me with the desire and intention to convey memories of past events for the purpose of creating better and more just relations between Indigenous and non-Indigenous people in Canada. Their memories of events of the past evoke ideas for a liberated future. They all had a vision of what the future entailed.

Each of the research participants witnessed contexts in which the knowledge and memories of Indigenous people in Canada were systemically undervalued and undermined. Campbell writes, "positioning Indigenous peoples as certain kinds of rememberers in order to control the sociality of memory was a damaging epistemological and political representation" (100). In articulating their memories of these contexts and the events that took place, the research participants in my project break the chain of control over what kinds of memories are allowed in Canada. Their words disrupt a history imagined through the lens of the state.

To remember is political. Campbell explores the disenfranchisement that occurs when memories or knowledge are discounted because of the identity of the rememberer. In particular, she challenges the perception of Indian residential school survivors as "vulnerable rememberers" just because they were children when the initial events happened to them. On Campbell's account, residential school survivors were exploited because they were made vulnerable to the breakage of links in an intergenerational remembering essential for the transmission of knowledge and for preserving the identity of distinct peoples (155). Their memories can end up being undervalued and disrespectfully challenged in the context of providing legal-style testimony, which in turn relies on isolation from other rememberers as a key criterion for accuracy. This type of disrespectful challenge relies on a conception of memory as existing in a storehouse to be recalled by an individual without connection to others. Children who were isolated from their families, language and communities and who experienced abuse end up being disadvantaged by a conception of memory that does not reflect relational memory, especially when their memories challenge the dominant myth of colonial benevolence.

Disrespectful challenges can take the form of denigrated people's status as testifiers, suggesting their accounts are contaminated by sharing their stories with others and devaluing memory by contrasting it with written history. In these ways, the challengers disrespectfully attacked the credibility of the rememberer as a political act of denial of the experiences of residential school survivors(166-67).

The articulation of memory by survivors where epistemic resources had long been denied (Koggel 2014), and where the words did not even exist to describe their experiences, is also a powerful political act. Residential school survivors and their advocates speaking about their experiences led to the reparations package known as the Indian Residential Schools Settlement Agreement and the TRC, which is part of that agreement. The TRC has advanced this work of knowledge production by conveying their words and putting their experiences into societal knowledge. The work of the TRC and other efforts have led to the current massive political movement to recognize colonial violence in Canada. The significance of including this knowledge will be explored further in chapter 2 through the concepts of epistemic injustice and collective interpretive resources.

As the testifier recounts memories, they are in relation with the listener and the memories themselves. We have pasts that are shared with others, we remember together, and we share our past with others who do not have shared pasts with us (Campbell et al. 2014, xvii). These activities, then, are relational and do not occur in isolation; however, they are not made up. Rather, they provide a more accurate description of how we actually do remember things from the past in light of our present circumstances and relationships. Campbell uses the concept of remembering the past faithfully in the present

moment, for the future. It allows those who Campbell calls "vulnerable rememberers"—those whose memories have been attacked or disregarded either by lack of a shared conceptual framework of language and knowledge or by reason of identity—to articulate their memories. For example, she develops this point particularly in her work regarding the Truth and Reconciliation Commission, which had the task of specifically listening to those whose memories and narratives had been disregarded because they had been children at the time of the events, whose accounts had been neglected by virtue of long-standing racism and attacks on their identity through the oppressive mechanisms of settler-colonialism. As we will examine in chapter 2, Indigenous epistemological resources were not out in the open or collectively acknowledged.

Residential school survivors are engaged in the process of remembering in order to improve the future for themselves and also for others who suffered under oppressive circumstances and whose memories were denigrated. Their memories identify and challenge inequalities, injustices and oppressive structures (Koggel 2014, 496). The entire phenomenon of remembering within contexts is a way to make sense along the continuum of time and within matrices of relationships. The commission, according to Koggel, itself revealed "the layers of relationships and the conditions for societal transformation that are missed when the account is presented from the perspective of the state and its laws and institutions" (Koggel 2018, 242).

This project includes individuals who have had a long history with residential schools, advocacy and issues relating to Indigenous justice. They revisited many past memories—some spanning back to the late 1960s and early 1970s—and thought about them in the current political and socio-economic context. Aligning with Campbell's

concept of remembering for the future, the meaning of past events, in their recollection during the current project, was contextualized in the present in order to develop a conception or vision of the future. And, because we were doing the interviews in a particularly sharp moment in Indigenous history with the 2020 Wet'suwet'en blockades, and international history with the COVID-19 pandemic, those two events are part of what framed their recollection. Collectively, as we engaged in the interviews, our recollections were framed by our relationship. Thus, for this project, the act of interviewing research participants happens in a relational context and with awareness of the political frame in which we exist at the time. Our experience is of engaging ideas of a shared future where we create spaces for speaking, hearing, and reflecting on what justice is.

In my interview with the First Senior Government Official, I was concerned about the reaction of the "institution" to my questions. My questions were intended to work toward a better way for the institution to move forward to a less oppressive reality. I knew that my questions could possibly be viewed as disruptive, and this worried me. Upon reflection, I realized that my reaction reinforced a sense that it is perilous and difficult to carry challenging conversations forward within the institution being called upon to consider change. The sense of being ill at ease, a concept I return to in chapter 3, emerged in a rather illustrative fashion. My feeling of discomfort made me question whether this type of research can be done and whether these questions can be asked. It also made me realize that there is value in existing in a place of discomfort and unease and that it is important to ask unsettling questions in order to understand structural oppression in institutions. Structural features of institutions that should be examined to move toward a liberated future are explored in chapters 6 and 7.

1.3.4 Case Studies

My research examines the listening done by three inquiries and commissions: the Mackenzie Valley Pipeline Inquiry (Berger Inquiry), which wrapped up in 1977; the Royal Commission on Aboriginal Peoples (RCAP), which wrapped up in 1996; and the Truth and Reconciliation Commission (TRC), which wrapped up in 2015. Each was nineteen years apart and covered similar descriptions of Indigenous justice. I use these case studies to illustrate how the state listens and responds. Though many of the research participants were involved with one or more of the inquiries and commissions, they were not selected strictly because they participated in them. Rather, they were selected because they had insight into the path of my work. The case studies presented here formed a part of the discussions and in turn form a part of the narrative. I weave together the stories of the research participants with reference to historical events in their pasts—including the three inquiries and commissions—in the context of the present.

The research project is designed to take to heart Indigenous scholarship and ways of being in the world and the work put into various inquiry reports by listening with humility and taking guidance from Indigenous community members and advocates on the meaning of Indigenous justice and their experiences with advocating for change. However, the project also looks to inquiry and commission leaders and participants for their insight into the process of listening and issuing recommendations. Finally, in seeking to articulate the ethical obligations of the state to address Indigenous justice claims, the field research project includes conversations with state officials for insight into the challenges in responding to justice claims.

1.4 Housekeeping

1.4.1 Note to Institutional Reviewers

My research does not take away from any institutional duties of loyalty that I may have, either to academia or to government. Both institutions officially have a policy of advancing "reconciliation" with Indigenous peoples—however defined—and I am, therefore, aligned with their stated policies. However, a close and vigorous examination of the challenges of addressing the gap between Indigenous worlds and non-Indigenous worlds in Canada, and of the lack of justice between these worlds, is not an easy task. I ask all readers to keep in mind that this project is intended to be productive and constructive. I specifically make arguments for integrating a non-polarized and non-adversarial stance when seeking to understand Indigenous justice and the challenges in meeting it. I will use concepts such as "impurity" from Alexis Shotwell in chapter 6 and "disorientation" from Ami Harbin in chapter 3 to argue that we are all impure and, as non-Indigenous peoples, are implicated in the benefits of colonization and at the same time can seek to decolonize (Shotwell 2016, 25). We need, however, to examine the territory of our relationships and understand how we are implicated. We need to also learn and hold the vision of a just, decolonized world in our heads and hearts as we work through the path forward. I argue for living in complexity, preferring diversity over fracturing, and being open to disorientation (Harbin 2016). The dissertation may seem controversial; it should not be. It may seem that it challenges loyalty; it does not. The loyalty is to justice and a better future for all of us, while knowing we are situated in injustice right now. This work may be unsettling, but from that point of disorientation, we can perhaps better redirect ourselves.

1.4.2 Terminology

A few terms that I use throughout the dissertation require definition:

Aboriginal law. When I speak about Aboriginal law, I refer to the laws and body of jurisprudence developed through the operation of European-based systems of law. The term "Aboriginal" is used in the *Constitution Act, 1982.* The term "Indian" is used in the *Indian Act* and in section 91(24) of the *Constitution Act, 1867.* I only use the terms "Aboriginal" and "Indian" in these contexts.

Indigenous law/Indigenous legal orders. When I speak about Indigenous law or Indigenous legal orders, I refer to Indigenous laws developed by Indigenous peoples. As I argue in chapter 7, Indigenous law, like laws in any society, is a dynamic and evolving instrument for social ordering, and embodies the social matrix in which it is embedded.

Reconciliation. The word "reconciliation" will come up in the dissertation given its heavy usage in popular narratives to refer to the reorientation of relations between Indigenous and non-Indigenous peoples in Canada, and also because I examine the work of the Truth and Reconciliation Commission (TRC) in some detail, but it will not be the core organizing framework of the dissertation. The concept is important in the context of listening and hearing Indigenous voices on what reconciliation and justice mean to them, and is obviously very important for the discussion concerning the Truth and Reconciliation Commission in chapters 4 and 5. Instead of focusing on a framework that uses the word "reconciliation", a concept that carries with it implications of re-establishing a previous status quo as well as significant ambiguity as to who is responsible for reconciliation and between which parties, I work in and through conceptions of justice and injustice. Though I started my research with the concept of

"injustice", I realized that there are limitations of damage-centred scholarship, where the analysis presumes only injury, thus denies positive identity and agency among those who have suffered oppression, and thereby reproduces a colonial power relationship (Calderon 2016). I have reframed my research question positively in order to avoid a damage-centred approach and to allow for a positive vision of justice. This means that instead of asking, "how does the state address or fail to address Indigenous injustices?", my question is "how can the state ethically address Indigenous claims for justice?" Conceptions of injustice are not ignored in this inquiry; they are simply not the sole focus. Instead, I focus on a more full and robust understanding of what justice consists of for Indigenous peoples now and into the future.

Purity. I use the term "purity" as a concept that is examined by Alexis Shotwell in her work *Against Purity: Living Ethically in Compromised Times* (2016). She argues that purity is in fact a false concept. I rely on her analysis to call attention to deep interrelatedness and to how our positions in colonized environments call for a thoughtful and self-reflexive ethical stance.

1.4.3 Range of Analysis

The analysis covers a lot of territory. I navigate a path through conceptual language that is often used to describe Indigenous justice issues such as recognition and inequality of distribution alongside larger issues such as sovereignty. My work covers a lot of ground, but it sticks to a primary analytical path.

1.5 Conclusion

This chapter has provided a roadmap of the dissertation and has illustrated the research methodologies that are used. My research methodologies are congruent with the two

bodies of scholarship I use in the dissertation: Indigenous scholarship and feminist relational approaches. Both bodies of scholarship will be explored in more depth in the next chapter. I have illustrated how I use a hybrid research methodology that engages field research interviews and case studies within broader conceptual ways of being that are explained in Indigenous scholarship and the broader conceptual account of relationships of power in feminist relational approaches. The methodologies being used demand self-reflection and an understanding of my relationship to the dissertation, and therefore I have situated myself within the project and within the broader political moment.

Chapter 2 Situating Myself and the Project

> I believe that the deeper we go into discussions around economy, around spiritual practice, around Indigenous law, common law, around all of those institutions that are really important to us, unless we begin to share and compare and see how these elements could support each other, we're not really going to move forward. And it's so far from any kind of understanding by settler populations, the distance between us. We tend to simplify things by [emphasis] "oh yeah racism really exists in Canada." Of course it does. It really does [laughs]. We found out through the Wet'suwet'en experience, right? (R. Joseph, personal communication, March 12, 2020)

2.1 Introduction

Joseph emphasizes the need for true and honest sharing, connection and humility. To explore bridging the gap and to work on Indigenous issues as a non-Indigenous scholar takes introspection in order to tread carefully, understand motivation and impact, and work across different identities and political experiences. The first chapter set out the questions I am exploring, how I did so and the context in which I was researching and writing. This chapter lays out the conceptual foundations for my exploration and new directions that I will pursue from those foundations. I will also outline the personal context and the broader political moment within which my work was undertaken.

2.2 Scholarship[1] Map

This project relies heavily on the work of Indigenous scholars and feminist relational approaches, bodies of work that are not subsets of each other but have familial resemblances. Indigenous scholars rely on a place-based framing as opposed to time-based (Deloria Jr., 1973, 75-76). Indigenous peoples live in relationships of mutual obligation with the land, waters and air and all other beings in a particular territory, both

[1] My intention is to acknowledge Indigenous scholarship as a body of academic work without imputing Eurocentric academic framings such as 'theory' or 'philosophy' to confine Indigenous ways of being in the world.

forwards and backwards in time (Coulthard 2014, 60). Relations to land are the foundation of existence and of elements of existence such as language, knowledge, social institutions, economy and ethics. Indigenous scholarship and ways of being in the world are grounded in relations that people have to territory and between a particular people and the territory in which they live in a web of mutually dependent relations. Feminist relational approaches are based on an understanding that human beings exist in relationships and are not autonomous, independent and self-sufficient agents (Koggel 2014, 495). The centring of relationships as the key unit of analysis allows a better and more direct way of understanding the operation of power in relationships—whether personal, political, institutional or global—and within oppressive structures (495). Both frameworks are relevant to understanding and addressing the historically oppressive relations between the state and Indigenous peoples in Canada.

I weave together different concepts of relatedness that exist in feminist relational scholarship and Indigenous scholarship to identify a path forward for the state in various situations of injustice. Indigenous scholarship and the words of Indigenous research participants are at the centre of the analysis. Indigenous scholarship informs my methodology (Wilson 2008, Smith 2012, Kovach 2009) and the way in which I listened to and conveyed the words of research participants. Centring the body of work around concepts such as grounded normativity (Coulthard 2014), refusal of recognition (A. Simpson 2014), rooted constitutionalism (Mills 2016) and place-thought (Watts 2013) creates a stance of learning and listening to a different thought system (Ermine 2007). These concepts, interpolated with the words of research participants, immerse the reader

in Indigenous conceptions of justice and sovereignty. My analysis moves forward from this platform.

Feminist relational approaches serves to situate me in the dissertation project (Lugones 2003) and in my methodology around listening (Campbell et al. 2014, Stauffer 2015). It also assists in clarifying the concepts of epistemic humility and epistemic injustice (Koggel 2018). Feminist relational scholars will also contribute to the analysis around purity and binaries (Shotwell 2016), disorientation (Harbin 2016), oppression (Young 1990) and identity and sovereignty (Lugones 2003, Young 2005). The goal is to centre an Indigenous conception of justice while engaging with feminist relational approaches to locate the spaces where the state should take particular actions. These actions are primarily targeted at acknowledging oppressive relations, diminishing the power differential between the state and Indigenous peoples, changing the way we think about structures and concepts inherent in state structures, and opening space for movement on issues relating to Indigenous peoples toward a liberated future. The ultimate goal of the argument in the dissertation is to better understand our ethical obligation not only to Indigenous peoples but also to the land with which they are co-constituted and upon which we all depend for survival.

2.2.1 Key Concepts in Indigenous Scholarship

Rooted constitutionalism and grounded normativity

Acknowledging the value and clarity that Indigenous knowledge brings to the explanation of ethical space that exists between Indigenous and European-based legal systems and other forms of institutional structures is crucial. Willie Ermine's (2007) view of the existence of distinct worlds that underpin Canada's European-based legal system

(common law and civil law) is similar to that of Aaron Mills (2016) when he refers to the "lifeworlds of law" (862). Both scholars argue that Indigenous legal systems are different from European-based legal systems. The Indigenous worldview cannot be subsumed beneath the other. Indigenous legal systems are not a sub-system or local version of Canadian constitutionalism. For example, when Mills explains "rooted constitutionalism", he points out that it is not subsumed within Canadian legal systems and liberal constitutionalism. Like Ermine, Mills argues that the underpinnings of Indigenous law are structures of normative relationships that are rooted in the Earth. Glen Coulthard (2014) uses a different term—grounded normativity—to describe the same concept in relation to political struggles against dispossession:

> . . . Indigenous struggles against capitalist imperialism are best understood as struggles oriented around the question of land—struggles not only for land, but also deeply informed by what the land as a mode of reciprocal relationship (which is itself informed by place-based practices and associated form of knowledge) ought to teach us about living our lives in relation to one another and our surroundings in a respectful, non-dominating and nonexploitative way. The ethical framework provided by these place-based practices and associated forms of knowledge is what I call "grounded normativity".
>
> . . .
>
> Ethically, this meant that humans held certain obligations to the land, animals, plants and lakes in much the same way as we hold obligations to other people. And if these obligations were met, then the land, animals, plants and lakes would reciprocate and meet their obligations to humans, thus ensuring the survival and well-being of all over time. (60-61)

As Aaron Mills (2016) argues, the European-based system of liberal constitutionalism in Canada places a moral divide between humans and nature, where humans are defined as autonomous and highly individualist with connection and relations being a matter of choice through social contract. Grounded normativity or rooted constitutionalism, on the

other hand, is centred on the idea that freedom stems from interdependence and not autonomy, in that freedom is experienced through and with others (865).

Ethical space

Ermine (2007) redefines ethics as the capacity to know what harms or enhances the well-being of sentient creatures, and what promotes our personal capacity and integrity to stand up for notions of good, responsibility, duty and so on. These ethical standards can be transgressed by ourselves and others. With this in mind, a discourse on ethics also involves demarcation of boundaries around ourselves, families, clan systems or extended families, and communities, as well as collective principles that cannot be transgressed, such as knowledge systems and treaties. The boundaries protect sacred spaces that should not be transgressed and "remind us of what is important in life as we collectively negotiate the future" (195-96). The boundaries around inviolable spaces allow for the assertion of Indigenous existence and agency in trans-cultural engagement with non-Indigenous communities.

Ermine's concern extends to the gap between the Indigenous and non-Indigenous normative systems. He states:

> …schismatic ambience is created between peoples and cultures, and in particular whenever and wherever the physical and philosophical encounter of Indigenous and Western worlds takes place. At the superficial level of encounter, the two entities may indeed acknowledge each other but there is a clear lack of substance or depth to the encounter. What remains hidden and enfolded are the deeper level thoughts, interests and assumptions that will inevitably influence and animate the kind of relationship the two can have. It is this deeper level force, the underflow-become-influential, the enfolded dimension that needs to be acknowledged and brought to bear in the complex situation produced by confronting knowledge and legal systems. (195)

Ermine examines the history of Indigenous/non-Indigenous engagement first through contact, then through the establishment of treaties, then disengagement following each

party's interpretation of the treaties within their own worldview, and then through oppressive and violent colonial policies and practices such as the Indian residential school system. He states:

> these acts of state [such as forced reengagement into mainstream Canadian culture through the imposition of the residential school system and other coercive state policies] produced an irritable bond of … transcultural confusion…. The ideas from our knowledge bases are so entangled and enmeshed with the other that we now find it compelling to decipher Indigenous thought from European thought…. The archaic practices of dominance obfuscated boundaries and repeatedly influenced the rupture of relations between peoples. (196)

This confusion means that the rules of engagement are unknown.

According to Ermine, one of the irritants for Indigenous people is the dominant assumption of a singular world consciousness or monoculture. The assumption of Western universality then leads to one model of society, one public sphere and one conception of justice. In assuming this universality, there is a lack of a framework "by which the experiences and reality of other cultures can be justly named, described and understood" (198). The assumption results in a belief that there is a consensus about what constitutes a society and its norms. Chapter 6 illustrates that the assumption of a monoculture is a disadvantage when norms are translated into laws. Ermine states that this form of marginalization effectively vanishes Indigenous peoples and others who don't fit within the European-based construct or worldview and that this leads to the loss of Indigenous peoples' freedom to be themselves. Indigenous existence is a "marginal part of broader Canadian life to be silent and ultimately controllable" (199). Ermine emphasizes the centrality of Indigenous existence when he writes, "the Indigenous community is the primary expression of a natural context and environment where exists the fundamental right of personhood to be what one is meant to be" (200). The notion of

being what one is meant to be that Ermine illustrates is a common theme in this work and in particular the interview with Sinclair.

Ermine envisages that as we examine the legal system in Canada, we enable processes so that rights are justly named, described and understood. I would add that there must also be processes so that justice is properly named, described, heard and understood in all of its ethical, economic, environmental and political dimensions. The legal dimension is but one necessary part of the process. Essentially, Ermine is arguing for resurgence of Indigenous institutions so that there can be some parity in engagement. Only with the assertion of Indigenous knowledge can there be engagement in the ethical gap between different perspectives of the world.

There are different worldviews that underpin Indigenous and Western-based political governance, economies and legal systems, among other means of social ordering. In this view, there is much work for non-Indigenous people to take up. Scholars and practitioners such as Paulette Regan (2010) call on non-Indigenous colleagues to sort out our own complicity in structures of oppression and to participate in the project of overcoming injustice while listening with humility and without fragility (11). In its recommendations, the TRC calls upon Canadians in all sectors to step up, learn about residential schools and the impacts of colonization and to take responsibility. The phrase "we are all treaty people" (TRC 2015a, 6: 193) is emblematic of the responsibility we each have to account for our failures to know history and for our ethical conduct in the foundational relationship between non-Indigenous and Indigenous peoples that has shaped Canada. This project takes up that call for accountability and the responsibility to know and to act ethically.

2.2.2 Key Concepts in Feminist Relational Approaches

Relational identity

Relational identity provides a resonant and meaningful alternative to liberal conceptions of identity and sovereignty that tend to be relied upon in understanding our institutional structures. Shifting away from the liberal notion of the self and state sovereignty means moving away from the fiction of autonomous, independent, atomistic and free agents where the promotion of agency is valued. Instead, relational identity centres a conception of ourselves that is derived through relationship, and it allows us to more easily account for relations of power and oppression. As we will see in chapter 7, the pivot away from a liberal conception of identity and its macro counterpart, state sovereignty, will allow for recommendations to be made that will move away from oppressive relations and toward addressing Indigenous justice claims. This notion of relational identity forms the basis for my positionality and engagement with the research project.

My understanding of identity is informed by Maria Lugones' (2003) notion of "worlds" and "world-traveling" (87). She describes "worlds" as the spaces in which one exists differently depending on dynamic constructions of one's identity. These are spaces where we are identified in ways that we may accept or not accept, but we may be animating it. For example, I am a woman; the gendered construction in this society of what it is to be a woman is a world I inhabit. I am Indo-Canadian, which is a world that I also inhabit and move in, which is constructed around me externally, and which I also animate (88). A world need not be a whole society; it may be a part of society or a society given an idiosyncratic construction (77). Worlds are based on shared experiences or one's interrelation with others. A person exists in different worlds, depending upon the circle of

relations. A person engages in "world-traveling" as one shifts between different constructions. Sometimes, a person is constructed in a world but may not accept that construction, or they may not even know that they are constructed in a particular world. Those who are tightly situated within the power centre of a world may not find it easy to shift to another. And they may also be "at ease" in that world by knowing all the norms to be followed and being comfortable with them, or being humanly bonded or loved and well regarded in that world. As well, one may be at ease in the world because there is a shared history or shared experience. People who exist more marginally and who do not share experiences with those who are the centres of power may find it easier to shift at the boundaries of power and share experiences of disenfranchisement.

Some worlds are safer than others, depending on who you are. Lugones explores this notion as she explores the idea of survival. Those who are outside the mainstream and who are ill at ease in some worlds they inhabit are forced to travel between worlds as a strategy for survival. Some worlds, especially those in which we are identified from outside and where we do not feel at ease, may be hostile to our understandings of ourselves. These worlds may also be dominating worlds. As Lugones says: "I think that most of us who are outside the mainstream of . . . dominant construction or organization of life are 'world' travelers as a matter of necessity and of survival" (88). Relatedly, Marilyn Frye (1983) uses the terms the "arrogant eye" and the "loving eye" to critique dominant constructions of views of others. In particular, her analysis is focused on patriarchy and the world of gender. According to Frye, women are viewed through the appropriating lens of men or the "arrogant eye" wherein all that is viewed is seen as being for the benefit of men. This notion is in opposition to the "loving eye", which recognizes

the inherent difference and independent worth of the person being viewed. The idea of not being seen as one wishes to be seen, and the converse concept of seeking recognition from the dominant power-holder (80-81) will be explored further in this chapter. Lugones' and Frye's conceptions of how we are constructed by others and what it means to exist in a world that is non-dominating will be important, particularly in chapter 7, where non-dominating sovereignty is discussed.

Oppression

Iris Marion Young's (1990) description of oppression includes an understanding of worlds in which we are constructed (42-43). Young describes a group as a specific kind of collectivity whose members have a special affinity with one another because of similar experiences. Young's conception is similar to Lugones' description of worlds that are created because of shared experiences or because of externally constructed identities. Relatedly, Young describes oppression as being "structural phenomena that immobilize or diminish a group" (42) that are not necessarily the result of the intentions of a tyrant. It is caused by underlying institutional rules and the consequences of following those rules. In this regard, there is not necessarily a particular group that is actively oppressing another group; rather oppression can operate through bureaucratic administration or any number of social operations where people function in their jobs and lives. The harms of oppression may be unintentional, but they may also result in intentional violence and harm being done to members of the oppressed group. It also means that members of one group may benefit from that oppression and therefore have an interest in maintaining those structures of oppression (42-43). Along with that of Lugones, Young's work will be raised and discussed in chapter 7 on sovereignty.

Young differentiates institutional domination from oppression. She defines oppression as referring "to structural phenomena that immobilize or diminish a group" (43), and she further defines groups as an expression of social relations where "members of a group have a special affinity with one another because of their similar experience or way of life" (43). The notion of oppression as structural in nature will be important for the discussion in chapter 3. Young goes on to define domination as being distinct from though possibly overlapping with oppression. Domination "consists in institutional conditions which inhibit or prevent people from participating in determining their actions or the conditions of their actions" (38). Oppression usually includes domination, but domination can exist without oppression. Young's conception of domination will be important for chapter 7.

Epistemic injustice

> I remember a long time ago they were talking about . . . languages were used.... And then the language within a government system—a political system—that kind of language. They always said, don't get pulled into that. That's not your language.
>
> That's not your language and they just refuse to understand our language. . . . And then when you get pulled in—into a forum that is not your language—you don't have a chance. You're going to have the same chance as those hens in that hen house with that fox at the door. (D. Nicholas, personal communication, September 2, 2020)

Nicholas brings forward a lesson: if your language and framework for the world is ignored, you are at a severe disadvantage. The concept of epistemic injustice, applied here, means that if you concede your own language and knowledge systems and adopt the language of the oppressor, you lose your power and sovereignty. Koggel (2018) examines Miranda Fricker's account of epistemic injustice and gaps in interpretative resources and applies these insights to the context of colonialism and the TRC process. Koggel argues that Indigenous collective interpretative resources such as Indigenous laws, histories,

social structures and traditions were undervalued and not identified as viable resources by non-Indigenous peoples. These collective interpretative resources were targeted for erasure by colonial tools such as the Indian residential schools' system. Koggel's and Ermine's work argue that knowledge systems must be respected and revitalized. The TRC, as pointed out by Koggel, highlighted the hermeneutic or the collective interpretative resources of Indigenous peoples in a range of areas, many of which continue to be ignored. The TRC final report also points out that the perspective of Indigenous peoples—and in particular of survivors of residential schools—are a critical missing piece to official narratives that only rely on non-Indigenous written histories and the laws and institutions of the state (TRC 2015d, *The Survivors Speak*, 1). It is this epistemic absence—the lack of knowledge of the experiences of survivors of the schools within the national and historical narrative of Canada—that the TRC sought to correct in collecting and incorporating testimonies of survivors into their report and with the National Centre for Truth and Reconciliation. The TRC report asserts that the collective interpretative resources such as Indigenous legal orders, governance, language and social structures, though greatly impacted by colonial policies, are damaged but are there and in the process of resurging (M. Sinclair, personal communication, May 30, 2020; Borrows, Asch and Tully, 2018).

The ethics of hearing

My project does not attempt to speak on behalf of or translate what Indigenous advocates say. My work deliberately focuses a lens on the state's ethical obligations and communicates how the state hears what is said, the language it uses to understand and respond. All of my analysis is on the state's response. I accept as given that Indigenous

justice claims as articulated by Indigenous advocates are fully articulated. And I am assuming that the state wishes to respond ethically.

Jill Stauffer's (2015) work on the injustice of not being heard explores the specific ethical wrong of not hearing. Not hearing is a separate wrong from the original injustice being voiced. Stauffer writes:

> Ethical loneliness is the isolation one feels when one, as a violated person or as one member of a persecuted group, has been abandoned by humanity, or by those who have power over one's life's possibilities. It is a condition undergone by persons who have been unjustly treated and dehumanized by human beings and political structures, who emerge from that injustice only to find that the surrounding world will not listen or cannot properly hear their testimony—their claims about what they suffered and about what is now owed to them—on their own terms. (1)

Silence and loneliness are important to this work. I ask: What is the justice that has been articulated? What is heard by the state and state apparati in inquiries and commissions that are specifically designed to listen? When and where does the general machinery of government fail to listen? Did the commissions and inquiries listen and convey what they heard faithfully? How did the state respond? These questions form the basis of my inquiry.

2.3 Situating Myself in the Project

2.3.1 The Relational Self

Conceptions of relational identity and oppression reflect my own experience as someone who grew up feeling outside some mainstream white worlds while also being at home in other worlds that were constructed with others who reflected my experience. I also felt a strong desire—whether from a natural tendency, as a bid for survival or out of a sense of justice—to travel to other worlds and find connection with others. Lugones' description sheds some light on this experience as she examines the variability of groups and the way in which we travel among worlds.

Another form of "world-traveling" is supported through the practices of interdisciplinarity, which allows for flexibility and openness to hear the claims of differently marginalized people in a more accurate way than when they are heard from the centre. For example, if you are deep in the legal world, there is an insistence that justice claims be articulated in ways that are recognized in the legal world, whether or not they capture the nature of the claims. Residential school survivors often included many types of experiential claims of injustice that were not torts recognized in law. So they were dismissed in law. However, survivors continued to advocate for recognition of their claims, but in the political realm, and through interdisciplinary academic spaces. Eventually they were able to obtain a remedy that includes broader recognition and a variety of justice claims. The role of litigation in filtering the hearing of justice claims will be discussed further in chapter 5.

2.3.2 My History of Relating to Indigenous Peoples

Many years ago, back in 1987 when I was doing my undergraduate degree in philosophy and economics, I was looking for a meaningful focus in my work. Justice in all its forms—economic justice, political justice, equality, fairness, environmental sustainability and well-being—seemed important, as did non-European conceptions of the world. And I could see—as a non-Indigenous person—that Indigenous people in Canada were faced with outrageous inequalities in all of these areas and that, as non-Indigenous people, we all bear responsibility for it. I saw the unequal treatment of Indigenous people in Canada because of racism. My sense of the unfairness facing Indigenous peoples in Canada, as well as a love of and commitment to the land where I lived, motivated me significantly. As I started to explore my role in participating in this area of work, I became more and

more aware of the challenges of working in an area where identity is an issue. My own identity is not the same identity as those who experience injustice. I had to look at my own motivations and at what I could do to contribute. I also started to grapple with the issue of inter-disciplinarity. I started my education in philosophy and economics and then moved to law and, in doing so, I found I had to work with multiple disciplines.

I became a lawyer to gain access to a profession that would allow me the freedom to pursue the work I wanted to do, which is to work with people directly on their claims of injustice. In order to do so, I situated myself within the feminist relational practice of seeking answers to the political questions of how relations either thwart or enable the agency of politically marginalized people, and how relations might be shaped and reshaped to advance greater social equality (Campbell et al. 2014, 5).

While the arc of socio-economic policy shifted toward neo-liberalism and globalization in the 1980s and 1990s, I was focused on injustices faced by those marginalized within power structures by virtue of identity, and the space created within neo-liberal remedies such as individual compensation for monetized harms. I have been a lawyer since 1994. For the majority of my career, I have focused on developing and implementing processes for overcoming historical wrongs. When I have been asked about my motivation, I explain my sense of connection to the land, my emotional motivations to address injustice. These motivations have not changed throughout my life. I applied for work in the Cree community of Moosonee and its sister community, Moose Factory. I established friendships with people in Moosonee and Moose Factory that have become one of the most important circles of relationships in my life. While working in Moosonee and the region, I first learned of the impacts of residential schools and as well the various

distributional and other injustices lived by the Mushkegowuk Cree peoples like inadequate housing and water, and systemic poverty.

I then worked at the Indian Claims Commission, where I learned about the Crown's ongoing and unanswered obligations to many Indigenous communities and the long, unwieldy and costly process that communities were forced to undertake in order to seek justice. Even at the end of the process, there was no assurance that remedies would follow. For some years I worked on how to improve processes intended to help people who have been radically disenfranchised by virtue of identity—such as adults who are seeking justice for abuses they suffered as children in institutions. For my LL.M. degree, I focused on the people who were oppressed by virtue of having been abused in institutional settings and how they reoriented their relationships so that they could seek remedies for their injuries. I worked at the Nova Scotia Institutional Abuse Inquiry at that time. In 2003 I was drawn back into the work of addressing the injustices experienced as a result of the Indian residential schools because of my graduate work on institutional abuse. The residential school system was put in place by the government "to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture" (Canada 2008). I have done this work from a range of locations and institutions that are more or less historically implicated in the original colonial and oppressive project.

I started working in the federal Department of Justice, where processes were being developed to address the legacy of Indian residential schools. I saw an opportunity to try to make the process more just, from within the system responsible for the original harms. At this point, I became most aware of the challenges of working within a large

institution of colonial power, with litigation processes that limit the nature of the remedies and the limitations of focusing on individual harm without addressing the larger structural and systemic changes that are needed.

In 2004 and more intensively in 2005 I had the opportunity to contribute to developing a space within the broader government machinery to try to work toward justice. I held the pen on translating the negotiated vision of survivors, their advocates and organizations and the government that became the mandate for the Indian Residential Schools Truth and Reconciliation Commission (TRC), and then I worked on the development of the TRC itself. I return to a discussion of the TRC in chapter 4.

Around this time, I met Dennis Nicholas of Kanesatake and then his wife Kathy Skye from Kahnawa:ke, who became great teachers in my life. We developed a friendship. They have always encouraged the connection between my head and my heart in my work. They also agreed to be on my Community Advisory Committee as part of my doctoral work. In 2007 I started working with the interim executive director of the TRC, Bob Watts, and also then with the two sets of commissioners for the initial stages. Bob agreed to be on the Community Advisory Committee for the dissertation.

I then returned to working within the Department of Justice on the Independent Assessment Process—the sister process to the TRC that adjudicated and awarded compensation to residential school survivors who had suffered abuse in the institutions. All of these work locations gave me the great privilege of being able to listen to survivors speak about their experiences and to learn about the true history of residential schools and their impacts. In late 2015 and early 2016, I was on the team supporting cross-country meetings between the Minister of Crown-Indigenous Relations and Northern Affairs, the

Minister of Justice and the Minister of Status of Women and the families and survivors for the Missing and Murdered Indigenous Women and Girls Pre-Inquiry. This temporary team was established to listen to families and survivors in order to learn what the eventual MMIWG Inquiry needed to achieve and put the mechanisms in place that would enable that. While on this team I gained a keen awareness of how government officials filter when they listen, especially when what is being spoken is conveyed in a complex, interconnected and holistic way.

I sought to work within each institutional setting while supporting justice and addressing injustice; however, questions always arise about how to do this without becoming complicit in creating further injustices. It has been particularly challenging to work within the Department of Justice given its location as part of the centre of colonial power and given the challenges of maintaining integrity in a large organization driven by values set by political agendas that have changed over a number of regimes. Even where the political agenda has shifted towards an intention to work toward reconciliation and decolonization and where best intentions may exist among officers, large bureaucracies are structures that cannot easily reverse or "fix" the colonial inequalities and injustices that existed at the time of their formation. My preoccupation with finding ethical possibilities for creating justice while working in oppressive institutions has been a major driver behind the development of this dissertation.

The issue of "intention" is integral to understanding oppression. Young (1990) writes that those who operate within structures of oppression may not intend to do harm or oppress; however, they may benefit from maintaining structures of oppression. She relies upon Foucault's understanding of how power operates and the necessity to move

beyond "the model of power as 'sovereignty', a dyadic relation of ruler and subject, and instead analyze the exercise of power as the effect of often liberal and 'humane' practices of education, bureaucratic administration, production and distribution of consumer goods, medicine and so on" (41). Young's exploration helps to illustrate how individual intention to oppress is not necessary for structural oppression to exist. However, this articulation does not account for state actors actively seeking to ameliorate unjust conditions for Indigenous peoples, but perpetuating injustice or failing to address injustice because of structural limitations. Young's discussion of intention does not fully theorize how those within structures of power can act with an intention to overcome structural oppression and actually have a just impact. I explore intentionality in chapter 6.

As we engage with the idea of sovereignty as power, Foucault's description of a dyadic relation of power between ruler and subject aligns with Westphalian sovereignty and will be contrasted with Indigenous conceptions of sovereignty in chapter 7. In particular, the Inuit vision of Arctic sovereignty, where the Inuit exercise influence among other "polities" as opposed to power, will be highlighted as a rich example of how Indigenous sovereignty can positively influence an imperfect and dominance-reliant conception of state sovereignty. The dissertation does not fully explore the depth of the impact of Inuit conceptions of sovereignty and no research participants were Inuk, but this is an important site of future field research and scholarship.

2.3.3 Imperial Colonialism Versus Settler Colonialism

This work requires bringing one's heart and head together and listening well. Indigenous/non-Indigenous relations are often code for Indigenous/white settler. I have

challenged that polarity by throwing myself into the mix.[2] I look to listen, hear and understand the marginalized experiences of Indigenous people from my own position as a person affected by a different manifestation of colonization. My position, as a non-Indigenous person whose family has experienced colonial oppression that is different from settler colonial oppression, is important. My experience and my family's own form of colonially induced trauma is not the same as what is ongoing in Canada. Settler colonialism is distinct from colonization induced by the spreading of empire to countries where the colonized remained in a significant majority. Tuck and Yang (2012) define settler colonialism:

> Within settler colonialism, the most important concern is land/water/air/subterranean earth (land, for shorthand, in this article.) Land is what is most valuable, contested, required. This is both because the settlers make Indigenous land their new home and source of capital, and also because the disruption of Indigenous relationships to land represents a profound epistemic, ontological, cosmological violence. This violence is not temporally contained in the arrival of the settler but is reasserted each day of occupation. (5)

My family experienced and resisted colonialism in India, and we also moved here around the end of the nineteenth century. We benefitted from settler colonialism by occupying land when we arrived. Eva Mackey (2014) describes the expectation of settlers as based on a "national jurisdictional imaginary" such that all Canadians—white and non-white settlers and Indigenous peoples—share the same country "under a singular set of the 'same rules' and regulations that ensure that neighbours can 'continue living as [they]

[2] Attempting to shift the structural relations of power from within is professionally challenging and can be personally difficult. I have questioned my own integrity in working within certain institutional settings, probably more than I have been overtly questioned. Though since I started working in this area, I have had many very frank discussions with Indigenous co-workers, colleagues and fellow-students about my motivations and contributions. These questions and guidance were important and always educational. They kept me humble and questioning. They continue to cause me to examine how we engage with/within structures of oppression.

do now'" (247). This national imaginary upholds an implicit imbalance by not challenging who has the power to make the rules. Understanding the distinctions relating to Indigenous justice claims is a task for those of us with a troubled relationship with imperialism and for those who may have always identified with the ones who hold power in the colonial equation. Certainty of the national project, disorientation, resoluteness and intentionality are themes that will emerge throughout the dissertation.

I take responsibility for my privilege, and my own marginality allows me to see when I lack humility and have an arrogant eye, and how to take responsibility for it. As Campbell points out, "theorists from Euro-Western traditions, must exercise vigilance in maintaining that our predilection for abstract discussions of justice does not simply repeat and reinforce cultural imperialism.…" (Campbell et al. 2014, 90).

2.4 Situating the Project in the Broader Moment

This dissertation germinated during two particularly significant events in Canada that happened concurrently. I am referring to the Wet'suwet'en blockades and the Covid-19 pandemic.

2.4.1 Wet'suwet'en Blockades

The Wet'suwet'en people of British Columbia have been advocating for legal and political recognition of their rights within the Canadian legal framework for a long time. They had originally brought the Delgamuukw case in the 1980s against the Crown seeking jurisdiction and ownership over their traditional territory. Their lawsuit advanced to the Supreme Court of Canada and was transformed into a claim for Aboriginal title and self-government. In *Delgamuukw v. British Columbia* [1997] the Supreme Court of Canada ruled that the case had to be retried and did not issue a ruling on whether

Aboriginal title or self-government rights existed for the Wet'suwet'en people over the territory in question. However, in that decision the Supreme Court of Canada laid out the framework for the establishment of Aboriginal title in future cases, and it was used to establish Aboriginal title for the first time in Canada in *Tsilhqot'in Nation v. British Columbia* [2014]. The original case brought by the Wet'suwet'en was not retried. However, the Wet'suwet'en hereditary chiefs maintained their claim of title and self-governance and set up a checkpoint at Unist'ot'en to establish that those who entered their territory did so only with their consent (Unist'ot'en, n.d.).

In December 2018 the Supreme Court of British Columbia issued an injunction allowing the RCMP to clear the land to allow the Coastal GasLink pipeline company to have access to the territory in order to start constructing a pipeline ("Our Impact", n.d.). The dispute continued until the court granted Coastal GasLink a permanent injunction on December 31, 2019. At this point the dispute escalated further. The RCMP established an exclusion zone on the territory in mid-January, and the conflict and broadening awareness of the conflict began to increase exponentially. On January 31, 2020, the RCMP arrested an Elder for refusing to provide identification while going through an RCMP checkpoint. The RCMP moved to enforce the injunction on February 6, and on that same day the Mohawks of the Bay of Quinte First Nation set up a blockade next to rail lines near their community. Other blockade sites soon followed, including a significant blockade in Kahnawa:ke, Quebec. Rolling blockades and protests across the country pushed the issue to the forefront of broader Canadian consciousness, and international support became more pronounced. Rail service across the country was halted along certain lines. There was significant support from many non-Indigenous Canadians for the protests, but racial

incidents erupted, particularly in Alberta, reminding us of the potential for violence and death.

The conflict had primarily begun between the Wet'suwet'en, the provincial Crown and Coastal GasLink. However, when rail blockades started in other jurisdictions, the federal government became more visibly involved. The Minister of Indigenous Services went to meet with those blockading the railway from the Mohawks of the Bay of Quinte First Nation to begin negotiating a resolution (Barrera 2020). The blockades forced discussions between federal ministers, provincial ministers and the Wet'suwet'en hereditary chiefs. A Memorandum of Agreement was drafted, and on March 1, 2020, the Wet'suwet'en hereditary chiefs took the draft agreement to community members to be discussed internally. The initial discussion on approval was given a two-week deadline, but that was extended due to the Covid-19 pandemic lockdown. The research interviews began during the time when the blockades were active and there was heightened tension across the country. While the Covid-19 pandemic removed the mainstream spotlight from the Wet'suwet'en blockade, it gave the people time and space to consider the Memorandum of Agreement. On May 14, 2020, the Wet'suwet'en hereditary chiefs signed the Memorandum of Agreement, which recognizes Wet'suwet'en Aboriginal rights and title throughout the Yintah (Wet'suwet'en territory). The document outlines commitments on the part of Canada, British Columbia and the Wet'suwet'en to negotiate, and includes legal recognition that the Wet'suwet'en Houses are the Indigenous governing body holding Aboriginal rights and title. The parties agreed to negotiate further with respect to numerous areas of jurisdiction, including child and family wellness, water,

wildlife, fish, land use planning land and resources, revenue sharing and decision-making (Canada 2020).

There are two important pieces to consider as we move forward: the Berger Inquiry and the Royal Commission on Aboriginal Peoples (RCAP). The Berger Inquiry was also about pipelines, although its task was to evaluate the impact before a company had been granted rights to construct a pipeline. The RCAP was in the aftermath of the Oka Crisis and a heightened awareness of Indigenous claims to justice. Both are direct predecessors of the Wet'suwet'en blockades and about land dispossession and conflicts between Indigenous claims to territory and corporate projects of expansion. In turn, the TRC report raised awareness of Indigenous issues in Canada and has resulted in greater education of Indigenous reality in Canada, therefore leading to a different type of public response to Indigenous protests. The Wet'suwet'en protests were akin to the Oka Crisis during the summer of 1990, when Mohawk communities resisted incursions onto their land by the town of Oka, which wanted to expand its golf course. Similarly, the Wet'suwet'en were resisting incursions onto their territory by a pipeline corporation that was proceeding with construction despite the unresolved issue of Aboriginal title. The elevation of this conflict to national and international consciousness had broad ramifications as well as personal impacts on the interviewees and on the Community Advisory Committee for this project. Two of my community advisors and research participants had been behind the lines during the Oka Crisis when the Canadian Armed Forces were deployed against Mohawk community members. They were also supporting rail blockades during the Wet'suwet'en crisis. The crisis was very personal and also very traumatic. They understood the significance of the Wet'suwet'en claims and the

possibility for violence and racism. This political event had a presence in the discussions with interviewees.

2.4.2 The Covid-19 Pandemic

During this time the World Health Organization (2020) had declared a global pandemic. Two days after I returned from field research interviews, the Government of Canada announced the beginning of several measures to shut down the country, including the eventual shutting of Canada's borders (Prime Minister of Canada 2020).

2.5 A Time of Uncertainty and Potential for Change

At the time of writing, we are in an unprecedented shift in modern history. As a result of the Covid-19 pandemic, the focus of economic activity has moved away from mobility and physical proximity and toward awareness of relational needs and collective health. It has moved away from the consumer transactions that fuel a resource-extractive, capitalist market system and toward a focus on food security, shelter and clean water. As a result, tourism, air travel, restaurant visits and in-person shopping have dropped dramatically, if not entirely. In turn the resulting drop in demand has disrupted the oil industry and supply chains. As a country, we are unsure how to move forward. It is a point of uncertainty and disorientation. Ami Harbin (2016) defines disorientation as a moment in our moral lives when we do not know how to go on. These moments are not chosen, but rather are unexpected. As Harbin describes it, "to be disoriented feels like one loses one's footing and is adrift in deep, unpredictable waters. In many such cases, it seems impossible that life will go on. Yet it does, and individuals can be carried along with it" (3). Because of the Covid-19 pandemic, we are globally in a kind of suspension and no longer on the track we were on before the Covid-19 pandemic started. Harbin sees moral value in this

moment of suspension and takes a closer look at possibilities for agency while disoriented. I explore Harbin in more detail in chapter 3.

The world-wide reaction to the Covid-19 pandemic reveals that large-scale collective change is possible (O'Flynn 2020). Those who are preoccupied with environmental injustice and land-related injustices that are fed by an extraction-based economy realize that large-scale shifts in direction are possible, where only recently it seemed that such shifts were remote possibilities. It has become apparent to many that the status quo is not the only direction. The nature of resistance against the path we were on in October 2019 is potentially very different, because the nature of our priorities and understandings of our existence is shifting. However, it is not entirely clear. We are in a moment of disorientation. Although we have a sense—if we are focused on overcoming oppression that exists in the status quo—that we do not want to resume on that path, truly we are not even sure if we are on or off it.

As we look at our collective past in this moment, we are aware that the future is unstable and that a future with less oppression is a real possibility. This is the context in which the interviews for this project were conducted. The first interview happened just as the Wet'suwet'en crisis was emerging in the consciousness of the broader non-Indigenous population. By the end of the interviews the Covid-19 pandemic was in full swing. The Wet'suwet'en crisis also provided a context for engaging with questions about the Indigenous rights movement, the Berger Inquiry, RCAP and the TRC—events that spanned from the 1970s to the present.

The Covid-19 pandemic seems to be leading to a massive shift in how we understand globalization, neo-liberalism and state sovereignty—all forces that shape the

Indigenous/state dynamic in significant ways. We do not yet know how the Covid-19 pandemic will change our world and relations. However, it seems clear that it will. The following chapters chart out some of the key areas where the state should adjust its strategies to navigate an ethical path to address Indigenous claims for justice.

2.6 Conclusion

The dissertation relies heavily on Indigenous scholars who frame ethical relations in terms of grounded normativity, rooted constitutionalism and other concepts that illustrate how Indigenous peoples are co-constituted with lands, waters, non-human beings and past and future generations. Understanding the interrelatedness of all things, the mutual obligation that exists, the social orderings, language and knowledge that arise as a result is foundational to understanding Indigenous claims to justice. Feminist relational scholars serve to centre relationships for the purpose of understanding how power and oppression operate within structures and relations. Both bodies of scholarship centre relatedness, but they are not the same. Indigenous scholarship focuses on groundedness and co-constitution with earth in order to promote Indigenous existence. Feminist relational approaches focus on relationships to understand structural oppression in order to work toward non-oppressive relations as we move forward. Both bodies of work form the substrate for what follows. In the next chapter, I explore in more detail the kinds of ethical strategies that can be employed by those who hold power within oppressive institutions.

Chapter 3 How to Respond to Claims for Justice within Government

> Because to make these big fancy announcements and then no implementation... And so where does the change come from? ... So how do… It isn't just for our Indigenous people, the injustice is there in the whole system, right? Because there's poverty, there's injustice across the whole system, right? And there's kids in the whole system that go from foster care to juvie and the group homes are shameful. (Y. Rigsby-Jones, personal communication, March 10, 2020)

3.1 Introduction

The work of Indigenous scholars Coulthard, Mills and Ermine is important to understanding the centrality of land and territory to Indigenous justice claims. Other Indigenous scholars examine Indigenous legal orders (Mills 2016; Borrows, Asch and Tully 2018) and Indigenous governance structures (Horn-Miller 2013), which are also central to this work. As we examine these areas, it reveals that this work is situated within Indigenous spaces. Many non-Indigenous scholars work to be allies in this process of re-invigorating Indigenous existence by learning, acknowledging our role in colonization and supporting the creation of space for Indigenous jurisdiction to take shape (Pasternak 2017). One of the remaining tasks in this work is to sort out the types of ethical actions that can be taken by oppressive institutions and their administrators to address the ongoing injustices that are perpetuated against Indigenous peoples. What ethical actions can those who are in positions of power, and who benefit from relations of oppression, take to address unjust relations?

This chapter explores the words of Indigenous advocates relating to the types of challenges they have faced in trying to address injustices faced by their peoples, while at the same time moving toward articulating a vision of justice. Indigenous advocates have often faced challenges when coming up against state institutional structures that were originally established to implement oppressive colonial practices. These colonial

structures have not fundamentally changed. In the interviews with advocates it became apparent that it is important to understand who potential change-makers are. They also provide insights into their visions of justice and strategies for working within structures that are oppressive by virtue of the unequal power relationship between the institution and Indigenous peoples.

This chapter focuses on the types of efforts and work that can be done within institutional structures that were designed to advance a colonial agenda. It starts from the self-examination of my role within public institutions articulated in the previous chapter, and an exploration of what ethical actions can be taken toward a liberated future from within oppressive structures. This work builds upon Young's (1990) descriptions of how oppression operates within bureaucracies through social operations. It is difficult to operate as an individual within a structure that defaults to oppressive operations. The work of Harbin (2016) and other feminist relational scholars will then help to clarify the types of positive movements that can be made by those *within* relatively rigid structures that exert oppressive pressure to reinforce colonial relationships with Indigenous peoples. Later chapters discuss types of change that can be made *to* colonial structures in order to move toward more just relations between Indigenous peoples and non-Indigenous peoples in Canada. This chapter, building on the work on disorientation by Harbin (2016), explores how to disrupt power inequalities from within institutions.

3.2 Seeking Justice

3.2.1 Who Makes Change?

When I explained my research topic to the participants—the ethical responsibility of the state to fully respond to Indigenous justice claims—participants emphasized the same

point: who is the appropriate target for change? The first distinction was made by Sinclair:

> Well, it all depends on what you mean by government because it's been my experience that the political arm of government is generally more responsive to the public voice than the bureaucratic arm of government. The political arm of government of course is split along various political lines—various political ideologies. Some of those ideologies are more willing to listen to—are open to—a dialogue around the Indigenous perspective.
>
> . . . .
>
> Whereas, there is an arm of political ideology—and it's not just the Conservatives—but there's an arm of political ideology even within what I would loosely call the progressive movement who are ingrained to believe that the overall interests of Canada lie in advancing the interests of the capitalist world. That whatever is good for capitalism, whatever is good for industry, whatever is good for the economy is good for the country. Therefore, when there is conflict between the way that Indigenous people would do things—or want to do things—versus the way that the corporate world wants to do things, then Indigenous perspectives will always lose out to that voice.
>
> I think that voice is more concretely ingrained in the bureaucracy than it is within the political field. It is ingrained in the political field quite significantly because political parties are more susceptible to being influenced by them. The corporate world knows which parties to fund, knows which parties to manipulate, knows which parties to support in order to put in place a government that will give them what they want or will support what they want. Whereas within the bureaucracy, people have been educated in such a way as to believe that the way things now are is the way that things have always been and the way things should always be.
>
> We're prepared to massage it a little bit. We're prepared to be kinder. We're prepared to be gentler but we're not prepared to give up certain principles. That's why I said at the beginning that it depends on what you mean by government. Government is not this one entity. Government is a series of pockets of entities within the overall institution that I call government. I think the way that you approach each of those pockets is going to be somewhat different from the way you approach other pockets. I think that we need to be sensitive to that. … (M. Sinclair, personal communication, May 15, 2020)

Sinclair outlines different forms of agency among the constituent parts of government. He emphasizes that there is a greater degree of movement or willingness to move on the part of politicians, and attributes an underlying commitment to the existing

socio-economic and political system that is fundamentally at odds with Indigenous assertions of justice. The perception that the bureaucracy holds back structural change because of a kind of inertia or educational bias is common. Joseph also made this point when he said:

> You know what? We're trying to talk in small ways yet about systemic change because what we're doing right now, even though government announces beautiful ideas, the bureaucracy doesn't change with it. And so they become the obstacle. In Canada—I wish I had the numbers but—there are so many court cases that have ruled in favour of Indigenous people that are.... The implementation doesn't happen even though the Supreme Court has ruled on something. The Nuchatlaht negotiated a fishing agreement almost two decades ago and still don't have any Indigenous fishing rights and they're still negotiating, right?
>
> Sunga: So how do we move that? How do we shift government, culture, structure?
>
> Joseph: In a long term, we move that when we've moved Canadians, right? I don't think it's possible until then.
>
> Sunga: You don't think that it'll.…
>
> Joseph: Because politicians won't move. First of all, they won't have to account if they're not engaged. They won't move unless they think and feel that the population is going to respond and say hey, you're not being fair—which is a little glimpse of it in the Wet'suwet'en response. So there's a big shift in government political circles right now but gee how are we gonna respond in the future to these Aboriginal, Indigenous rights issues. (R. Joseph, personal communication, March 12, 2020)

From the perspective of these two advocates, it is the people of Canada who need to hear and understand the claims of Indigenous peoples, and the genesis of action to address justice claims starts there. Listening will be the motivator for politicians, and eventually bureaucrats. Sinclair and Joseph saw, however, that the bureaucrats were an impediment to action to address Indigenous justice claims. The sense that bureaucrats do not take action quickly is an important one that may actually underemphasize the role of politicians and leaders to change the structures within the institutions of government that bind the actions of bureaucrats. As we move forward in chapters 4, 5, 6 and 7, it is

important to consider the limitations and checks and balances within the Canadian governance system that constrain bureaucrats from making structural change, absent direction from politicians and the people of Canada. Those checks and balances are based on priorities set through a growth agenda and settler colonialism. Though lack of movement toward reform within that structure can be blamed on bureaucrats, more fundamental structural change requires different actors including the Canadian public and provinces and territories.

From the perspective of senior government officials who are responsible for implementing policy direction of the executive decisions of cabinet, there is agreement that the policy direction set by politicians is key, and some implicit acknowledgment that it takes effort to move the bureaucracy in a specific direction. The First Senior Official articulates:

> At least getting the machinery in place for progress to be made, because this is what I think is so hard for others outside government—and frankly, for some of us inside government at times—to understand, is just how slow the sausage-making process is. How important in many ways of course the inputs of all the different perspectives are. I am the first to be kind of impatient at times but every time I try to move ahead and we haven't properly engaged with other departments that have a stake in the game you just get push back.
>
> Sometimes it's got to be a push and pull and it is a bit of a question of each individual bureaucrat's will to keep things moving in the direction that you know you're supposed to be moving. It's very easy to just sort of sit back and say wah! you know, X department is raising this obstacle, or PCO's [Privy Council Office] worried it's never going to move so I'm just going to kind of give up in a way, because it is.
>
> I've used this as analogy in other contexts as well, it's like Sisyphus rolling a big rock up the hill. You need people with drive and determination to get even several feet up that hill let alone to the top or it can get very mired down in bureaucratic process. Now you need people with will on the bureaucratic side but more than anything, again, you need the political level saying this is a priority, this is where we're going. And then you will see the resources of the public sector marshalled in that direction. And if there's waffling or uncertainty about level of priority then

> that's when things really will founder. (First Senior Official, personal communication, April 30, 2020)

The First Senior Official emphasizes the importance of overcoming inertia in order to change with the direction of policy. Inertia, however, is not the same as irresolution. Indigenous advocates who were interviewed want government officials to act in line with progressive policy agendas and not be obstructionist, but as I argue, it is important for bureaucrats and politicians to also maintain a stance of irresolution or uncertainty where they do not know how to go on in the face of an unsettling vision of Indigenous justice. The role of resolution as well as irresolution will be explored further.

3.2.2 What is Justice?

Many of the interview participants, having been deeply involved in the practice of seeking and creating just responses for Indigenous individuals and communities, emphasized that there is work to do within the scope of existing policy frameworks alongside necessary structural changes. These advocates work from outside the system, while interfacing with those who administer from within institutional structures of government. However, every one of the Indigenous advocates that I interviewed had a resolute sense of their goal—to seek improvements for their communities and for Indigenous peoples to exist as peoples. A critical aspect of this goal is to allow Indigenous peoples to exist as Indigenous as opposed to integrating into non-Indigenous social systems with a corresponding loss of community.

When I called Maggie Hodgson from the airport to meet her, she gave me an address for Ambrose Place and told me to meet her there without providing further details. When I was admitted, the first thing I noted was the singularly kind and gentle

manner of the staff. I also noted that this was a residential facility and that many of the people who were in the building were in need of support of some kind. As I waited for the staff to find Hodgson in the building, I saw that this was a place that provided support to those who are the most disenfranchised in society. Before Hodgson and I sat down, she introduced me to the staff of Ambrose Place and arranged for me to get a tour in order to learn about what Ambrose Place does. The entire facility is designed to provide permanent housing for difficult-to-house Indigenous people in Edmonton. Ambrose Place takes in people who are not easily accepted in other facilities such as people with complicated physical and mental health profiles and those convicted of violent crimes. They have few belongings, sometimes addictions issues, sometimes diabetes and related complications, and are without support. Without Ambrose Place, they would be living on the streets of Edmonton and cycling in and out of jails and hospitals. Ambrose Place does not reject people based on their past. Hodgson pointed out that even the worst repeat offenders convicted of violent crimes are welcome.

The building provides space for their belongings including the shopping carts which are often used to contain all of their possessions. The residents were not asked to abandon any part of their few belongings as a condition of moving into the facility. The rooms are designed to support their needs. Healthy and delicious meals are provided. There is a healing lodge, which is the heart of the building. Most importantly, the staff treat the residents with love, respect and care and this treatment brings a response of love in return. For example, in the middle of our interview we heard a commotion outside the door. One of the residents was raising his voice and seemed violent. Hodgson went out

and then promptly came back to say, “It’s okay. The four of them surrounded him and are loving him up!” In other words, they used kindness to defuse his violence.

Ambrose Place raises its own funding. In providing a permanent housing solution for those who would otherwise cycle in and out of police stations and acute care hospitals, the facility provides excellent long-term care for less cost. It is an Indigenous-centred vision of how to compassionately care for those who are most vulnerable in society and the most disadvantaged from a health and economic viewpoint.

Hodgson’s invitation and her deliberate effort to situate me as a guest of Ambrose Place is an important demonstration of what she means by justice for her community. It was also a way to shift my understanding of what is possible for those who face significant daily challenges in survival, and for me to see what the terms of care look like when they are set by Indigenous peoples.

Hodgson has been involved in many ground-breaking initiatives that address the loss of dignity associated with unfair and unequal treatment, oppression, gender-related issues and systemic discrimination in health. Specifically, she is a leader in Indigenous health, justice and reconciliation and has worked to establish initiatives relating to addictions. Her work centres on communicating her community’s perspective on the processes the government used to address the legacy of Indian residential schools. She worked on the development of the precursors to the Indian Residential Schools Settlement Agreement and the development of the Truth and Reconciliation Commission. She also worked with the Missing and Murdered Indigenous Women and Girls Inquiry.

When I asked what motivated her to become an advocate, she said to me, “my people didn’t have a voice and I didn’t have a voice”. She spoke of the absolute power of

the Indian agent, the priest and the police over her people when she was young. They could determine who was included and excluded, who could be buried where, and who they could oppress. She also spoke about her brothers being turned away by the priest at the residential school after they had walked five miles to visit their sister, because visiting hours were over. As she said:

> That kind of thing [residential schools], that doesn't even acknowledge and recognize the importance of family and relationship and nurturing and being supportive. So it's not only the law, it's about the developed Canadian culture of oppression and experience in that oppression. (M. Hodgson, personal communication, March 4, 2020)

I asked her what justice meant to her. She recounted to me that her parents taught her the meaning of justice in different ways. When one of the first Indigenous men in her community to build a house off reserve lost his house to fire, Hodgson's dad organized the rebuilding of his house over the space of a few days. As she said, "My dad strived for justice and that's justice. Neighbour takes care of neighbour" (M. Hodgson, personal communication, March 4, 2020). Her mother demonstrated justice in another way. When Hodgson's grandfather gave twenty fish out of his net to the family, Hodgson's mother gave eighteen fish to others who needed them. She also fed the homeless people who came through on the rail lines. Hodgson said that what she learned from her mother is that compassion and sharing are lived forms of justice. For Hodgson, redistribution to those who are in need is an essential aspect of justice.

Throughout her interview, Hodgson reinforced the relational nature of justice. I had told her that I felt very gifted that she arranged to meet me at Ambrose Place but said that I was nobody important—I had no influence. She said, in reference to showing me Ambrose Place:

> Who's important is the neighbours. I don't think the Minister of so-and-so is important. I think the more we can do what Paulette Regan says is unsettling settler within and educating other mainstream people about the positive things that are happening and the money that's being saved here and lives are being saved, you know? So, when you said, I'm nobody important? Well, I think neighbours are important. Very important. I'm proud of them. They're like my family. And I'm proud of you and you're like my family so I want my family to meet each other. (M. Hodgson, personal communication, March 4, 2020)

Hodgson mentions Regan's (2010) important work on non-Indigenous Canadians taking personal responsibility by allowing themselves to be disrupted by the truth of what happened in Indian residential schools. Regan, a colleague of mine at the TRC and as well at Indian Residential Schools Resolution Canada, based her work on her experiences listening to survivors of residential schools. She used the disruptive effect of those experiences to look at what it means to be personally responsible for the myths we believe about who we are as a society (60-61). The focus on the very personal location of change was also articulated by Joseph in his interview:

> But beyond that it has to be something that compels us to a higher state of humanity where we live and work and play. It's not just in the academic halls and learning that we should talk about morality or ethics or anything. It should be where we live and work and play. (R. Joseph, personal communication, March 12, 2020)

Both Joseph and Hodgson emphasize that interpersonal interactions among people within their lived experiences are important to effect change. For both, the critical location of change occurs in the relationship between non-Indigenous people and Indigenous people, and it is not primarily about infusions of resources, though that is critically important for allowing for more substantive relational participation. The truly necessary element of change is the relational dynamic between Indigenous people and non-Indigenous people. Joseph explains this best when he elaborates on what justice means to him:

> I don't know if we're ever going to resolve the separation or the divide or the distance between us or the gap between us all until we have a real dialogue about who we are ... Indigenous people. Who are we? Even though everybody knows we were here first nobody really cares who we are. They don't know that we hold long-held values, principles that speak to fairness and equality, [emphasis] justice, that's what justice is. Fairness and equality in all its dimension and I think I'm in this—the work I'm in—because I believe that here in this country, nothing will ever truly be resolved—and we call everything reconciliation these days—unless we have some really meaningful deep dialogue that actually transforms, or has the potential to transform, our relationships. (R. Joseph, personal communication, March 12, 2020)

Joseph believes that it is important to engage in a dynamic conversation that will bring care, respect and fairness to a relationship that has historically and continuously lacked all three. He asserts the value of his people as Indigenous people, on their own terms, and he sees relationship as the core vehicle for transformation.

Another long-standing advocate and pioneer who worked to address the childhood traumas of Indigenous people who are cycling through the criminal justice system is Yvonne Rigsby-Jones, the former executive director of the Tsow Tun Le Lum Society on Vancouver Island. I initially met her when I was part of a government delegation to visit the society in 2003 or 2004. She spearheaded many ground-breaking initiatives aimed at addressing the core traumas that cause cycles of abuse. The people who participated in Tsow Tun Le Lum Society programs are formerly incarcerated. Rigsby-Jones and the Tsow Tun Le Lum Society provided crucial support for residential school survivors and were therefore involved with the Indian Residential Schools Settlement Agreement and the Truth and Reconciliation Commission in a healing capacity. Rigsby-Jones also worked to support the women and families who advocated for the Missing and Murdered Indigenous Women and Girls Inquiry.

Hodgson, Joseph and Rigsby-Jones are all extraordinary advocates who have worked in all levels of programming and implementation relating to such issues as

residential school trauma, addictions and Indigenous/non-Indigenous relations. From the start, they have been involved with trying to address injustices such as addictions, poor health outcomes, disproportionate involvement with the criminal justice system, disproportionately high rates of violence suffered by Indigenous women and girls, the negative outcomes from attendance and abuses suffered in Indian residential schools and other issues. All three spoke from an understanding that all of these impacts of colonialism that are suffered within Indigenous communities are intertwined. From her perspective of working with trauma, Rigsby-Jones explained:

> I think if we listen to the stories from TRC, the statements, and know how much work there still is to do and how broken our communities are and how much they're still—how much devastation and destruction ... the missing and murdered women, I mean that is so unjust. When we think about how long it took for response for the Highway of Tears [3]… (Y. Rigsby-Jones, personal communication, March 10, 2020)

Specifically, the innovation that was offered by the Tsow Tun Le Lum Society through the work of Rigsby-Jones as executive director and the staff and board was to make the links between trauma and abuse suffered in childhood and the rates of recidivism in the criminal justice system. The organization worked to address the damage to relationships through the state's separation of children from their parents, and the abuse suffered by children in their relations to state or church employees. In speaking about Indigenous offenders who were re-integrating into society she says:

> But without—and this is the piece about the trauma programming—without the healing of that childhood trauma they didn't make it. They didn't make it.

[3] The Highway of Tears refers to a stretch of highway in Northern British Columbia between Prince George and Prince Rupert where at least nine women, and possibly as many as fifty, went missing or were murdered. There are many reserves along the highway, and up until 2018 they had no public transportation services. https://www.highwayoftears.org/about-us/highway-of-tears and https://www.nytimes.com/2016/05/25/world/americas/canada-indigenous-women-highway-16.html

> No. And the degree of the abuse from Residential school in . . . most cases, or if their parents had gone and then their childhoods were so terrible that without doing, like, because—okay I'll back up a whole bunch. People were not being, getting successful, going to non—in the old language—non-Native treatment centres. They were not being successful because they didn't address the trauma. They didn't—even in those days most addiction centres didn't address abuse. They addressed, you know, the twelve steps. (Y. Rigsby-Jones, personal communication, March 10, 2020)

Then she linked it to the broader issue underlying differential treatment between Indigenous and non-Indigenous people in terms of racism, distributional injustice and inequality:

> . . . it's that systemic racism. Injustice is still so blatant. Canada is unkind. It's not just unkind to Indigenous people. Poverty is so huge. We think of injustice.... It's all that. Are there any easy solutions? I think not. (Y. Rigsby-Jones, personal communication, March 10, 2020)

Rigsby-Jones' work to address childhood trauma in order to enable people to lead good lives and break out of cycles of poverty, disenfranchisement and institutionalization demonstrates the interlinking of many of the various injustices that are described individually in mainstream policy circles and media.

As advocates worked for structural change and for change in decision-making within existing systems, Joseph, Hodgson and Sinclair emphasized the need to target the people of Canada to become the main drivers of change at both the interpersonal and structural levels. Rigsby-Jones and Hodgson emphasized the impact of injustice on people, where those working within the state at some point had seen injustice being perpetrated in some form.

One of the challenges to addressing injustice was rigidity within government. Rigsby-Jones, who worked in the non-profit sector, spoke of the agility within her organization to adapt and learn ways to improve their program. She said, "with a society, which is so different from the cogs within government, there was freedom that you can't

do when you're working in a government—in a more structured government system" (Y. Rigsby-Jones, personal communication, March 10, 2020). Stephen Kakfwi, who also had many dealings with government institutions as a Dene advocate and then as a cabinet minister and premier of the Northwest Territories, described a level of rigidity in the structure and an adherence to that rigidity by government officials. Kakfwi described to me an instance when he was premier where the issue came up in government about whether gravel pits could go to Dene communities. Kakfwi described a situation where despite political will to transfer resources to Dene communities so they could benefit from resource-based industries, the bureaucracy—and in particular the Government of Northwest Territories Department of Justice—vetoed the transfer. As he explained to me, the barrier to moving forward on benefits for Indigenous communities is "inherent in government. It's inherent in institutions." (S. Kakfwi, personal communication, March 6, 2020)

Indigenous advocates have worked tirelessly to present their positions to government, argued on behalf of community members, and worked within the limitations of the system to advance the situation of their community. They have come up against the limitations that imposed boundaries on their work, but have worked nonetheless to do what is possible to help people in the near and long term. At the same time, they have sought to change the systems and the administrators of institutions through incremental and situation-specific efforts, as well as through political or system-wide advocacy.

It is often the case, however, that the limitations that they face when they are dealing with government officials are not immediately clear. As noted by Sinclair, Joseph, Hodgson and Rigsby-Jones, they suspect there are various reasons for resistance on the

part of government ranging from rigidity, structural issues, lack of motivation or understanding on the part of bureaucrats and lack of political will. From inside government, senior officials outlined political will as an important factor in the challenge of changing the direction of the bureaucracy. Regardless of the reasons for lack of movement toward liberation from oppressive relations with Indigenous peoples, assuming there is the will to make positive change, how can we focus our actions and what should we do within an environment that is resistant to change? The first challenge is to understand the structural framework within which government officials operate.

3.3 How Do We Work within Historically and Ongoing Oppressive Structures to Make Change?

When faced with the rigidity of rules that do not take into account the lived experiences of Indigenous peoples, advocates must expend enormous amounts of energy and effort to advance the justice claims of their peoples. For those within government institutions it also takes significant effort to move things forward, as noted by the First Senior Official above. Additionally, it may also take some other kind of ethical stance to ensure that justice is not denied to Indigenous peoples when they advocate for it. In particular, when faced with institutional barriers to addressing Indigenous justice claims, state officials need to listen more closely instead of screening out visions of Indigenous justice that may seem unreachable. And they may need to shift from a state of resolution to do what can be done within existing restrictions; that is, they may need to shift to being irresolute. In the remainder of this chapter, I will lay out the types of structural barriers that limit the ability of state officials to respond to Indigenous justice claims. I will explore the types of stances that can be taken by those who work within colonially oppressive institutions to

ethically meet Indigenous justice claims. Later chapters examine the ways in which the structures themselves may need to change, and I argue for some strategies to shift power imbalances in colonial institutions.

3.3.1 The Structure of Oppression: Government as a Colonial Institution

One of the issues highlighted by the research participants is the challenge of working within state structures to effect change. They particularly focused on the lack of action by public servants. Institutional structures constrain the scope of actions public servants can take. Before focusing on the types of changes that can happen within structures, it is important to understand what is meant by oppressive institutional structures.

3.3.1.1 The *Indian Act* and other laws

One of the institutional structures that has historically shaped and continues to shape oppressive relations vis-à-vis Indigenous peoples in Canada is the *Indian Act*—a law originally established to regulate federal administration of all aspects of life relating to "Indians" pursuant to section 91(24) of the *Constitution Act, 1867.* The Canadian government uses a system of accountability to a majoritarian legislature for dispensation of collective resources, which does not take into account Indigenous normative systems of mutual obligation arising from "relations of interdependence with land and animals, past and future generations and as well other people and communities" (Coulthard 2014, 63). Governance structures such as the *Financial Administration Act*, the *Indian Act* and an economic system that values growth over sustainability rigidify settler colonial agendas to dispossess Indigenous people of their lands in order to be used for the benefit of industry and Canadians.

As noted by Sinclair, government is not a monolith. There is an overarching law called the *Constitution Act, 1982* that governs the ways in which we understand the structure of our society as between federal and provincial jurisdiction and how we make our laws. To this effect, there are various entities that wield state power: the legislative branch, which creates positive legal rules; the executive branch, which administers those legal rules and completes other tasks conferred by statute; and the judicial branch, which interprets and applies legal rules in various contexts (Mathen 2019, 20- 21, 26). The bureaucracy follows the priorities set out by the ministers of their departments within the bounds of judicially interpreted laws. I will focus on two underlying issues as examples of institutional domination which create oppressive conditions for Indigenous peoples: accountability and Crown title.

3.3.1.2 Accountability

Government bureaucrats operate within a structured system of accountability. Approval for new programs and initiatives first goes through cabinet, consisting of several Crown ministers. Cabinet approves new programs and initiatives, additional funding to meet legislative requirements, new policy or responses to past commitments under previous budgets. Cabinet provides policy authority for a particular government initiative, and then Treasury Board must approve funding from an identified source such as the federal budget, existing government funds, internal reallocation or other means. Once Treasury Board approves funding, the departmental officials have spending authority. Funding flows to a department once Parliament grants approval through the estimates process. Once this process is complete, the department can spend funds (Scratch 2012).

Parliament is the body to which bureaucrats must be accountable. They can only act once they have spending authority approved through a system of checks and balances. Government funds come from taxation revenues. Therefore, the democratically elected members of the legislature hold government and departments accountable for the spending of revenues generated by members of society. This system of accountability provides a significant amount of power to the party that wins more seats than other parties. Structurally this means that a party that represents the interests and priorities of a portion of society can set the *prima facie* policy direction that will be pursued by the government and authorize the spending of funds based on wealth that is ultimately derived from land-based resources.

The system of revenues, the setting of policy direction and accountability for spending does not take into account the original relationship of Indigenous peoples to the land (Manuel and Derrickson 2015, 158-59). It does not take into account Indigenous entitlement to be on the land and the accompanying relations of knowledge, social ordering, language and governance (LaDuke 2016, 62-63). It does not take into account that there is no moral justification for ignoring those entitlements to the detriment of Indigenous being and existence as a people (TRC 2015b, 5: 124-26). It does not take into account the ethical wrongness of dispossession of Indigenous people from land and the subsequent mistreatment and breach of obligations of care to the land and to Indigenous people. It also does not recognize that wealth accumulated by non-Indigenous voters and taxpayers originates from an economy based on resource extraction and derivative industries that have overridden original obligations to Indigenous peoples (LaDuke 2016, 15). Add to this the harms that have been perpetrated such as the imposition of the Indian

residential school system in order to eradicate language and cultural existence that ties Indigenous peoples to community, family and a way of life (TRC 2015b, 5:110-11). There is a mismatch between accountability for wealth accumulated through taxes and accountability to Indigenous peoples for the wealth that had been previously safeguarded by them through systems of mutual obligation to land and the natural environment.

Accountability to Parliament for tax revenues is at the core of government operations and accounts for the structural resistance to a robust fulfillment of ethical obligations to address wrongs committed against Indigenous peoples (TRC 2015b). Ultimately the interests of the majority outweigh whether Indigenous injustices are addressed, and it requires the will of non-Indigenous Canadians for justice claims to be fully addressed. Hence the argument made by both Sinclair and Joseph that the people of Canada need to understand Indigenous justice claims for things to change. Further, though it is beyond the scope of this project, addressing deeper structural bias contained within the founding principles of the *Constitution Act, 1982*, requires a federal government majority alongside provincial support (sections 38-49; Mathen 2019, 118-26). Addressing the bounds of authority and accountability processes requires structural changes that address the absence of accountability in the relationship between Indigenous peoples in Canada and the non-Indigenous majority. Chapter 7 explores how Indigenous interests are incorporated into the majoritarian system.

3.3.1.3 The Presumption of Underlying Crown Title

A problematic structural feature exists in Canadian Aboriginal law. Canada's system has its roots in the European legal system, and therefore the Crown has underlying title to all land in Canada. Where there is no other property interest, the land is deemed Crown land.

In the European-based Canadian legal system, Aboriginal title arises from the prior occupation of Canada by Indigenous peoples (*Delgamuukw* para 126). The court in *Delgamuukw* found that the date of sovereignty is the date of first contact (*Delgamuukw* para 145). In the case of *Tsilhqot'in*, where the Supreme Court applied the principles in *Delgamuukw* to make the first finding of Aboriginal title in Canada, the court stated the following: "The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763" (*Tsilhqot'in* para 69). The Supreme Court of Canada set out the content of Aboriginal title in the *Delgamuukw* decision with the intent to reconcile the prior presence of Indigenous peoples with the assertion of Crown sovereignty, without straining "the Canadian legal and constitutional structure" (*Delgamuukw* para 82; *Van der Peet* para 49). In *Delgamuukw*, the court considered the evidence of the Gitksan and Wet'suwet'en nations, and particularly the adaawk and kungax. The adaawk sets out the existence of a system of land tenure internal to the Gitksan, and the kungax established the importance of land for the Wet'suwet'en (*Delgamuukw* para 95). Thus, the court accepted Indigenous legal orders—a concept I discuss in chapter 7 in more depth—as proof of Indigenous relations to land. Noted Indigenous legal scholar John Borrows challenges this characterization by the Supreme Court:

> If only this declaration were deeply true. Canadian law still has *terra nullius* written all over it. The same paragraph that purportedly denied *terra nullius* contains the following statement: "At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province." If that land was owned by Indigenous peoples prior to the assertion of European sovereignty, one wonders how the Crown acquired title in the same land by merely asserting sovereignty, without a version of *terra nullius* being deployed. The Crown's claim to underlying title on this basis "does not make sense." Some kind of legal vacuum must be imagined in order to create the Crown's radical title. The emptiness at the heart of the Court's decision is disturbing. (Borrows 2015)

The TRC sought to upend racist notions at the heart of assertions of Crown sovereignty over Indigenous territory. TRC Call to Action 49 repudiates the concepts used to justify European sovereignty over Indigenous peoples such as the Doctrine of Discovery and *terra nullius*. Though the Supreme Court said that *terra nullius* never applied, Borrows' point about Crown assertion of radical title having no basis except reliance on a racist doctrine means that the point is not resolved. The assertion of sovereignty and the assumption of Crown title over land marks a structural feature that makes Indigenous claims to land dispossession difficult to address. Though it is not possible to resolve this issue within the scope of this dissertation, I query the possibility of shifting from underlying title resting with the Crown to instead resting with the Indigenous peoples of Canada. Would this create room for structural change and a different way of thinking about sovereignty? I do not explore the implications of changing the nature of underlying title in this dissertation, but will engage with issues of sovereignty in chapter 7.

3.3.1.4 Economic Goals

Sinclair outlines an important aspect of Canada and its economy and how the Indigenous voice is pushed aside:

> The overall interests of Canada lie in advancing the interests of the capitalist world. That whatever is good for capitalism, whatever is good for industry, whatever is good for the economy is good for the country. Therefore, when there is conflict between the way that Indigenous people would do things—or want to do things—versus the way that the corporate world wants to do things, then Indigenous perspectives will always lose out to that voice. (M. Sinclair, personal communication, May 15, 2020)

The economic goals of Canada are intimately related to the extraction of resources. The Second Senior Official discussed approaches to negotiations with Indigenous peoples and the move away from Crown insistence on finality and certainty:

> I do understand that you have to be frank and honest in saying to First Nations groups, look our interest is also that we can continue to develop the land or some of the land. Our interest is to make sure that the economy is going to continue to grow for this and this reason. There's nothing bad for one of the parties to go to a treaty or to a negotiation expressing exactly what you're looking for. That for me is not necessarily bad. (Second Senior Official, personal communication, June 29, 2020)

An extraction-based economic structure and a political system rooted in majoritarian interests are fundamentally at odds with the renewable and sustainable economic model advocated by many Indigenous peoples. When coupled with the fact that Indigenous peoples are demographically in the minority (Veracini 2011), it is easier to understand the challenges faced by those within and outside the system who want to take ethical action to support Indigenous existence. Watts discussed whether there is motivation by the state to recognize Indigenous legal orders:

> I think in the short term anything that impacts on land or wealth ends up being not in the best interest of the state and given that, I don't think there's any big rush on the part of the state to say that "oh yeah we need to create space for Indigenous law because it's good for Canada". I think they have a different view of what's good for Canada than what may be good for Indigenous people or what Indigenous people think is good for Indigenous people. (B. Watts, personal communication, July 1, 2020.)

3.3.2 Disorientation in an Institutional Context

The structures outlined above provide a sense of the framework within which government officials operate. Some of them, such as the *Indian Act*, are more apparently colonial and oppressive than others, and engender an awareness on the part of government officials as to the reasons why the *Indian Act* limits movement forward. However, like with the other examples of colonial structures, officials are compelled to work within the framework of the *Indian Act* until it is repealed. As such, it is challenging to act upon the words of Indigenous advocates when they seek justice because the structures within which officials operate make a full response not possible. The inability to listen because of the

impossibility of responding effectively can be an important site for change. In this context, I will now focus on the role of disorientation, as outlined by Harbin, to provide some guidance to those limited in their response to Indigenous visions of justice because of the hard limitations of colonial structures. I will then follow with an example of Indigenous efforts to unsettle or disorient officials within government to illustrate disorientation.

3.3.2.1 Disorientation

Ami Harbin (2016) defines disorientation as "experiencing serious disruption such that we do not know how to go on" (xi). Harbin carefully delineates what is meant by disorientation and also what types of moral value can arise from different disorienting experiences. Disorientation is most easily illustrated by traumatic events such as catastrophic loss, grief or illness, when one is most clearly shaken out of one's normal habits and expectations of what will happen next in life. After the disruption there is sustained uncertainty in terms of self-identity, knowing how to act, how to relate to others and how to proceed or respond. These are not momentary feelings but rather longer periods of discomfort and uncertainty. She refers to a survivor who has lost her family in a tsunami as a first example, but disorientation is not limited to such catastrophic events. Situations of disorientation can have a "family resemblance" to each other (17) in that there are overlapping similarities or threads of relation to each other. Different types of disorientation, however, can have specific effects in terms of changing attitudes, behaviours, capacities and relations to others (25). Thus, disorientations—which are experiences that do not generate the moral resolve so desired by traditional liberal scholars—may be morally productive and politically important (66). Of the types of

disorientations that Harbin explores, there are types that are relevant to the work of the Indigenous advocates and government officials who work within rigid structures.

3.3.2.2 An Example of Indigenous Efforts to Disrupt Officials within an Institution

Hodgson spoke at length of various times when she argued with government bureaucrats in an attempt to ensure the lived realities of Indigenous peoples could impact policy and decision-making. She made efforts to be heard regardless of structure that limits hearing her vision of justice. Hodgson described a situation where she argued with a government official about how criteria for hiring adjudicators for determining compensation for residential school abuses disqualified Indigenous adjudicators. Of critical importance, Hodgson occupied a kind of liminal position in that she was a consultant within government, but clearly represented her community's interests. She described her argument:

> It's like, you know, when I was mean to that . . . woman . . . the hierarchy had made the decision that people had to have ten years' adjudication experience just to make the barrier so high that Indians couldn't get in. My opinion. Okay? So I was mad. I was pushing back, pushing back.
>
> I'm bitching, bitching. This is wrong, this is wrong, blah blah. And she's defending because she was born and raised in federal government employment. Her great grandmother worked for.... You know, she'd worked for the government all her life. She was rationalizing and I got really mad and I said a mean thing to her. I said, "you'd a made a good Indian Agent in 1952". I went home and I thought about it and I thought, what a mean, mean, mean thing to say.
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> . . .
>
> But you see, I live 3,000 miles—at that point—from my family. Do I just wait for other people to hold me accountable? like you know. . . . That's not the justice system I believe in. I thought about it and I was ashamed about what I said to her. I mean, I didn't say I'm sorry. . .. And not mean it and not have any relationship transference about what I'd had said and how I had treated her.
>
> I went back and I got a quilt made and it cost me $250 to get the quilt made with tobacco. So I gave her the tobacco and . . . at the staff meeting. I says, when I was so upset when we were screening for adjudicators and when I got really upset with you I said "you'da made a really good Indian Agent in 1952". I says, "that's a very

> cruel thing to say. You didn't make that decision. There were other people who made that decision. I shoulda said that to them. Not to you. I should say it, but not to you. And I was wrong to hurt your spirit so I'd like to acknowledge that my mean mouth hurt your spirit. In my tradition I have to acknowledge that I hurt you and I actually have to pay for it with this gift. So I give you this gift." And she says, oh, she said, "you don't have to give me the gift, she said, because you already said you're sorry." I says, "actually I didn't say I was sorry. This blanket acknowledges that I was wrong. And this blanket will teach me—if I pay enough, $250 blankets, I'll teach myself how to be more respectful." (M. Hodgson, personal communication, March 4, 2020)

Hodgson's story calls to mind Leanne Simpson's (2017) description of acts of radical resurgence that don't accommodate structures of oppression (17). Simpson describes the knowledge of Elders as based in practice: "knowledge or existence itself is a function of intellectual thought, emotional knowledge, and kinetics or movement" (20). Acts of Indigenous existence are refusals of settler colonialism. In giving a blanket and engaging her people's system of justice and making right, Hodgson was refusing the government policy framework, the government structure that produced the initial decision regarding adjudicators and was a disruption of a status quo that would otherwise have made invisible Hodgson's resistance. In taking a stance of humility and recognizing her own wrongdoing within her own legal system, she also likely made it uncomfortable for the government official to refuse the blanket and the system of law that dictated Hodgson's act. In line with Simpson's description, it was an act of radical resurgence of who Hodgson is, and the systems of knowledge that guide her existence.

Hodgson's story also demonstrated her attempt to make the official recognize her implicit bias and shake her from a comfortable path that was supported by oppressive institutional structures. She saw that government officials were exercising their discretion within the existing policy framework in a way that meant that fewer Indigenous decision-

makers would be involved in adjudicating claims for compensation for abuse suffered in Indian residential schools.

Hodgson deliberately shook the official's frame of reference by telling her she was not doing any better than historical figures such as the Indian Agent who represent colonial oppression. The impacts of her attempts to disrupt the official did not seem to be immediately successful. She presented tobacco and a blanket to acknowledge that her words had been mean-spirited. She situated this act of relationship in a meeting with other officials. She pointed out that she was aware that the decision to set a standard for adjudicators that excluded many qualified Indigenous adjudicators was an institutional one. Nevertheless, she persisted with the assertion of her and her people's understanding of justice within an oppressive and colonial institutional space so she could be heard. The official seemed to have tried to dismiss the effort by saying "you already said you're sorry" and Hodgson corrected her. She insisted that the official retread the ground to better understand her own bias and her own lack of understanding of what was happening.

She magnified her message by asserting jurisdiction over her behaviour in line with her community's justice system in a meeting attended by many people. And, in recognition of the relationship between her and the woman that was in need of repair, she gave tobacco and a blanket. The relationship was not nullified or dismissed; it was reinforced and righted. The entire sequence of events served not only to speak to the systemic injustice and its impact on Indigenous people, but also to reinforce and assert her people's way of dealing with conflict in an environment where the language and mode of conduct is set by the institution, *and* to assert the centrality of relationship in that system of justice. She claimed her voice, and her system of justice. She did not stop there:

> . . . So, the rest of the story was . . . the . . . people that I had to deal with in Justice, I was like a woodpecker. . . . I said, "this is wrong. This is wrong. This is oppression. This is colonization. This is everything that RCAP talks about and you guys, you're crossing the line and you're doing it because you can. You're making rules because you can. That's your job." Not that they're just rules. It's injustice. So every chance I got . . . to be in whoever's face that was hanging on to why it should happen. Six months I got it changed to where they didn't have to have ten years of experience, except we had a lot of really, really good applicants at the first call. They didn't come back because they weren't accepted, eh? And I really felt ashamed for myself for not accepting them but the rules were the rules. You have to have ten years of experience.
>
> So anyways, so I didn't let it go, you know. I didn't let it go. And I think that fear and control and colonization and oppression.... I think that those things still happen—it's not going to happen here. I'm going to stand on this ground and I'm going to fight until I get justice. (M. Hodgson, personal communication, March 4, 2020)

Hodgson's story contains many levels of effort to disrupt injustice, both through actions directed at the individual, within an institutional context, and through the use of her own insight into the need to ground her efforts within the legal order of her people.

If we shift perspectives to that of the official, Hodgson's story efforts to disrupt can also be seen as a location for the possibility of disorientation on the part of the official. Though Hodgson may not have intended to create a disorienting situation, her actions may have done so.

Harbin (2016) looks specifically at colonialism and action that is possible in disorientation. "Doubling back actions" are responses to injustice that involve returning to the territory of injustice over and over again to correct injustices as they appear or, I would argue, as one learns about them anew (138). In this way, "doubling back actions" involve a degree of epistemic humility and acknowledgement that one does not always know or understand what bias and injustice look like all the time. It is possible to not see it at times. Other examples Hodgson provided during the interview include disrupting and teaching officials who only exercised their discretion or power in a very limited way

through cajoling, arguing and encouraging them to expand their actions. She has insisted that they retread old ground to understand their bias. If one person could not hear her or be disoriented, like the one who received the blanket, Hodgson moves towards others who might hear her claims.

I am interested in the possibility in that moment when someone is disrupted by an Indigenous advocate like Hodgson. In that moment when their own certainty and resoluteness is challenged and they feel disoriented, what is morally possible? Colonial injustice requires constant retreading of ground and examination of bias. For non-Indigenous peoples in Canada, part of not knowing how to move forward once shaken out of the complacency of privilege is not knowing what a decolonized future might look like. Harbin states that the goal is to support Indigenous resurgence and to also decolonize our ways of thinking about nationalism, history, property and other assumptions about society (141) through "doubling back actions". However, decolonizing our way of thinking does not actually mean we will ever be fully decolonized. We are immersed in our colonized environment and cannot extract ourselves from it.

Hodgson's story is also an example of a situation where an institutional officer who may have thought they were acting in a race-neutral fashion was made aware of their power and their decision-making privilege and that their actions had oppressive impacts specifically on Indigenous peoples. It can be a moment of sudden awareness of race, privilege, power and oppression. Hodgson's efforts to disorient and shock the officials out of complacency may have moved the officer into understanding their own complicity in a decision that reinforced systemic racism, while at the same time maintaining a relationship and engaging in dialogue.

Harbin refers to this type of disorientation as “white ambush”. White ambush occurs when people become aware of their own white privilege and the benefits from accepting that privilege. Disruption in one’s understanding of the world is critical for transformation to occur, although when in a state of disorientation, a person may not be aware of how to take action. The awareness of privilege itself, however, can help white people to understand how they are implicated in the perpetuation of injustice (75). Having looked at Indigenous efforts to disorient, we move forward to examine the moral value of disorientation.

3.3.2.3 Disorientation in Action: Irresoluteness and Justice

Harbin (2016) has focused on individual agents who are disoriented and then shifts to moral contexts within which disoriented agents act. Harbin refers to individuals who work within settings where they are conflicted about their role. She references a black woman working in a white and male-dominated workplace where she is tokenized, but where she also thinks she needs to be in order to advance possibilities for future black women in the workplace (131). These types of actions, which are inherently conflicted, exist where there are efforts “to reduce harm in current unjust institutions, while at the same time working to create new just institutions” (135). She calls these types of actions “both/and” actions. It is these types of actions that facilitate the link between individual disorientation and actions that can build structures that are more just toward Indigenous peoples.

Harbin discusses awareness of injustice and the actions people may take even when they are not sure that the impact of those actions will be positive. These actions may be taken in institutional settings where a person may decide upon a course of action while understanding that deeper structural inequalities continue to remain in place. There is a

risk that they may be in the position of legitimizing some further injustice. Harbin speaks of "both/and" actions where, for example, a person works for prison reform while at the same time seeking prison abolishment. Harbin looks at situations where "both/and" actions may be useful in cases where an agent can tentatively pursue multiple goals that are in tension with each other (137). These are irresolute actions in response to injustice. She examines situations where there is a choice of responses to a particular injustice, but there is internal conflict within the moral agent about what to do.

Hodgson had a dual role when she attempted to disorient the government official. She was working inside government as a consultant/advisor, while at the same time explicitly representing her community and their visions of Indigenous justice. She was participating and engaging with colonial institutions where unfair decisions are made from the inside while at the same time putting forward a vision of justice and disorienting officials. Hodgson was not only seeking to disrupt individuals, she was also trying to create a more just institutional response to her people's claims. Hodgson had to continue with a resolute sense of what justice is, while trying to disrupt the government officials who had set a policy that disenfranchised Indigenous adjudicators. Her actions were all geared towards creating a more just institution that respects her people's system of dispute resolution and law. She wanted the institutional decision-makers to change the way the institution operated in relation to her people. She sought to shift the power relations within government and unsettle not just the individual but also the other decision-makers to help them understand the injustice of their decision. She wanted to create moments where individuals within institutions might stop and consider other possibilities for change.

3.3.3 Power and Resolution

As noted above by Kakfwi, Rigsby-Jones and Hodgson, there is incredible rigidity once a decision is made within an institution. In Harbin's analysis, institutions such as government exercise strong resoluteness in their decision-making and their implementation of policies. Institutional officials hold the power in the relationship and are resolute much in the same way that the official in Hodgson's story was sure and firm in her decision not to change the qualifications for Indigenous applicants. I would argue that in an institutional setting within government, where the historical power imbalance has rested with non-Indigenous peoples and is rigidified, an expansion of Harbin's notion of disorientation should be applied to illustrate the location of resoluteness and irresoluteness and the inversion of power-holding. I argue that it is important for Indigenous visions of justice to be recognized as resolute and for the integrity of an interrelated and grounded concept of justice to be respected. In terms of the complexity of being Indigenous and working within a state structure, as Hodgson was doing, it is important to focus on the role of power. Hodgson was not the power-holder; the policy makers who were operating within a system of accountability that did not take into account Hodgson's vision of justice were the ones who held power. Therefore, even where there are Indigenous officials who may also be advocates for their communities within a system that is structured in an oppressive way, we must look at the operation of power and where irresolution needs to be introduced, and resolution respected. It is the power-holders within the state who must be prepared to accept an Indigenous stance of resoluteness and not take it as a challenge to personal or state autonomy. The power-

holders must be willing to rest in a stance of irresoluteness themselves when faced with concepts of Indigenous justice that are unsettling and disorienting.

In the situations that have been illustrated by research participants, the institutional power-holders who make decisions about Indigenous people's lives act with firm resolution even when Indigenous visions of justice have been articulated. In some instances, the resolute response of institutional power-holders may have adopted some aspects of the vision of justice, but not necessarily the difficult aspects that require concession of power and recognition of self-determination on the part of Indigenous peoples.

Democratic accountability is structured in a way that demands resoluteness by government. Election cycles of four years or less demand that policy leaders must demonstrate the timely implementation of policy goals or risk losing the election and control over policy. Officials can often be insulated from interactions with the people who are most impacted by their decisions, and therefore do not readily have disorienting experiences. There are promotional and other performance incentives tied to officials' ability to move a project forward with resolute action.

Frameworks for democratic accountability within bureaucratic institutions disregard and underemphasize different forms of accountability like that reflected in treaties such as the Two Row Wampum[4] or other evidence of nation-to-nation relations. These forms of accountability may also not allow for concessions of control or power to Indigenous peoples.

[4] The Two Row Wampum treaty is the basis for all Haudenosaunee relationships with European powers and establishes the relationship as two nations moving side by side down the river of life while avoiding interfering or overlapping with one another. (Keefer 2014, 15)

An individual within an institution may understand that there is injustice and may want to acknowledge the disoriented state of not knowing exactly how to proceed. They may want to work toward a shift in relationships because they understand epistemic humility (Harbin 2016, 91). However, the power in this moment of disorientation may lose its moral potential as it encounters institutional deadlines, the demand for resolute action and other structural forces. It is when these institutional pressures are encountered that there is a risk of being complicit in institutional oppression.

Conversely, Indigenous advocates and scholars have clear ideas of what justice means for Indigenous peoples. As discussed in chapter 1, each assertion of claims to justice voices a conception of justice that has Indigenous peoples existing as they want to exist—in relation to their territory, language, institutions, economics and social ordering (A. Simpson 2014; Coulthard 2014). Concepts of justice may differ between specific communities for a number of reasons, including being different peoples in counterpoint to their experiences with European colonizers (Deloria Jr. 1973, 54-55) where they were viewed as homogenous. Additionally, as will be further discussed in chapter 6, communities face economic and other pressures during negotiations with the state that can result in fragmentation of their voices. However, in no situation does the vision of justice include diminishment as Indigenous peoples.

Critically important is opening up to Indigenous visions of justice through consultations and engagement. However, consultation and engagement are not enough. Institutional power-holders must also take responsibility for ethical action, for inquiring into the structural limitations for action and for honest communication about these

limitations. It is necessary to know and communicate about limitations so that Indigenous advocates can understand the limits of bureaucrats and the sources of injustice.

Indigenous people cannot be the ones to fix the bureaucracy or expect the bureaucracy to make serious change. It becomes a process of over-claiming, where promises are made through engagement to share power beyond the capacity of the existing structure. An example was raised by Nicholas:

> I remember at one point they had a meeting here at the gym and some government official was sitting there with the lawyers and all that and they were telling the band council and telling the people sitting there, okay, we're going to have a Nation to Nation discussion here. I said, "whoa", I asked the guy, I said, "what are you smoking?" I said, "because man, you're far from the truth. That must be good stuff that you're smoking because you're dreaming. That is an outward lie." You know what he did? He started laughing and he put his head down and he didn't stand up for the rest of the evening.
>
> A Nation to a Nation…. How can interdepartmental agencies speak on that level? It doesn't happen. It's a joke. It's crazy. But anyway, they do things like that to win the people over, to keep things quiet, and to keep the lie going. They really believe that the more that this lie continues that a lot of it will become true. (D. Nicholas, personal communication, September 2, 2020)

This story is an example of over-claiming and ignorance of the structural limitations that prevent a claim from being made true. Over-claiming results in a loss of credibility, despite what may be good intentions on the part of the speaker. The issue of good intentions will be explored further in chapter 7.

State institutions are designed to support the settler-colonial majority as well as regulate and usurp self-regulation or jurisdictional practices of Indigenous peoples (Pasternak 2017). Indigenous resolution does not have the ability to implement justice on an equal footing. Institutional change requires institutional support to allow for ongoing non-oppositional relationships with Indigenous advocates and acknowledgement of

irresolution on the part of non-Indigenous peoples. Ongoing engagement and relationships that provide structural space for irresoluteness may seem to be small institutional steps that do not change structures such as the *Indian Act*; but permitting disorientation and irresolution within institutions can provide the necessary space for a reorientation in relationships with Indigenous peoples, shifts in power, and the concession of jurisdiction in ways that lead to deeper structural reforms.

Forms of irresolution can happen in every situation where a decision or action is made concerning Indigenous peoples. Efforts should be integrated into bureaucratic practice to listen and learn from Indigenous peoples concerning the vision of justice relating to the decision or action. In these spaces, there may be room for a transformation of the state's relationship with Indigenous communities such that leadership is ceded to Indigenous peoples.

3.4 Conclusion

This chapter focused on various aspects of the dynamics of Indigenous advocacy for justice from the state that occurs when Indigenous peoples advocate with government. It examined the confrontation of challenges and resistance from the state. It examined the sources of resistance to change and the colonial structures that create oppressive relations between government and Indigenous peoples and thereby limit the actions of officials to hear Indigenous justice claims. It explored what can be done by officials and others who are operating within structures of oppression. I argued that power-holders within institutions must recognize the power they hold, and be willing to be disoriented and irresolute, and open to conceding in favour of the visions of justice held by Indigenous advocates.

This chapter was preoccupied with coming to a better understanding of the experiences of Indigenous advocates, the sources of resistance they face and the possibilities for action that can be taken by officials who hold power within institutions. The next chapter turns to larger and more formal mechanisms instituted to listen and report where there has been inadequate response to claims of injustice. Inquiries and commissions result from state officials at various levels advocating within the government for the necessity of a larger scale of listening. There is a connection between the type of personal disorientation and openness that is described in this chapter, and the larger scale of the inquiry or commission. The next chapter examines two bodies that operated to shift perceptions and open space for Indigenous visions of justice at a national level. It examines whether they have resulted in better and more ethical responses to Indigenous justice claims. In later chapters I will examine some of the structural or conceptual impediments to being fully receptive to Indigenous claims for justice.

Chapter 4 State Mechanisms for Hearing Claims of Justice

> About how times of crisis—like what we're in right now—really helps us see really clearly some of the fault lines that—as a society—we've either agreed that they should be fault lines or we've sort of delegated so much of our societal responsibility to government to deal with those things that we wouldn't have seen the fault lines anyway unless it's in the headlines.
>
> Like, crappy drinking water at Attawapiskat or a suicide pandemic in Pikanjikum. Then people are saying, "boy there's something wrong here and it's probably not just wrong with the Indians. There's probably something wrong with what we're doing in Canada." I think that sort of thing is important because I think that's where people go. It's not like, "boy there's some real character fault with Indigenous people that they keep killing themselves." (B. Watts, personal communication, July 1, 2020)

4.1 Introduction

My work focuses on three inquiries and commissions—the Berger Inquiry, the Royal Commission on Aboriginal Peoples (RCAP), and the Truth and Reconciliation Commission (TRC)—as examples of state listening. These inquiries were three moments in the history of Indigenous/non-Indigenous relations when the state agreed to set up a specially mandated "ear" for listening to Indigenous people and for acknowledging that there had been a failure to listen and a loss of legitimacy for the state. These temporary bodies provide information about how justice claims in a number of areas have been articulated, received and transmitted to the people of Canada and to the central operations of government. Therefore, they illustrate whether or not there have been differences in the ways in which claims have been spoken, received and acted upon over the span of approximately forty years. This chapter will focus on the Berger Inquiry and the TRC. Chapter 6 will focus on the RCAP.

All of the research participants are very aware of the three inquiries and commissions, and some of them were intimately involved with the Berger Inquiry or the

Truth and Reconciliation Commission, either as an advocate, visionary, commission staff or government official. This chapter provides insights into the inquiries through the voices of Indigenous advocates and commissioners for their insights into issues relating to the practice of speaking, hearing and recommending.

Jill Stauffer's (2015) work on "ethical loneliness" and the ethical wrong committed by not hearing a claim for justice and Audra Simpson's conception of political recognition as being "seen by another *as one wants to be seen"* (23[italics in original]) provide insights into the approaches to listening of the Berger Inquiry and the Truth and Reconciliation Commission. I examine the broad outlines of the recommendations and calls to action that they made, and the government's response to their reports. I introduce a concept I call "the field of justice" to understand how the location of the justice claim in time and in relation to land can help us realize the likelihood of the state being more or less successful in addressing the claim. I also look at litigation in relation to commissions and inquiries and how it can play a role in distorting justice claims from their original intention.

4.2 Commissions and Inquiries as Mechanisms of State Listening

4.2.1 The Ethical Wrongs of Not Hearing/Not Seeing

Stauffer (2015) uses a term called ethical loneliness to refer to the isolation a violated person or member of a persecuted group feels when testimony of suffering is not heard properly by the surrounding world (1). In the context of legal or political processes such as trials or truth commissions, Stauffer questions whether the liberal reliance on an autonomous individual, as apart from an account of the conditions and contexts in which the individual exists, denies the relational construction of their identity and thus

contributes to the destruction of worlds suffered by those who have suffered oppression. She explores this form of ethical wrong in the context of truth commissions and states. Her work importantly identifies a specific wrong in the incapacity to properly hear the injustice, as opposed to simply focusing on the ethical wrongs of the harms that are heard. As she says, "a survivor whose story cannot or will not be heard is likely also someone whose harms have not yet been addressed" (32). The identification of an ethical wrong that results from the structuring of a truth commission, for example, is critical for understanding the types of ethical actions that need to be taken in order to properly hear Indigenous justice claims within state institutions. It is also important for understanding the wrong that exists in highly structured forms of testimony, such as in litigation, which overly relies upon the autonomous hyper-individuality of the testifier to recall in an isolated fashion (Campbell 2003, 48-49).

Stauffer (2015) speaks about a person who testified before the South African Truth and Reconciliation Commission who was considered to be incoherent, at least partially because she spoke in terms that did not make sense to the hearers. She spoke of being forced out of her connectedness to the world through the death of her son. In an individualistic setting, where within the European tradition we expect assertions of individual rights and dignity, she spoke of relational loss (160). The limits of litigation and litigation-related forms of listening will be explored further. Audra Simpson (2014) uses a similar notion of not being seen as one wishes to be seen, which hearkens back to Lugones' notion of worlds of identity constructed by the dominant and powerful. Simpson's idea of not being seen is raised in the context of state recognition of Indigenous peoples, and in particular the Mohawks of Kahnawa:ke. Her work will be

explored further in chapter 6. Throughout the following chapters, and particularly in chapter 7 where I discuss sovereignty, I will look further into standard liberal notions of autonomy and the role it plays.

In repositioning individual actions vis-à-vis the state, Simpson starts with a simple definition of political recognition: it is being seen by another "as one wants to be seen" (23), to appear politically in formal and official forms, and to have rights that protect you from harm. In this iteration, to be unrecognized means literally to be free from recognition and operate as an unprotected identity. To be unrecognized politically is to be vulnerable to harm. Simpson argues that it is impossible to be free from context or to be free-floating, or to be entirely independent of recognition of the master, or in this context, the state. In her view, "settler colonialism structures justice and injustice in particular ways, not through the conferral of recognition of the enslaved but by the conferral of disappearance in subject. It is this *not seeing* that is so profound that mutuality cannot be achieved" (23). Ways of understanding the individual and the state effectively erase critical aspects of being that are essential to existence and moral repair, especially in the context of addressing past and historical injustices. Both Stauffer and Simpson focus on a form of vanishing of experiences of truth and self-determination. Not hearing and not seeing prohibit the ability to witness injustice, to understand what justice looks like, or to address it. Inquiries and commissions are ways in which the state establishes a structure to hear specific types of justice claims, because the machinery of government has failed to see and to hear adequately.

4.2.2 Public Inquiries and Commissions

Public inquiries are temporary government-established bodies with a degree of procedural independence. Inquiries are struck because public confidence in existing institutional responses has been shaken or diminished and it is hoped that the inquiry will, through its transparency and rigour, restore confidence in the state's ability to deliver justice. Their purpose is to investigate a specific fact, scenario or circumstance, examine a broad policy issue or a combination of both. Often the topic of the inquiry has broader societal or political implications. As one example, Justice Dennis O'Connor and Freya Kristjanson (2007) point out that universal health care in Canada was a result of an inquiry held by Justice Emmett Hall, and they specifically mention the Berger Inquiry as having significant recommendations concerning development in the North in relation to the interests of Indigenous peoples. Commissioners operate inquiries to create space for counter-narrative testimonies and to disrupt or disorient public discourse through magnification of the voices of those who have not been heard through the subjugation of their knowledge. Inquiries, therefore, are potentially important vehicles for government to create an intermediary, at-arm's-length "listener" of injustice claims and to present recommendations for addressing injustice. Commissions of inquiry, however, are not all equal in terms of their ability to listen and disrupt structures of systemic injustice. Further, even if the inquiry effectively hears and articulates the injustices and provides recommendations, that is not enough in itself to create change. Government must still respond effectively.

Since the Berger Inquiry in 1975, there have been many reports detailing the nature of injustices faced by Indigenous peoples in Canada. Notably there was the Donald

Marshall Junior Inquiry Report in Nova Scotia, tasked with examining racism in the criminal justice system that resulted in the wrongful conviction of Donald Marshall Junior, a Mi'kmaq man. The Aboriginal Justice Inquiry Report in Manitoba, chaired by Sinclair who participated in this research project, examined the miscarriages of justice around the deaths of Helen Betty Osborne and J. J. Harper, two Indigenous people in Manitoba who were victims of racism and brutality within the criminal justice system. The Royal Commission on Aboriginal Peoples report issued recommendations respecting all aspects of the lives of Indigenous peoples. The Truth and Reconciliation Commission, chaired by Sinclair and with Marie Wilson as commissioner, issued a range of recommendations arising from its examination of the Indian residential school system. Most recently, the Missing and Murdered Indigenous Women and Girls Inquiry report examined the various issues relating to the extremely high rate and disproportionate level of violence suffered by Indigenous women and girls in Canada.

Inquiries are often, but not always, established under inquiries legislation and have some degree of procedural independence that potentially allows them freedom to design a range of ways to hear from various participants (Canada 2016a). O'Connor and Kristjanson (2007) argue:

> that greater creativity and flexibility in fact-determining processes will ultimately improve the inquiry process from the perspective of all participants, increasing responsiveness, decreasing cost, and ultimately improving the process and results of public inquiries. . . . there is a real advantage to directly involving groups and individuals in the inquiry process, rather than having them participate only through lawyers. This is particularly the case where the participants have experience, expertise and an understanding of issues under consideration.

As noted by Justice Berger (1978) in his reflections on inquiries and their impact on policy, it is in the public interest for inquiries to hear from those who are affected by the issue under examination and who might not otherwise have a chance to be heard.

Thus, he decided to fund Indigenous participants in the Berger Inquiry, and he went into every community to listen to anyone who wanted to speak.

However, not all commissioners draw upon this freedom to deviate from existing court procedures, which contain procedural rigidity and formality as well as limits on the types of witnesses who can provide testimony and the way in which this testimony is delivered. As tools of government, inquiries have the default position of reinforcing the structures of colonialism (Balint, Evans and McMillan 2016). For example, the British Columbia provincial Missing Women Commission of Inquiry chaired by Justice Oppal (Oppal Inquiry) was heavily criticized for reinforcing existing structural injustices perpetuated by the state by not listening adequately or fairly. In particular, he was criticized for denying legal aid funding for advocacy groups, many of whom represented vulnerable Indigenous women and their families directly impacted by systemic discrimination, sexism and poverty ("Missing Women Report to Be Released Amid Heavy Criticism" 2012). In effect, this decision demonstrated that the inquiry did not adequately recognize that a) it is specifically the women and families at the heart of the inquiry's concern who are not able to afford professional representation within structures of power; and b) the inability to participate or control the manner of participation in these structures is one of the key reasons for victimization in the first place.

Inquiries such as the Oppal Inquiry can fail to understand the structures of power that uphold oppressive narratives and practices, or perhaps they are understood, but not disrupted. If we recall the discussion of epistemic humility and epistemic injustice in chapter 2, the Oppal Inquiry can be seen as failing to take an opportunity to restructure a relationship of oppression. Epistemic injustice as a concept developed by Fricker refers to

gaps in interpretive resources. Koggel (2018), expanding on this concept, writes that epistemic injustice for Indigenous peoples refers to the specific undervaluing of Indigenous knowledge and systems for understanding that knowledge (241). In the context of the Oppal Inquiry, families of missing and murdered women and girls were not allowed to express their lived experiences around loss of their loved ones, and how they understood the broader phenomenon of violence against Indigenous women and girls because of a structural flaw in the inquiry itself, the decision to limit their participation. Applying Stauffer's concept, an ethical wrong was committed against them when the justice system refused to hear the nature of the wrongs they suffered. Subsequently, when an opportunity came in the form of the Oppal Inquiry—which was supposed to provide the space to listen to and incorporate the full accounting of what happened around missing and murdered women and girls—the families were victimized again by its failure to do so. The lack of space and support in this inquiry's structure resulted in an epistemic injustice because the people most affected by injustices were not able to have their knowledge form part of the narrative and understanding of injustice and justice. The Oppal Inquiry had the potential to create an intermediate space that could have disrupted or disoriented the status quo such that new knowledge could have emerged about oppression and supported conditions for a less oppressive future, but it failed and this failure is significant.

When inquiries are not responsive—particularly to the people who demanded the inquiry as a result of lack of confidence in government institutions—inquiries are rightly vulnerable to criticisms that they simply replicate existing structural power imbalances and inequalities perpetuated by the state and re-entrench forms of alienation by

communities primarily affected by the issues being examined. In particular, they can be criticized for reinforcing historical injustices relating to colonization by claiming that the historical effects of colonization are now being heard but should be put in the past. The denial of the persistence of colonialism and its impacts perpetuates the vanishing of an articulation of ongoing injustices (Balint, Evans and McMillan 2016). Articulated in the transitional justice context, "state sanctioned approaches to reconciliation tend to ideologically fabricate such a transition by narrowly situating the abuses of settler colonization firmly in the past" (Coulthard 2014, 22). Coulthard argues that in doing so, a commission or inquiry frames its process and main task as overcoming the legacy of past abuse, while leaving the structures of colonialism intact.

4.3 The Complexities of Hearing—The Berger Inquiry and the Truth and Reconciliation Commission

Six of the research participants were involved with the Truth and Reconciliation Commission in some capacity, and two of the interviewees had close knowledge of the Berger Inquiry. I interviewed two TRC commissioners, one of the lead Dene advocates who presented the Dene vision to the Berger Inquiry, three community advocates for residential school survivors as well as one of the founding members of the Indian residential school survivor movement in British Columbia. The last person was also one of the key visionaries behind the TRC mandate. Their backgrounds suggest that the issue of speaking to, listening to and being heard is much more complex, nuanced and perhaps not as dire or "lonely" as represented by Stauffer.

Research participants had the experience of articulating what justice means because they were involved in hearing claims and magnifying them. Those who fought

for justice also tracked how those claims were articulated by the inquiries and commissions and received by government. They were involved with hearing or the absence of hearing at different levels. In their involvement, they witnessed complexity and a lack of a pure response to justice claims while also maintaining and being resolute in their vision of a just and non-oppressive future for their communities.

The three inquiries and commissions that are examined provide a snapshot of time that encompasses a span of Indigenous/state political history from approximately 1969 to 2015. In 1969, the federal government introduced the White Paper in which an intention was declared to assimilate Indigenous communities in Canada within the broader non-Indigenous population. The assimilationist approach led to Indigenous political organization coalescing around their mutual resistance to these policies. The former chair of the TRC, Sinclair, and Dene advocate Stephen Kakfwi both spoke of the genesis of their activism and advocacy as coming from a growing awareness of the similarities and differences between what Indigenous peoples had experienced and what activists in the civil rights movements had experienced in terms of injustice. The period from the beginning of the Berger Inquiry in 1974 to the issuance of the TRC report in 2015 represents a significant period of political history concerning the Indigenous resistance movement and the articulation of forward-looking Indigenous visions of justice. This chapter focuses on the Berger Inquiry and the TRC to examine the issues relating to listening, understanding and responding to articulations of Indigenous justice.

4.3.1 The Dene Nation and *Northern Frontier, Northern Homeland*: The Report of the Mackenzie Valley Pipeline Inquiry (Berger Inquiry 1977)

4.3.1.1 Events Leading Up to the Berger Inquiry

4.3.1.1.1 Pipeline Proposal and Resistance

In the late 1960s the government for the Northwest Territories was moved to Yellowknife from Ottawa, and provincial-like powers were granted to the territorial government (Northwest Territories, n.d.). The new government resulted in an expanded bureaucracy, which increased the non-Indigenous and transient population in the North. In 1968, a significant basin of oil and gas reserves was discovered in Prudhoe Bay in Alaska (Coulthard 2014, 56-58). The federal government began fielding plans from corporations for the construction of a pipeline—at that time the largest development project in the history of Canada—without consulting Indigenous communities. Two years after the discovery, guidelines were developed to address environmental concerns. However, the social and economic impacts on the people along the Mackenzie Valley continued to be ignored.

In the summer of 1969, the federal government issued the White Paper, which intended to integrate Indigenous people into the broader Canadian population. The paper was largely rejected by Indigenous people across Canada. In response, the Indigenous peoples of the North became politically organized. In order to represent community concerns in the face of these major developments, the Indian Brotherhood of the Northwest Territories (later to be known as the Dene Nation) came into being and developed a response to the proposed pipeline (Dene Nation, n.d.).The Inuvialuit Committee for Original People's Entitlement (Inuvialuit Regional Corporation, n.d.), the

Inuit Tapirisat of Canada (Inuit Tapiriit Kanatami, n.d.) and the Métis Association of the Northwest Territories also came into being around this time period in response to the proposed pipeline. Though leaders in Indigenous communities had long advocated politically and legally for their people, the modern Indigenous rights movement came into being at this time.

The Indian Brotherhood of the Northwest Territories threatened a lawsuit if the government went ahead with its plan to grant a right-of-way for an oil pipeline without first hearing from Indigenous peoples and settling Indigenous claims (Chrétien 1974). The Indian Brotherhood filed a caveat with the Northwest Territories Registrar of Land Titles, claiming a Dene interest in more than a million square miles of the territory. Upon examination, Justice Morrow found that the Dene had a potentially legitimate case, but before that decision was issued the federal Crown announced a new comprehensive land claims policy and then announced the Berger Inquiry (Coulthard 2014, 58).

I interviewed Kakfwi about this particular moment in time that the Berger Inquiry was proposed. He had gone through residential school and had been witness to the unfairness of that system, and like other young Indigenous people of that era he was invigorated by the civil rights movements and by the burgeoning Indigenous rights movement. He had been brought on board right out of university by the Dene political leadership to work with Dene community members and the Dene committees to coalesce the Dene vision that was to be presented before the Berger Inquiry. He was closely involved with the Dene preparation for the Berger Inquiry and was also a main participant of the Berger Inquiry and the testimonies of the Dene people.

Kakfwi made it clear what was at stake before the Berger Inquiry, with the proposed pipeline:

> What if the pipeline went ahead? What the hell are we going to do? We didn't think we'd survive. As I said, my people were, you know, 500 of us in the world and everybody was still hunting and trapping. There was no wage economy. Even if they gave us a million dollars and said, here, get ready, we wouldn't even know where to put it. … We have no staff. There was that fear that this is it, you know? I think the more we thought about.... We're standing on the edge and if they push us, we're gone. (S. Kakfwi, personal communication, March 6, 2020)

The Dene developed a positive vision of what they needed to exist as a people:

> And I tell the story about my father . . . who was one of the leaders of the community. He turned to me and sa[id], tell me again what is it you're going to do? And I sa[id], well dad, we're going to take back our land.
>
> We're going to manage the wildlife, we're going to take over our schools, we're going to rename a lot of our communities, we're going to try to get a member of Parliament in Ottawa, change the laws, get the Constitution changed, and we're going to set up our own government. And he amusingly says, "You going to do all that?" And I say, "Yeah." It was my second job in my life. He loved that. Just the sheer conviction. It's kind of like Cassius Clay saying, you know, I'm going to beat Sonny Liston and the world thinking, are you crazy? You know?
>
> . . .
>
> It was that kind of a moment for us. We had a vision and we had a plan and it translated into saying, "No we don't want a pipeline because it doesn't fit into our plan. Our plan is this. This is our plan." I think even for people that didn't believe in Indigenous people—that we're human, that we're intelligent—I think all the rednecks in the country could understand what we meant when we said, "We have a plan for our land, for our resources, for ourselves and a pipeline doesn't fit in there right now." And so they said what is our plan and well here it is. (S. Kakfwi, personal communication, March 6, 2020)

Kakfwi describes a moment in Dene history where they were on the point of cultural annihilation, but also at a pivot point or space where the possibility of asserting a positive vision was possible. The Dene seized that chance with powerful results.

The continuous and effective advocacy and activism on the part of the Dene to advance their full vision of what was necessary for Dene existence is central and

foundational to the success of the Berger Inquiry. Kakfwi described some of what he heard from Dene community members when he went to communities to find out what people wanted:

> One lady said, what we want more than anything is respect. Respect for who we are, for what we have, and that was her message. I remember being struck by that and saying, all right if that's all that they gave us, they recognize us for who we are that it's our land, our resources and they should let us live our lives on our land the way we want. That's respect.
>
> . . .
>
> If people respect you truly then they'll accept you for whoever you are. (S. Kakfwi, personal communication, March 6, 2020)

Kakfwi described a full strategy of educating people in Dene communities about the pipeline and what it would mean to them. He also spoke about raising awareness and seeking allies to support their vision once it had been developed among community members. Kakfwi himself travelled throughout southern cities on a harrowing schedule:

> And so, we took the battle south. We said, let's go find people in Vancouver, Edmonton, Calgary, Toronto, Winnipeg, Halifax, Montreal, people of the church, people of the churches, and others at universities, students, social justice groups, educate them about who we are, what are we talking about and get them to speak to Berger when he went across the country.
>
> And I did that. I was one of the key guys. I spent a total of about four weeks at a time when nobody wanted to go south. . . . I flew to Edmonton. I did two days of group after group after group after group.
>
> . . .
>
> … it was called the Southern Support Network. It actually existed under what they call Project North which was a staff group funded by a coalition of churches. Then I went to Winnipeg, then I went to Toronto, then I went to Ottawa, Then I went to Montreal, then I went to Fredericton I think, Halifax and then all the way back again. I was just a shell of a guy when—I couldn't even remember where I was or what I had said. I'd start speaking to a group and think, shit did I say that already? (S. Kakfwi, personal communication, March 6, 2020)

With these strategies, the Dene developed a vision of both Dene existence and flourishing to provide some countervailing force to the push for a pipeline, and they explained their vision broadly to non-Indigenous communities in the south.

4.3.1.1.2 The Dene Declaration

The work of Kakfwi and others culminated in the Dene Declaration (Public Autonomy Project 2018) that was conveyed to Justice Berger. It is a complex and interconnected social, political and economic manifesto that centres on the people's connection to Dene territory, simply, Dene "being". The Declaration itself makes it clear that the existence of the Dene people requires a Dene economy that is not reliant on the non-Indigenous industrial/wage/extraction economy that impoverishes colonized peoples. Instead, the Dene put forward a vision for their collective self-determination on their territory to preserve a Dene renewable economy, control over education of children in communities, Dene forms of governance and, most importantly, Dene control over their territory. In the face of incursions by non-Indigenous populations and extraction companies supported by the federal and territorial governments, the Dene sought control over lands, resources and development in the North. The Dene were seeking a society free of exploitative relationships (Public Autonomy Project 2018, para 31). The Dene were seeking a land claims settlement that aligned with their aspirations. As understood by Justice Berger, they were seeking a land claims settlement that affirmed their sovereignty as a people and acknowledged a rich relationship between the Dene and their territory. The Dene were struggling for recognition of the Dene nation by the governments and peoples of the world Dene Manifesto (Public Autonomy Project 2018).

Glen Coulthard in *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (2014) writes that Indigenous political action is best understood as oriented "around the question of *land*—struggles not only *for* land, but also deeply *informed* by what the land as a mode of reciprocal *relationship* (which is itself informed by place-based practices and associated forms of knowledge) ought to teach us about living our lives in relation to one another in a respectful, nondominating, and nonexploitative way" (60). Coulthard refers to this way of living as "grounded normativity". This normative definition of Dene sovereignty will be picked up again in chapter 7, where I will look at Indigenous sovereignties in more depth. Chapter 6 will explore Coulthard's important critique of the politics of recognition, in which he argues that the state controlled the terms of the land claims settlement negotiations, thereby distorting the original claim being made through the Dene Declaration. For purposes of this chapter, I note that Justice Berger received the Dene Declaration through its advocates and from the many voices in the communities that the Berger Inquiry visited.

4.3.1.2 Mandate Interpretation and Process

4.3.1.2.1 Mandate

The Berger Inquiry was established on March 21, 1974, by a Liberal minority government that was supported by the New Democratic Party. In a statement to a CBC reporter, then Minister of Indian and Northern Development Jean Chrétien stated that the inquiry was being held because though the government wanted the pipeline constructed, they wanted it to be in the best interest of everyone and in particular "the natives" and for long-term benefit (Chrétien 1974).

The Government of Canada established the Mackenzie Valley Pipeline Inquiry (also known as the Berger Inquiry) under the *Inquiries Act* to investigate the environmental and social impacts potentially flowing from the construction of a pipeline in the Mackenzie Valley in northern Canada (Berger Inquiry 1977, 203). Specifically, the mandate tasked Justice Berger with inquiring into and reporting on the terms and conditions that should be imposed with respect to any right-of-way that might be granted across Crown lands for the purposes of the pipeline.

4.3.1.2.2 Process

As noted by Justice Berger himself in a talk at Carleton University in 1978 soon after the inquiry had completed its work, the Berger Inquiry was one of the few inquiries tasked with examining the impacts *before* the commencement of the project and thus was prospective instead of retrospective in nature (Berger 1978, 5). The mandate further stipulated that the impacts were to be examined with regard to "the social, environmental and economic impact regionally, of the construction, operation and subsequent abandonment of the proposed pipeline" (Berger 1977, 205). The Berger Inquiry had autonomy in its process and the right to call witnesses and to provide evidence as the commissioner required. Justice Berger chose to exercise his jurisdiction by travelling across Canada and the North to hear from Indigenous and non-Indigenous people who would likely be impacted by the pipelines and associated projects. Berger describes the process:

> The Inquiry did not seek to impose any preconceived notion of how the hearing should be conducted. Its proceedings were not based upon a model or an agenda with which we, as white people, would feel comfortable. All members of each community were invited to speak. All were free to question the representatives of the pipeline companies. And the Inquiry stayed in a community until everyone there

> who wished to say something had been heard. The native people had an opportunity to express themselves in their own languages and in their own way (95).

Berger faced opposition from gas company participants in allowing Indigenous witnesses to advance arguments in support of the settlement of comprehensive land claims in advance of pipeline approval. They argued that he was expanding his mandate too far. He responded:

> The Order-in-Council calls upon the Inquiry to consider the social, economic and environmental impact of the construction of a pipeline in the North. The effects of these impacts cannot be disentangled from the whole question of native claims (164).

Though Berger could have chosen to interpret his mandate very narrowly and to focus on expert evidence relating to limited impacts on a narrow strip of land, he chose a comprehensive approach that captured the nature of the concerns of the witnesses who spoke to him. Thus, he avoided the pitfalls of perpetuating epistemic injustice that caught Justice Oppal many years later.

Justice Berger ensured that the inquiry was open and proactively accessible to those impacted by the matter under investigation (Berger 1978). Going into every community and hearing every person who wanted to be heard was a core component of success. Sinclair pointed out that another very important element of the inquiry was that it was broadcast across Canada and the North on CBC radio. He remembers listening to Dene testimony and following it closely and being inspired by it. The ability of the communities in the North and across Canada to listen to Dene claims made it a national conversation and educated everyone about the nature of their justice claims even before the report came out (M. Sinclair, personal communication, May 15, 2020).

Relatedly, Joseph—hereditary chief, first executive director of the Indian Residential Schools Survivors Society, founder of Reconciliation Canada and a key

visionary who negotiated the mandate of the Truth and Reconciliation Commission—and Sinclair independently emphasized the importance of bringing the public into the listening process in order to better understand Indigenous justice claims. Joseph emphasized that the core interaction of understanding is among Indigenous and non-Indigenous people, not politicians and advocacy groups. Further, he said that the government—the politicians, the executive branch, and the bureaucrats—should not be the main audience for inquiries. Rather, it is more important to bring the public into the process of listening and understanding, and then the politicians will follow, and the bureaucrats will be brought along as members of the public (R. Joseph, personal communication, March 12, 2020). I argued in chapter 3 that the people of Canada should be open to hearing a disorienting vision of Indigenous justice and being irresolute. The Berger Inquiry deliberately created procedural openness within the Inquiry's structure to allow for the conditions for full hearing and disorientation, within the Canadian public domain. The notion of creating a space for public listening and disorientation is linked to my argument in chapter 7 where I articulate the importance of the bureaucracy to fully hear Indigenous justice claims and of being willingly disoriented and irresolute in order for change to happen within institutions. True structural change must be driven by the Canadian public. Thus, the point made by Justice Berger, Sinclair and Joseph—that the Canadian public is the foundational target audience—is important.

4.3.1.3 Findings and Recommendations

4.3.1.3.1 The Breadth and Interlocking Nature of the Findings

Berger's report carefully details the technical aspects of the construction and maintenance of the pipeline as well as the likelihood of the establishment of a higher risk energy

corridor that would include the transportation of oil. He makes specific findings based on his examination of the evidence relating to the pipeline itself. However, Berger constantly frames his findings not only from an ecological perspective in the sense that ecosystems, caribou migration and other ecological factors would be disrupted, but also in terms of the relations and dependency of Indigenous peoples in the affected area on the land. In his argument, he centres Indigenous co-existence with the land and the connections that will be affected by the pipelines. Furthermore, he consistently advances recommendations both for protecting the ecosystem through the establishment of wilderness parks and, most importantly, for the resolution of land claims before any pipeline would be considered. Significantly, he understands that Indigenous peoples

> do not want a settlement—in the tradition of the treaties—that will extinguish their rights to the land. They want a settlement that will entrench their rights to the land and that will lay the foundations to self-determination under the Constitution of Canada. (Berger 1978, xxii)

Berger's process of holding hearings in every community and his ability to listen to and convey the essential messages from Indigenous peoples in the North in his report and recommendations meant that he captured a range of interlocking impacts from the incursion of European-based industrial capitalism. He articulated the impacts of exercises of government jurisdiction and bureaucratic infrastructure related to the proposed project and, most importantly, the impacts of the imposition of non-Indigenous values and the corresponding disrespect and ignorance of Indigenous values and systems. His report could have easily focused only on fossil fuel extraction and transportation; however, it drew linkages between cultural disruption through pipelines to the impact of non-Indigenous school systems and the fact that it was intended to disrupt the transmission of Indigenous culture, language and values from generation to generation (Berger 1978, 92-

93). So, even in 1977, before the schools were out of operation and well before the Truth and Reconciliation Commission report, the impacts of residential schools and other non-Indigenous schooling had been conveyed to the federal government. Furthermore, they were explained as part of a broader strategy of assimilation, cultural interruption and alienation. His report captured the destruction of identity and sovereignty that results from the industrialization and capitalization of land; the destruction of intergenerational continuity of collective identity resulting from loss of language and Indigenous control over education of children; the attempted erasure of collective interpretative resources; and a number of other impacts relating to non-Indigenous incursions onto Indigenous territory in the North.

4.3.1.3.2 Recommendations

The National Energy Board conducted its own hearings and came out with recommendations concerning the pipeline about eight weeks after the Berger report issued its recommendations. It came to the same conclusions. The main recommendations of the Berger Inquiry were that no oil and gas projects should occur in certain areas and that there should be a moratorium on the development of the pipeline to allow for resolution of Indigenous land claims and to deal with environmental concerns. The inquiry also recommended the establishment of wilderness preserves to protect fragile ecosystems and Indigenous relations within those systems. Interestingly, the inquiry recommended that studies should be done not only on the impact of oil spills on ecosystems but also on the impact of the development of non-renewable resources and consequent reduction of sea ice on climate (Berger 1978, xvi). These recommendations were framed in terms of the impacts of the industrialization of the North and its impact on the entirety of relations

between environment, the people of the North and the land. Though discrete recommendations were made, they were couched in comprehensive criticisms of capitalism and industrialization, an analysis that had been advocated by the Dene and other Indigenous peoples who appeared before the inquiry and magnified by Berger in the report (Coulthard 2014, 59).

The main substantive recommendations were adopted by the federal government. The pipeline was delayed pending resolution of Indigenous claims, and settlement negotiations commenced. Wilderness areas were established. It is considered by many to be one of the most successful inquiries in terms of its ability to reflect the interests and demands of Indigenous communities.

4.3.2 The Indian Residential Schools Truth and Reconciliation Commission of Canada (TRC) (2015)

Almost all of the interviewees had been impacted by the Indian residential school system in some way. They were survivors or former residents, they were married to survivors, they were intergenerational survivors, and many of them were involved with the work of addressing the legacy of the IRS system either through healing, advocacy and supporting survivors through the mechanisms of the Indian Residential Schools Settlement Agreement or as part of the TRC.

I designed the research protocol in such as way as to avoid asking the interviewees about their personal experiences relating to Indian residential schools. I did this to avoid triggering trauma, to avoid a damage-centred conversation, and to recognize the breadth of what they have to offer to this project beyond negative experiences in their lives. The work of the Aboriginal Healing Foundation, the TRC and many survivors who

have published their works are excellent sources for people wishing to learn about the details of what happened in Indian residential schools from survivors themselves in written form.

4.3.2.1 Events Leading Up to the Truth and Reconciliation Commission

4.3.2.1.1 Brief History of the Indian Residential School System

The Indian residential school system was the result of a deeply impactful colonial policy of assimilation through the placement of Indigenous children in residential educational institutions. Children were separated from their families and communities often through coercion, operation of laws and policy and violence through intervention of the Indian Agent or the police. Transmission of Indigenous knowledge—including language, systems of governance, ways of being, and ways of parenting among other things—was interrupted, leading to deep alienation and often dependence on the state by survivors and their families. Children were not protected and were therefore vulnerable to sexual and physical abuse and neglect. Residential schools were operated by the churches and the state from the late nineteenth century until the last school closed in 1998. Over 130,000 children were estimated to have attended the schools between 1910 and 1996, which was the duration covered by the Indian Residential Schools Settlement Agreement. At the time the Settlement Agreement was signed, 70,000 survivors were alive. Approximately 38,000 former students (Indian Residential Schools Adjudication Secretariat, 2020) brought claims of sexual or serious physical abuse under a companion process to the TRC under the Settlement Agreement which was designed to compensate those claims. In addition to the harms suffered directly by former students, there were many egregious

intergenerational effects suffered by parents and the children of those who had been students.

4.3.2.1.2 Survivor Advocacy and Previous Efforts to Listen

Beginning in the mid-1990s, residential school survivors began to organize politically and to advocate for remedies for the harms they suffered in the schools. Notably, then National Chief Phil Fontaine spoke publicly about his experience in the IRS system and raised the profile of survivor advocacy. Residential schools had been discussed in the Berger report and received in-depth treatment by the Royal Commission on Aboriginal Peoples. Both had noted that survivors came forward to talk about the deeply devastating impacts of state education of children and the interruption of relationships with their families and communities. They had also noted that the residential school system was one of the most detrimental colonial policies that damaged the social fabric of Indigenous families, communities and nations. In fact, the Royal Commission on Aboriginal Peoples recommended to the government that an inquiry be established to examine the legacy of the residential school system (RCAP 1996, vol. 1 chapter 10).

Despite the recommendation, the government of the day failed to establish an inquiry into residential schools. Instead, in 1998 there was a Statement of Reconciliation delivered by then Minister of Indian Affairs and Northern Development Jane Stewart to acknowledge the RCAP report and to indicate movement on the recommendations where possible. However, the government did not establish an arms' length inquiry as recommended by RCAP, but rather maintained control of any initiatives set up to align with the tenor of RCAP's recommendations. The minister expressed "profound regret" and said that the government was deeply sorry for the residential school system (Canada

1998). As well, the government announced the launch of the Aboriginal Healing Foundation (AHF) "designed to address the healing needs of all Aboriginal people affected by the legacy of sexual and physical abuse in the Residential School System, including intergenerational effects" (Street 1998). The AHF was highly successful in its operations, advocacy and research, but ultimately was not designed to address the justice needs of survivors.

The words in the statement sound similar to the Harper apology of June 2008 (Canada 2008), though the latter was entirely focused on the residential school system and provided a more detailed narrative. The key differences between Minister Stewart's Statement of Reconciliation and Prime Minister Harper's apology are primarily threefold. The issuance of the apology from the Prime Minister in the House of Commons with Indigenous leaders present on the floor of the House, around the same time as the launch of the Truth and Reconciliation Commission, gave it the national attention and gravitas missing in the Statement of Reconciliation by Minister Stewart. The establishment of the TRC itself, which is similar to what had been originally recommended by RCAP, but not acted upon by government in 1996, was an important indication that residential school survivors had successfully pressured the government in 2008 to concede control over the process of listening and responding. Third, the Statement of Reconciliation announced funding for the Aboriginal Healing Foundation and focused on healing the wounds of the residential school system, without dealing with the growing number of litigation cases brought by survivors of the schools. The Harper apology, on the other hand, came after the launch of the Indian Residential Schools Settlement Agreement, which in addition to

the TRC contained reparations to individuals through the Independent Assessment Process and Common Experience Payment process.

Interestingly, the Statement of Reconciliation by Minister Stewart, which covered many topics highlighted by the RCAP report, said this about partnerships:

> The Royal Commission challenged us to construct relationships between Aboriginal and non-Aboriginal people characterized by mutual respect and recognition, responsibility and sharing. This is the basis of the partnership we seek. It includes Aboriginal organizations and individuals, all levels of government, the private and voluntary sectors, other interested parties and all Canadians. It implies a celebration of our diversity while sharing a common vision. It also implies a practical and constructive working relationship. In this context, and particularly with respect to the working relationship, our commitment to partnership is:
>
> - to work out solutions together beforehand, instead of picking up the pieces after the fact;
> - a commitment to negotiate rather than litigate;
> - a commitment to communication;
> - a commitment to meaningful consultation; and
> - a commitment to prompt action to address concerns before positions get too polarized to move.

The desire for a forward-looking approach to resolution of conflict displays an important intention that may be difficult to implement. The issue of good intentions is examined in chapter 7 within the context of a potentially problematic underlying assumption by the state that there is a common national project among Indigenous and non-Indigenous peoples. With RCAP, the government attempted to move forward in a unilateral fashion with the assumption that it was acting for the good of all, in partnership with Indigenous peoples. However, the government did not address the underlying structural power imbalances and the harms that flowed from the imbalances that were explored in the RCAP Report. The failure led to an incomplete response by government to RCAP that ended up being addressed through litigation.

In 1999, the federal government established dispute resolution pilot projects to advance settlement outside of court (Regan 2010, 121). They established a Dispute Resolution Framework, a precursor to the compensation mechanism eventually integrated into the Settlement Agreement for addressing claims of physical and sexual abuse. At the same time, in addition to the burgeoning number of individual civil litigation actions, there were class actions brought in Ontario and other jurisdictions (Canada 2007).

These efforts at resolving the claims to abuse that occurred at the schools through litigation-like processes did not capture the totality of the impacts of residential schools on Indigenous communities, families and individuals. As a result, and in the context of pressure from survivor advocates and from class action litigation and the courts, the federal government entered class action negotiations to comprehensively settle all litigation claims. The Assembly of First Nations and survivor advocacy groups such as Joseph's organization, the Indian Residential Schools Survivors Society, sought broader recognition of the harms resulting from the schools. They also sought a broader range of remedies, including a truth and reconciliation commission that would listen to residential school survivors and examine the systemic impacts and broader harms relating to the implementation of the residential school policy.

4.3.2.1.3 The Indian Residential Schools Settlement Agreement

The result of the negotiations was the Indian Residential Schools Settlement Agreement. The Settlement Agreement resolved all outstanding litigation and released the defendant parties from future liability. In exchange, the Settlement Agreement contained a six-part package:

- The Independent Assessment Process: an adjudicative process for assessing and compensating residential school survivors who had been subjected to physical and/or sexual abuse;
- The Common Experience Payment: a payment that was proportional to the number of years attended, which was in acknowledgment of the experience of having been placed in an Indian residential school;
- Health supports provided to those who engaged in any Settlement Agreement process;
- Funding for the Aboriginal Healing Foundation;
- Funding for Commemoration initiatives; and,
- Funding for the establishment of the Truth and Reconciliation Commission. ("Indian Residential Schools Class Action Settlement—Settlement Agreement." n.d)

The TRC is therefore an anomalous commission. It is neither a commission of inquiry established by the executive under the *Inquiries Act* with all of its accompanying quasi-judicial powers, nor is it a royal commission. As it resulted from litigation and was one of the terms of settlement of the Indian Residential Schools Settlement Agreement, it should be understood in the context of the other terms of the agreement.

As part of the research project, I interviewed one of the key advocates involved with the establishment of the TRC. Joseph is a hereditary chief of the Gwawaenuk First Nation and one of the last few speakers of the Kwakwaka'wakw language. He is a survivor of the residential school system and has dedicated his life to bridging the

differences brought about by intolerance, lack of understanding and racism at home and abroad (Reconciliation Canada, n.d.).

His insights into the destructive impacts these forces can have on people's lives, families and cultures were shaped by his experience with the Canadian Indian residential school system. He is the founder of Reconciliation Canada.

Joseph was one of the key advocates who negotiated the mandate of the TRC. He worked toward a strong community reconciliation component in the TRC mandate and was the drafter of the preamble that sets the vision of the TRC. When I asked Joseph about what justice means, he said the following:

> For me what's really important—and I don't know if we're ever going to resolve the separation or the divide or the distance between us or the gap between us all until we have a real dialogue about who we are ... Indigenous people. Who are we? Even though everybody knows we were here first nobody really cares who we are. They don't know that we hold long-held values, principles that speak to fairness and equality, justice, that's what justice is. Fairness and equality in all its dimension and I think I'm in this—the work I'm in—because I believe that here in this country, nothing will ever truly be resolved—and we call everything reconciliation these days—unless we have some really meaningful deep dialogue that actually transforms, or has the potential to transform, our relationships. (R. Joseph, personal communication, March 12, 2020)

There are several elements of this definition that stand out. First, the task he has undertaken does not underestimate the deep racism, oppression and unfairness of the relationship that exists. Second, his vision is forward-looking. Third, he seeks a transformation of relationships that have been oppressive, racist and lacking in recognition, through dialogue. Finally, he emphasizes the necessity for a deep understanding of who Indigenous peoples are and of fairness in dialogue. Joseph's vision of reconciliation is deeply relational and transformative. Joseph set the tone of the TRC mandate in his drafting of the preamble; however, the term "reconciliation" itself required significant consideration by the commissioners and anyone who engages with the

concept; it can be personal, familial or societal. In the TRC report, the commissioners consider reconciliation to be about "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country" (TRC 2015a, 6:3). In a legal context, the Supreme Court considers section 35 of the *Constitution Act, 1982* as reconciling Indigenous prior occupation of Canada with the Crown's assertion of sovereignty (McNeil 2003). This latter concept of reconciliation will be explored in chapter 7. In every sense of the word, however, reconciliation is relational in nature.

The elements of Joseph's articulation of reconciliation served as an important focus for the TRC. They will also be critical for my analysis of why the TRC avoided some of the pitfalls that existed for other elements of the Indian Residential Schools Settlement Agreement, and why it was able to achieve at least some of what Justice Berger accomplished with the Berger Inquiry.

4.3.2.2 Mandate, Interpretation and Approach of the TRC

4.3.2.2.1 Mandate

The mandate of the TRC was established through negotiation between survivor organizations and their advocates, government and the church entities that were party to the Settlement Agreement. Unlike mandates that are established by executive orders-in-council, the TRC mandate is several pages long and touches on a variety of issues such as the type of support survivors will receive, the overarching goals as well as detailed tasks, the manner in which the commissioners were to carry out their tasks and which activities should not be pursued. In terms of the limits of the mandate, it was designed to not overlap with other aspects of the Settlement Agreement such as the Independent

Assessment Process and the Common Experience Payment, which were intended to provide monetary reparations: the Common Experience Payment was to recognize the harmful experience of having attended the school, and the Independent Assessment Process was for specific injuries relating to abuses suffered by former students at the schools.

The TRC had several core activities. It was to hold a number of national events to raise consciousness and bear witness to the testimonies of survivors. The commission was to hold community events in collaboration with communities wishing to hold truth and reconciliation activities. A third major component allowed individuals wishing to provide testimony to take part in the statement-taking component of the mandate. The commission was to establish a national research centre in order to house testimonies and educate the public. Finally, the TRC was to conduct research and prepare a report on the systemic and other impacts of the residential school system.

4.3.2.2.2 Interpretation and Approach

The interpretation of the mandate and design of the TRC was in the hands of an interim executive director prior to the appointment of the commissioners. I was the primary drafter of the mandate and worked on the first stage of the establishment of the TRC prior to the appointment of the interim executive director, Bob Watts, and then with the interim executive director as well as with the two sets of commissioners[5] once they were appointed, until the end of the first year of their mandate (five years). We were very aware that there were many tasks appointed to the commissioners, and there were limited resources to achieve their goals. We also were very aware that it was critical to engage the

[5] The commissioners who were appointed at the first instance in 2008 resigned because of difficulties with internal governance. The second set of commissioners were appointed in 2009.

parties, and especially survivor organizations, in a collaborative process in developing the design of the TRC so that there was strong design, ongoing support for the TRC as well as engagement and responsibility by all parties for its success. It became clear early on that the TRC would also have to promote awareness and engagement among Canadian civil society at large in order for the commission's work to be relevant and impactful, while at the same time centring the involvement and experiences of residential school survivors. The TRC was established as a government department within the core federal machinery, with all the statutory and policy requirements that are attendant. It was not established as a commission or inquiry under the *Inquiries Act*, which provides a degree of independence and procedural powers. Legitimacy among survivors and engagement with the Canadian public were explicit and ongoing concerns because of the lack of structural independence.

4.3.3 Findings and Calls to Action

The final TRC report was set out in six volumes and covers the history of residential schools, the Inuit and Northern experience, the Métis experience, missing children and unmarked burials, the legacy of the schools and reconciliation. In terms of guidance for the future, the TRC produced ninety-four "Calls to Action" as opposed to recommendations, a move which Sinclair indicated was very deliberate. The Calls to Action are dynamic and broad ranging, and they target government, the education sector, media and civil society among others to take action immediately (M. Sinclair, personal communication, May 15, 2020).

The TRC framed residential schools in the context of the overarching assumptions of European racial superiority and the imperialist and colonial projects that

followed. The TRC report discusses the Doctrine of Discovery, which was an assumption used at the time of European arrival in North America and other lands to claim sovereignty to territory where the inhabitants were not Christians. The report covered the arrival of Christian missionaries and of course their role in running the schools. The TRC also discussed treaty-making and cessation of title, which to this day is contentious between the state and Indigenous treaty signatories who dispute in many cases that Indigenous interests in land were ceded. The TRC covered a number of other assimilationist and oppressive policies. Like the Berger report, the TRC was primarily tasked with examining one particular issue, residential schools. Similar to the Berger report, the commissioners kept in the forefront the interrelatedness and context of the variety of injustices faced by Indigenous peoples subject to colonization. Though the constellation of social, political, legal and economic injustices faced by Indigenous people was configured differently and had a different focal point than the Berger Inquiry, the approach was similar.

One aspect and view of the history of the schools could be derived from the large number of documents in government and church archives. As well, previous inquiries and commissions such as the Berger Inquiry, the Law Commission of Canada and RCAP had discussed residential schools and their impact. The missing piece in the documentary history was the knowledge and testimony of residential school survivors and their families. Thus, an important part of the TRC's function was to address a form of epistemic injustice—discussed in chapter 2—that existed in the Canadian historical narrative that had omitted the primary witnesses and participants in the residential school phenomenon. Not only did the TRC have the task of addressing testimonial injustices

(Fricker 2007, 20; Koggel 2018) connected with the denial of individual survivors' credibility about their experiences in the schools, it also recognized the devaluation or misrecognition of the collective interpretative resources within Indigenous communities themselves (Koggel 2018, 241). Koggel points out that in order for Indigenous voices to be heard, and by extension for Indigenous justice claims to be heard, it is necessary for Indigenous collective interpretative resources to form a basis for understanding the experiences of survivors and others who make claims for justice. In fact, the residential schools' disruption of collective interpretative resources reflected in language, legal orders, governance protocols and diplomacy was one of the bases for the finding of cultural genocide made in the TRC report (M. Sinclair, personal communication, May 15, 2020; M. Wilson, personal communication, February 7, 2020). The commissioners heard from survivors that this fundamental form of severance and denial was what happened in the schools, and they felt that a finding of cultural genocide was necessary to underline the depth of loss and to lay fault with those who denied the existence of Indigenous identity, knowledge and relations.

The TRC report discusses the ongoing nature of the legacy of residential schools, attempting to put to rest the notion that residential schools were an event in the past that can be easily "gotten over". The links between the children who were removed and placed in residential schools—and thus were removed from an environment where they could learn loving parenting—and the notoriously high number of Indigenous children in care of the child welfare system are delineated in the report. Several of the Calls to Action are related to child welfare. The report draws links between the deficient education provided in residential schools and current low-income levels and education gaps among

Indigenous people. Again, there are Calls to Action in this regard. Similarly, the TRC made findings that linked residential schools and the loss of Indigenous languages and cultural alienation and loss, and made recommendations to that effect. Forty-two of the ninety-four Calls to Action that emanated from the TRC radiate into many other areas where Indigenous peoples have been negatively affected by residential schools, such as health indices, the justice system (overrepresentation in jails, civil and criminal court systems) and violence against Indigenous women and girls. The Calls to Action are targeted not only at the federal government but also at the provincial governments and public institutions like schools and universities, and civil society sectors.

The remaining portions of the TRC report, especially volume 6, focus on reconciliation and the Calls to Action. The TRC commissioners interpret their mandate broadly to encompass competing sovereignties, the Doctrine of Discovery, treaties, rights to self-determination, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and many other foundational foci of concern around the relationship between Indigenous and non-Indigenous peoples in Canada (TRC 2015c, Executive Summary 190). They also address areas of Indigenous resurgence and the revitalization of Indigenous institutions such as Indigenous legal orders, and as well governance structures that the commissioners saw as necessary for entrenching reconciliation in national culture. To overcome the impacts of residential schools, resurgence in Indigenous languages, laws and governance practices must be supported (TRC 2015a). Specifically, Calls to Action 10iv, 13, 14, 15 and 16 are geared toward supporting Indigenous language revitalization; Calls to Action 42, 45iv toward Indigenous justice systems; and Call to Action 50 to the establishment of Indigenous law institutes.

4.4 Conclusion

This chapter explored the ethical wrong of not hearing and not seeing claims of injustice through descriptions of the state mechanisms that are used specifically for hearing claims where the core machinery of the government and society have failed to hear. In particular, the Berger Inquiry and the TRC were examined to lay out their operations and approach to listening. The next chapter will explore the legacies of both the Berger Inquiry and the TRC.

Chapter 5 The Berger Inquiry and the TRC—Evaluating Success

> The approach was to make sure that the people—the voices of the people—are heard by the members of society. That's really the key. I can remember in the early 70s sitting for hours everyday listening to the testimony of the Dene people during the Berger Inquiry. I listened enthralled by what they were saying. It was the first time as a young Indigenous man that I heard Indigenous people saying, we are more than this, we are entitled to this, we have always had this, we have always been here. I remember thinking, where are our teachings? Where are our Elders? What are they saying? that kind of thing . . . . The important point to be made was that governments are the ones that respond to the public. They don't respond to inquiries too well. That's the important thing that most inquiries fail to recognize. (M. Sinclair, personal communication, May 15, 2020)

> But I am trying to talk about continuity.… Continuity in the sense of keeping it alive, forcing us as a country to remain conscious about all of this and assuming goodwill and good intent to help us know "are we getting better or are we getting worse?" (M. Wilson, personal communication, February 7, 2020)

5.1 Introduction

This chapter discusses the legacies of the Berger Inquiry and the TRC. In order to illustrate the success or failure of inquiries and commissions, I have developed a concept called "the field of justice" that builds on Vine Deloria Jr.'s (1973) concept of place-based ethics. This chapter will also discuss the way in which litigation limits the ability to hear justice claims.

5.2 Legacies of the Berger Inquiry and the TRC

5.2.1 Government Response to the Berger Inquiry

The Berger Inquiry report was issued in 1977. In 1996, the RCAP report was released. Nineteen years after that, the TRC report came out in 2015. The three reports generated different political responses to their recommendations which are reflective of their time and political moments. Though not the focus of this dissertation, it is worthwhile to examine the impact of the political and social context and the history of the Indigenous

rights movement on the actual implementation of recommendations by the commissions and inquiries.

The recommendations of the Berger report relating to the establishment of a moratorium on the pipeline until critical issues were resolved were accepted by government. These critical issues involved the establishment of conservation areas, as well as settlement of land claims. Land claims took many more years than the ten years assumed by Berger. Conservation areas were established, and other recommendations were followed. Kakfwi stated that the government was not keen on oil development at that time, and even industry felt that they could not secure a pipeline corridor if the people in the territory were not in favour of it. Negotiations to settle comprehensive claims did begin.

5.2.2 Government Response to the TRC

The day before the TRC issued its report on June 3, 2015, the Justin Trudeau election campaign "affirmed unwavering support" and called upon the Canadian government to implement the TRC recommendations (Liberal Party of Canada 2015). Trudeau came into power after November 2015, and the prime minister instructed his ministers to implement the TRC Calls to Action (Prime Minister of Canada 2015). Up until the Covid-19 pandemic the Privy Council kept a mandate commitment tracker and marked its advancement respecting the implementation of the Calls to Action (Canada 2019). In it, the government reports the following:

> The Truth and Reconciliation Commission identified 94 Calls to Action, 76 of which fall under federal or shared responsibility with other partners, involving 25 federal departments or agencies. Progress has been made on implementing over 80 per cent of the Calls to Action under federal or shared purview. Nine Calls to Action are fully implemented, 54 are well underway and 13 others are in early planning stages.

5.2.3 Critiques/praise of the Berger Inquiry and the TRC

It is important to examine critiques of listening and implementation of the Berger Inquiry and the TRC. I will not do a full analysis of all critiques and successes of both commissions. In line with my preoccupation with listening and responding to justice claims, I will focus on how well the Berger Inquiry and TRC listened and broadcast the articulations of justice and injustice, the breadth of the analysis and its relation to land, and whether or not they were able to address the justice claims being articulated.

The Berger Inquiry is widely held to have been a significant success and a model for future inquiries. Returning to Stauffer's examinations of the ethical wrong of not hearing claims of injustice, we saw that the inquiry itself did listen in response to the government's failure to listen. And so, there was an ethical fault recognized at the outset of setting up the inquiry. The Berger Inquiry, however, did by all accounts and, as explained earlier in this chapter, hear the full nature of the justice claims of Northern Indigenous peoples and the impact of the proposed pipeline. The TRC was modelled on the Berger Inquiry.

5.2.3.1 Success at Listening

Kakfwi emphatically affirmed that Berger completely understood what was conveyed to him by the Dene people and that he incorporated it accurately in his report. Dene scholar Glen Coulthard confirms as well that the Berger Inquiry was a success in terms of listening, understanding and conveying the Dene vision of justice. Berger heard the community. He understood Dene concerns and their vision, and he communicated it in his report. I asked Kakfwi why that was so. He said that Berger was well suited to understand

Indigenous narratives as he had done related work before he was appointed (S. Kakfwi, personal communication, March 6, 2020).

In his book critiquing state recognition practices, Coulthard (2014) also acknowledged the importance of the Berger Inquiry for highlighting the struggles of Indigenous peoples. He quotes Frances Abele as saying that no commission or inquiry sustained such a large and diverse audience and such strong emotional responses (59).

5.2.3.2 Success at Broadcasting

In her article, "Looking Forward, Looking Back: The Canadian Truth and Reconciliation Commission and the Mackenzie Valley Pipeline Inquiry", Kim Stanton (2012) analyzed the Berger Inquiry to see what procedural design features could be adopted by the TRC. In particular she advocated for the TRC to perform the social function of educating a broader audience, bringing people to a common understanding of the issues being faced by the people and fostering social accountability with respect to the issues before the inquiry. Stanton advised that doing so would make it difficult for the report recommendations to be ignored, because there would be a public that had been educated and that was invested in a positive outcome to the issues. In fact, as I heard from Sinclair, this particular approach taken by Justice Berger was one Sinclair adopted for both the Aboriginal Justice Inquiry in 1988 and the TRC. As well, prior to Sinclair's appointment, both myself and Watts (B. Watts, personal communication, July 1, 2020), who were on the preparation team, were very aware of and prioritized engagement with civil society and developing support through education.

Sinclair found it important for everyone to hear the voices of the participants of the inquiry and to understand the issues being discussed. He made the hearings accessible

to the broader public, as Justice Berger had done, by broadcasting the Berger Inquiry hearings via Canadian Broadcasting Corporation radio services (M. Sinclair, personal communication, May 15, 2020). Sinclair also explicitly acknowledged the significance of the Berger Inquiry process in the methods used by the TRC and stated that he had adopted Justice Berger's approach of ensuring that as broad an audience as possible could hear the testimonies of the participants in the Inquiry.

5.2.3.3 Challenges

The three inquiries that are examined in this dissertation are not ones that have been heavily criticized for egregiously perpetuating oppressive practices such as epistemic injustice in failing to reflect or hear the voices of Indigenous people, as happened with the Oppal Inquiry. Even so, there have been critiques of the manner in which the land claims arising from the Berger report were settled. The argument has been made that those processes did not follow in the spirit of either the Berger report or the comprehensive and interrelated nature of the economic, political and social vision of the Dene people, which the report had adopted. Coulthard (2014) argues:

> understanding "culture" as the interconnected social totality of distinct *mode of life* encompassing the economic, political, spiritual, and social is crucial for comprehending the state's response to the challenge posed by our land-claim proposals. (65-66)

Despite this critique, Kakfwi indicated that there were difficulties in preparing for negotiations on the Dene side and that these difficulties contributed to the challenges of achieving a successful land claims negotiation that stayed within the spirit of the Dene Declaration. These difficulties will be explored in the chapter that follows, where the concept of recognition and of the state's responsibility to alleviate fracturing pressures on communities is examined.

The TRC has been critiqued for not dealing with the narratives of church and Indian residential school employees in a full enough way (Niezen 2017) and for not exploring a detailed accountability of institutional responsibility (James 2012). However, its transformative potential, despite weaknesses in the initial political environment as well as its structural limitations, was recognized early on. Nagy (2013) postulated that reconciliation could not be understood apart from the injustices of colonization, land dispossession and genocide. And, in fact, when the TRC issued its report, this broader context was explicitly described and was the focus alongside the Calls to Action. If one were to affirm that placing the Indian residential school system within a broader framework of colonization denotes success, then the TRC was successful. Wilson, on the issue of land dispossession, indicated that many survivors spoke of being alienated from their territories:

> So when we asked people, what was the consequence, what has your life been like since Residential School, people would talk about all manner of things.
>
> Sunga**:** Why would they talk about the land?
>
> Wilson**:** They would talk about language. They would talk about parenting. They would talk about not being able to sustain themselves. They would talk about not knowing where their land was, not being, feeling capable to be out on their land.
>
> Not having the skills that they needed. Not knowing the names of places, and you know sort of having the land mapped in their head. People talked about all of that and people talked about all of those things as being integral to their cultural identity. Not just as a cultural thing like a folklore thing but a cultural thing as an essential connection to land. And, I mean, it's right in everybody's names. Look at the names of the Indigenous peoples across the country. Certainly up here that's what their names mean. The people of the land. That's what Inuit means, that's what Dene means. You see that all over the place. (M. Wilson, personal communication, March 5, 2020)

Wilson indicated that the commissioners, in framing their Calls to Action squarely around the UNDRIP, intended land dispossession and connection to territory to

be a fundamental part of the final report. Sinclair also spoke of reflecting the survivors' testimony around the impact that the schools had upon their cultural identity, connection to family and community. As stated by Wilson, the commissioners felt it was necessary to reflect the survivors' words through an analysis of cultural genocide in the report (M. Wilson, personal communication, March 5, 2020).

With the change in the political environment at the time of the release of the TRC report, the newly elected government committed itself to full implementation of all the Calls to Action. Such a commitment, no matter the reason, can be considered to be illustrative of success. The First Senior Official within the federal government, who holds responsibility for responding to certain Calls to Action, told me that the key to a strong government response is truly the political direction set by the prime minister and cabinet. The bureaucracy must follow their direction, though there are challenges in changing direction, as seen in the discussion in chapter 3. The First Senior Official said:

> you need the political level saying this a priority, this is where we're going. And then you will see the resources of the public sector marshalled in that direction. And if there's waffling or uncertainty about level of priority then that's when things really will founder. (First Senior Official, personal communication, April 30, 2020)

Sinclair also indicated that once the political decision is made, the challenge is for the bureaucracy to follow through and implement the political direction. Ultimate success lies in how effectively the TRC's Calls to Action reflect the claims for justice made to commissioners and the effectiveness of implementation of those claims. Implementation by the bureaucracy, once decisions by politicians are made, is key. Working within the bureaucracy, which is structurally designed to account to majority non-Indigenous interests, achieving Calls to Action that demand a different level of accountability to Indigenous peoples is a significant dilemma. When asked about whether

structural reform could address issues, both the First Senior Official and Sinclair affirmed that structural reform is necessary to deal with foundational issues, but that implementation within the existing structures can go a long way to responding to justice claims. Both expressed that there is not likely an appetite or the possibility of significant structural reform such as constitutional reform on these issues, and in the meantime, there are many other ways to advance justice within the existing framework.

While the wheels of government turn to try to fulfill recommendations and Calls to Action, Indigenous peoples who are seeking self-determination, control over territory and equitable treatment in education, clean water, housing and other core issues may not be experiencing any improvement in their lives. When government action is seen as inadequate in speed, scope or quality, the challenge is issued that "reconciliation is dead". This phrase was loudly heard during the Wet'suwet'en blockades and protests (Ballingall 2020). Wilson, who was a commissioner with the TRC, acknowledges the challenges of reconciliation but does not feel that the concept is dead. In her words:

> I do not agree with the banner statement and the upside-down flags that say reconciliation is dead. I do not—I don't agree with that. I do believe—and I'm not saying so because of Wet'suwet'en, I said it all along—reconciliation is really difficult. It's messy. It's not guaranteed. Some things won't work and you'll have to try something else and it is for the long term. It's not a quick fix. I think all of those things are also true and I think we're in a state where, you know, thinking that you just talk nicely about people... I know at one point in the work at commission I said, you know reconciliation is not a kinder, gentler form of assimilation. It's not that. It's not just being nice to each other and being kinder.
>
> It's about shifting the way we do things and finding new ways to make decisions and to be respectful of the rights that we say we recognize. (M. Wilson, personal communication, February 7, 2020)

Sinclair expressed worry that the young of today will have much less patience for action, and that there may be violent resistance. Both of these sentiments indicate that the challenges of addressing the issues brought before the TRC will continue to carry

forward into the future. Wilson particularly emphasized the need for a legacy organization—the National Council for Reconciliation, which was the subject of TRC Calls to Action 53-56—to continue to call Canadians to account and advance the work of reconciliation (M. Wilson, personal communication, February 7, 2020).

The TRC did succeed in engaging broader sectors of society. Many of these sectors, such as educational institutions, media and professional organizations, have taken up the challenge of decolonizing their institutions and at the very least educating their constituents about residential schools and Indigenous history. Engagement by the non-governmental sector cannot be underestimated, especially when a crisis emerges such as the Wet'suwet'en blockades. Children and young people who have been educated about Indigenous history will at least question the narratives around the conflict. The media can be held to account more easily for its representation of events. The momentum among civil society sectors was most notable immediately after the issuance of the report in 2015. Setbacks such as the Government of Ontario's 2018 reversal of the curriculum changes made by the Wynne government to address the TRC's Calls to Action (Crawley 2018) are at least newsworthy because they go back on a commitment to implement the TRC Calls to Action.

5.3 Analysis

Though both of these bodies heard Indigenous claims and put forward their recommendations, there are differences in the degree to which each inquiry and commission could potentially achieve the fulfillment of Indigenous justice. My analysis centres around two factors that played a role in the Berger Inquiry and the TRC: the

location of the inquiry in the field of justice and the role of litigation in hearing and responding to the nature of the justice claims that were made.

5.3.1 Location in the Field of Justice

5.3.1.1 Space and Time

In his foundational book, *God is Red*, Vine Deloria Jr. (1973) compares the underlying spatial nature of Indigenous history, theology and philosophy to the underlying temporal nature of European history, theology and philosophy. He notes that a temporal view of history and theology results in a linear idea of progression of events. Spatial views of history, religion and theology are in relation to specific geographical areas. Within a spatial system, "religion thus becomes a present examination of community needs and values, not a progression of conceptual advances" (83). To Indigenous peoples, their territories have the highest possible meaning, and all statements are made with this reference point in mind (75). Deloria Jr. writes that ethical systems that are not spatially grounded are not easily applicable to practical situations or the reality of our existence in places; rather they are directed to experiential interpretation. Christianity, he notes, is focused on an afterlife and eternity, but not on the earth we live in and the land that gives rise to who we are (88). This aspect of the spatial nature of ethical systems is important for understanding how I build on his analysis to develop a concept I have coined "the field of justice", which is a tool for evaluating possibilities for progress.

5.3.1.2 Field of Justice

In consideration of Deloria Jr.'s underlying distinction between space-focused thought and time-focused thought, I have developed the term "field of justice" to refer to a matrix that has a spatial reference to land, and relation to time. I analyze the degree to which the

mandate and work of the Berger Inquiry and the TRC centred on connections to territory as a system of relations (Murdock 2018). I also examine how much of their mandate was directed at remedies for historical wrongs or was examining the prevention of future harms. If an inquiry is established at a point when it can hear justice claims before harm is done and if the mandate is focused on land, there will be a higher chance of addressing Indigenous justice claims. If the inquiry or commission must deal with past harm and has a mandate that does not explicitly centre relations to land, there will be challenges to addressing harm, but still possibilities for addressing injustice. I will locate the TRC and the Berger Inquiry on the field of justice as I conceptualize it in order to better understand some of the built-in limitations in achieving or promoting a full response to Indigenous justice claims.

5.3.1.2.1 Berger Inquiry—Space and time

Spatially, the Berger Inquiry dealt directly with the relations of Northern peoples to their land. The pipeline and the incursion of a southern migrant workforce would interrupt relationships between the peoples of the North and their hunting territories, familial relationships, migration patterns, environmental integrity, their economies, political systems of governance and many other aspects related directly to territory. And, in acknowledgement of the centrality of territory, Justice Berger went to each community to hear testimony on the land.

Temporally, the Berger Inquiry was situated in a moment in history where the incursion of the forces of industrial capitalism into Dene territory and an extractive and non-sustainable wage economy and settler colonialism were relatively recent and were paused as a result of the inquiry. In that space, Berger created a window of

communication into the vision of the people for their self-determination *before* the impact of a massive resource project. For Northern Indigenous peoples, the threat was one of not being heard because the government had recently proceeded with initiating the pipeline project, before stopping short to start the inquiry. The pause that occurred to allow for the exploration of what would be lost in the future is a critical reason for the success of the Berger Inquiry. There was room for Northern Indigenous peoples to articulate both how the pipeline project would impact them and their vision and plan for the future. The visioning exercise resulted in the Dene Declaration—a full articulation of what is necessary for continued Dene being and way of life. This is justice is a holistic sense, in that it is a Dene vision of existence that is self-sustaining.

5.3.1.2.2 TRC—Space and Time

The TRC was concerned with harms to individuals and the disconnect with relations to family, community, nation and territory. Wilson pointed out the following:

> An area where we have heard occasionally, I would call it criticism or comment that wishing we had said more about land, and that we had made Calls to Action based on that. But on the other hand, I think we all felt that we've dealt with it significantly, but maybe not bluntly enough. (M. Wilson, personal communication, February 7, 2020)

The commissioners understood the connection to territory. However, the mandate of the TRC was by its nature focused on historical abuse of individuals, its impacts on communities and its ongoing legacy into the present and future. The mandate was preoccupied with a form of temporal progression toward reconciliation between peoples, based on a more accurate truth of the events of their shared existence. Structurally, the TRC was more temporally focused on addressing deficits in Canadian history and epistemology and not as focused on territory, whereas the Berger Inquiry was situated primarily in relation to land and articulated all the impacts of a pipeline. The

TRC was mandated to centre the survivors of residential schools, and from their testimony the various interlocking injustices would radiate, including dispossession of land.

The TRC faced greater challenges than the Berger Inquiry. It had been tasked with hearing, acknowledging, witnessing, understanding and communicating the experiences of survivors who had suffered wrongs in the past, with ongoing sequelae. It was further tasked with setting the stage for a transformation, however defined, toward a positive path. It is an enormous task to create the conditions for possible amelioration in the future where significant harms have been perpetrated and continue to have devastating effects. This is especially so where individuals and communities are at different stages in dealing with their trauma and high expectations are placed on the inquiry or commission to address injuries that cannot necessarily be remedied. Moreover, the visioning of what that future might look like is complicated and various, because the harms are complicated and various, regardless of the political unity of residential school survivors.

5.3.2 Epistemic and Relational Harm

5.3.2.1 Epistemic Harm

The TRC's focus on survivor memory and voice allowed the commissioners to fulfill the important task of advocating for the inclusion of survivor knowledge about the Indian residential school system into educational and historical narratives. The TRC also acknowledged Campbell's conception of reconstructive memory as dynamic, relational and "for the future", as opposed to relying on an archival model of independent recall (Campbell et al. 2014, 138). The TRC recognized that survivors might be subjected to challenges to their memories as a form of political disrespect (165). Campbell's work

supported a just and non-oppressive process for survivors to bring forth their experiences. Survivors of Indian residential schools had not been heard for decades as they suffered from a particularly egregious form of testimonial injustice through denial of their experiences (Fricker 2007, 1). As discussed in chapter 1, Koggel (2018) argues that there is also hermeneutical injustice through the denial of the collective interpretative resources of Indigenous laws, language, practices and traditions and that a revitalization of these resources and ways of knowing is needed to reorder the colonized Indigenous/non-Indigenous relationship (246).

However, the widespread public attention on unmarked burials that began in June 2021 (Austen and Bilefsky 2021) creates doubt about how effective the TRC was in bringing survivor knowledge to the non-Indigenous psyche. Though the facts and legacy of residential schools are now taught in curricula and there is greater awareness of the system and its impacts, the existence of thousands of unmarked burials only came to the forefront when ground-penetrating radar technology verified survivor testimony. The TRC had dedicated volume 4 of the Final Report to unmarked burials at the schools, but archival documentation, survivor testimony and preliminary field research had not impacted on public consciousness. In some respects, though efforts were made by the TRC to raise consciousness about how mass institutionalization of Indigenous children has impacted on almost all Indigenous people in Canada, non-Indigenous people were still complicit in "not hearing" survivor voices. The TRC laid the groundwork and prepared the Canadian public to understand, but it has taken technological verification to drive home the horror of the treatment of Indigenous children and families.

5.3.2.2 Relational Harm

There is a well-founded skepticism that any form of reconciliation—in the sense of relational repair between Indigenous peoples and non-Indigenous peoples in Canada based on a full understanding of a shared collective history—that does not call for deep accountability for settler colonialism will end up reinstating the colonizing state's power over Indigenous people (Murdock 2018, 233). The TRC wrote a report that highlighted various interlocking impacts of colonization such as how residential schools interrupted transmission of language, culture and Indigenous ways of being. It also reported that removal of children to the schools was a precursor to mass adoptions out of Indigenous communities in the 1960s ("The Sixties Scoop") and the current crisis in Indigenous child welfare. The commissioners further described the schools as part of a system of cultural genocide. Some recommendations, such as the repudiation of the Doctrine of Discovery, may seem to have been superficial, but they call attention to the terms of the original relationship and the racism inherent at the base of policies and laws that preceded and followed settler colonialism. They called for the UNDRIP to be the framework for further efforts toward reconciliation.

If the TRC had shied away from making disruptive findings and from recommending Calls to Action and instead had held symbolic meetings between church and government officials and survivors and declared reconciliation complete as a kind of static endpoint, then a greater harm would have resulted. The government and church entities would have been absolved from any further, ongoing and dynamic responsibility and the nature of the survivors' injury would have been completely unheard or, worse, buried. Furthermore, the state and church entities would have received the benediction of

the TRC, which they could claim as legitimacy for addressing Indigenous justice claims. Meanwhile nothing would have changed for survivors, their families, their communities and their nations or peoples, and the oppressive power structures that perpetuate daily injustice would have been unmoved.

However, the TRC's focus on both the past and the future was a challenge in terms of the degree to which it was possible to substantially address the needs of those whose injuries have spanned decades and sometimes generations in the past, while effecting structural change for the future. In large part, they tried to accomplish this task by focusing on what was told to them and by basing their Calls to Action on what they heard about the systemic nature of the injustices. As Wilson said:

> It's how people interpreted their own life experience as a result of what school had been like for them and what school had done to them. And that's why when we look at our Calls to Action we talk about so many things. We talk about business because that's about employability. We talk about the media because that's about people not seeing themselves anywhere being reflected. We talk about new citizens because we heard many people say that newcomers to Canada are just as racist as the people who came from Europe in the first place. We talk about culture and identity because so many people identified that as the pathway to healing. We talk about social welfare and child welfare because so many people said it isn't over, it's still happening, they're still taking our kids away. We talk about education because so many said they got a lousy one, they got a really lousy one and so they weren't equipped to do anything. We talk about cultural knowledge because people have said that is what they are hoping to reclaim those things that may still be available to them.
>
> They all come from things that people talk to us about. We had talked about the Calls to Action but we stood back at some point and said what are the principles that underline reconciliation. What are those principles? The very first one was that the UN Declaration on the Rights of Indigenous People should serve as a framework for all reconciliation. So if you dissect that and look at what all is in there it's the right to raise your own children, it's the right to have land, it's the right to have your own laws, it's the right to determine your own membership, it's the right to be self-governing, it's the right to have your cultural norms. It's all those things that we talk about in our calls to action. The bedrock of that is already articulated in the UN Declaration. Land is a big piece of that. (M. Wilson, personal communication, March 5, 2020)

A commission or inquiry, as a body responsible for listening and communicating claims for justice, is limited by its context and its relation in time and location to the subject matter of its work. This is what the concept of field of justice is meant to capture. Ideally, as occurred with the Berger Inquiry, a commission is tasked with hearing Indigenous claims for justice at a point when relationships can still be rebalanced and before harm that cannot be remedied is inflicted. And because sovereignty and land are foundational to Indigenous existence and Indigenous existence is at the core of justice claims, land and sovereignty should be included in its mandate. If commissions are established with these two elements in mind, there is a higher likelihood that listening will result in addressing justice claims and preventing harms that have not yet occurred. Where a commission is addressing past harm, there is still the possibility of successful listening by society and of the creation of effective responses to Indigenous claims of justice. Harms can be acknowledged and mourned, responsibility can be taken up, and action can be taken to prevent future harms. The response, however, will not be able to address the harm directly. The oppression experienced by survivors of residential schools and their impacts are a reality that cannot be remedied or fixed by material means. Success is determined by the degree to which future relations are based on having heard the survivors and the potential to transform relationships. I turn next to procedural rigidity—such as occurs in litigation—as another challenge to successful listening.

5.3.3 Litigation

Litigation is a flawed and imperfect tool of justice, especially with respect to Indigenous justice claims, for many reasons. It is expensive, but often necessary, in order to call attention to Indigenous claims for justice and to compel a response from the opposing

party. Litigation requires that one's claims fit a certain mould. Trying to fit claims into this mould often means that critically important aspects of the claim are lost and distorted beyond recognition. The common law system based on European law is a structure controlled and defined by the colonizer. Even where Indigenous peoples bring arguments to court in an attempt to change colonial systems of law and title, as in the case of the Wet'suwet'en hereditary chiefs who brought the *Delgamuukw* case, the terms are defined entirely within the colonial justice system. Colonial framing is particularly obvious when one reads Aboriginal law cases, which engage a distinct conceptual framework for "Aboriginal title and rights" as opposed to Indigenous law, which is focused on Indigenous-defined systems of legal ordering. The conventions set by the common law, civil law and statute create a highly structured playing field that often means a bid for justice will result in a limited number of possible actions on the part of the opposing party. These actions undertaken by any opposing party in turn will create a further limited response. Though it may be effective in urging a defendant to move forward, litigation can force both parties into a polarized and adversarial relation that follows a certain procedural path. In some instances, the procedural path through appeals can completely move away from the initial intended goal of the litigation (Parmar 2015, 95-133).

The civil litigation system is heavily reliant on an oppositional playing field. In this field, an individual seeks an imposition of liability upon an opposing party and a remedy. Even class actions, though they are collective suits, require a framework of harms to individuals. Litigation, therefore, does not easily capture systemic harms imposed through structural oppression. Constitutional litigation may capture such

imbalances, but the courts do not impose structural remedies that impede or overcome the will of the people, as represented by the legislature.

5.3.3.1 Litigation and the Berger Inquiry

For the Dene, Kakfwi told me that Canada took it seriously when Chief T'seleie said he was willing to lay down his life to stop the pipeline and Chief Antoine said he would stand with him. The caveat on legal title created uncertainty. Investors lost confidence in the project and proponents of it started to look at alternative routes for the pipelines. Together, these actions increased the cost to Canada of forcing a looming fight with the Dene and Inuvialuit (Stephen Kakfwi, personal communication, May 25, 2020). The Dene did not rely as much on legal tools as on political leadership, resistance and active lobbying for an inquiry. They also worked to gain the support of the New Democratic Party, because the Liberal Party was a minority government at the time. Once the Berger Inquiry was in operation, Justice Berger deliberately avoided litigation-style procedure for the inquiry, thus allowing the Dene vision of justice to remain intact and not be mediated through the distorting lens of litigation. In doing so, the Berger Inquiry was able to respect the centrality of place and territory to the Dene claims.

5.3.3.2 Litigation and the TRC

Though articulations of the harms from residential schools had been collective and multi-faceted as well as individual, the common law civil litigation system funneled the claims into individual claims for sexual and physical abuse (Canadian Bar Association 2005, 4-5). In 2005, the Baxter class action was settled when a non-typical solution was developed to add collective elements to the class action compensation package at the urging of the Assembly of First Nations (Assembly of First Nations 2004, 35-38). The

TRC was one of the three collective components in the Settlement Agreement with the other two being the commemoration initiative and funding for the Aboriginal Healing Foundation. The Settlement Agreement also had a compensation package intended for individuals harmed in the past and a payment in recognition of the wrong of having been forced to attend the schools ("Indian Residential Schools Class Action Settlement—Settlement Agreement", n.d.). The individual compensation components then aligned with the litigation model of addressing harm through monetary damages. The funding for the Aboriginal Healing Foundation, the Commemoration Fund and the TRC were intended for collective benefit and had the capacity to at least acknowledge the deeply relational nature of the injury done to communities, families, nations and individuals situated in those relational webs.

The Aboriginal Healing Foundation, in particular, had success in educating and providing healing services across the country and in the North (Centre for Public Impact 2019). The TRC itself could, by the very nature of its reconciliation agenda, work toward the repairing of relationships that were damaged, however defined. In this sense, it could hear from survivors about what had been lost and come to an understanding of injustice and damage and the types of actions that might prevent such injury in the future. It could also mitigate the effects from the injury. It cannot be forgotten, however, that some of the participants in the TRC process had first gone through the pressure to limit the articulation of their claims when they had sought remedies through individual or class action litigation. Once they came to the TRC process, they were told they could say what they wished, but it is possible that civil litigation may very well have distorted the initial framing of their justice claims. The phenomenon of Indigenous justice claims being

distorted through civil litigation processes has been well explored by Pooja Parmar (2015) in her work relating to Indigenous justice claims within India, another common law jurisdiction (95-133).

If we look to Koggel's (2018) concern about the injustice of the diminishment of collective interpretative resources through the Indian residential school system and colonial oppression (245-46), the fact that the TRC was part of a litigation settlement process may have meant that it could recognize the importance of collective interpretative resources but may not have had the ability to escape its own context within a highly individualistic and distorting litigation framework that deliberately shaves away types of claims for justice and collective means of speaking about those claims.

No matter how reconciliation is framed by government, survivors, non-Indigenous Canadians or the TRC itself, it is always in the context of profound and often ongoing damage. It is important that any discussion of reconciliation include an understanding that one cannot simply move on from injury and treat it as a discrete past event. Such profound injury is part of the fabric of the future and for many, the Settlement Agreement components were only the beginning of a long journey of understanding what had happened to them in the schools. The Settlement Agreement components, including the TRC, respond to injuries and injustices that commenced in the past, but they are ongoing. As with any litigation focused on addressing past harms, the Settlement Agreement suffers from the vulnerability of not being able to address the injustices suffered by residential school survivors.

5.3.3.3 The Inadequacy of Litigation

Finally, and importantly, I would argue that litigation tools are inadequate for addressing the types of harms perpetrated through residential schools. Justice in the litigation system that is structurally designed to provide individual reparations and not repair relationships will not address past relational harms. Only forward-looking listening and addressing of claims will make the move towards the repair of past relational harms. Forward-looking approaches also require structural change in addition to working to the maximum within the existing structures. One key problem identified in my account is that only listening within the parameters of the existing procedural structures and not being willing to hear about specific types of claims such as those that appear to challenge state sovereignty, means that claims that are founded on Indigenous relations to land without ceding Aboriginal title, and that may require constitutional reform are not heard.

Litigation can result in compensation, an order to stop something or an order to compel action. A monetary award is the tool used by the civil litigation system to try to compensate for injuries. In some cases, money is used as a signifier of value in order to acknowledge and recognize what may otherwise be considered incommensurable harms (Sunga 2002, 59). Residential schools were a large-scale effort to remove children from relationships with family, land, communities, knowledge and language and to re-orient their relationships toward the state and the church entities. Compensation for the injuries or even recognition payments are imperfect remedies that do not truly touch the relational nature of the injury. Those relationships within family cannot be healed with money from the government. Lost language cannot be regained with an individual compensation payment. These harms can be mitigated, however, with the state providing continuous

funding and space for Indigenous resurgence. However, any attempts to repair relations through these means will not necessarily be understood as related to the Settlement Agreement, which is steeped in the narrative of individual compensation and healing for past injury. As such, situating the TRC within a litigation settlement package will be understood within the context of the limitations of litigation. The TRC had to make significant efforts to distinguish itself from litigation remedies and the structural limitations of being a government department and ironically did so often through recourse to litigation itself.

5.4 Conclusion

The Berger Inquiry had the possibility of actually addressing the claims brought by Northern Indigenous peoples by preventing the pipeline, providing conservation areas and recommending comprehensive settlement—all forward-looking actions that could prevent harm. As well, the Dene formulated a vision of true justice—a vision of what is required for Dene to be who they are—and this vision was at a point in time and in relation to land before massive industrial infrastructure was imposed. The TRC's ability to form a vision of justice and of reconciliation was embedded in past harms and a long timeframe. It was the other elements of the Indian Residential Schools Settlement Agreement that used money to try to address relational damage. However, while the TRC could adopt other means of repair, the window for creating justice was small. This is not to say that the ongoing harms to relations, identity and physical integrity should not be addressed or were not advanced by the TRC; rather, the means of addressing the forms of injustice perpetuated by the Indian residential school system that are available and recognizable through the Indian Residential Schools Settlement Agreement will not actually repair the

damage expressed by those seeking to repair and create justice. In this sense, the broader litigation context behind and around the TRC commits the ethical wrong of not hearing the nature of the relational injury.

The First Senior Official acknowledged that once litigation is engaged, it is very difficult to have open discussions around justice claims (First Senior Official, personal communication, April 30, 2020). Historically, to be heard, Indigenous people have used litigation strategically. The TRC did hear claims of justice around relationship but was limited in its ability to divorce itself from the litigation environment and to formulate a vision of justice that is not steeped in injury. Though the TRC's efforts to work through injury are in themselves a form of justice, the Berger Inquiry, because of its location in time and space in the field of justice in relation to Indigenous justice claims, as well as its avoidance of the filters of litigation, appears more successful. Because of these factors, it was able to approach a more complete form of Indigenous justice—the justness of Indigenous being—than could the TRC.

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Chapter 6 Rethinking Recognition

6.1 Introduction

Indigenous advocates work to disorient holders of institutional power. It is important to examine the significance of allowing and promoting disorientation and irresoluteness within structures of oppressive power, and the critical importance of the resoluteness of Indigenous advocates in promoting Indigenous being and Indigenous visions of justice. This work has examined the challenges faced by state-appointed listeners—inquiries and commissions—in effecting change through recommendations or Calls to Action. This chapter focuses on the conceptual frameworks that are embedded in the work of institutional power-holders and some of the weaknesses inherent in those frameworks. In particular, the concept of recognition has been raised and is woven into laws, policies and international instruments. This chapter takes a deeper look at the constructs that underlie the language of recognition, and the problem inherent in those constructs as examined by Indigenous and other scholars. In particular, this chapter focuses on the tendency to describe Indigenous justice claims and the state's reaction to them in binary terms. I examine the importance of understanding the lateral, non-binary and multi-relational nature of Indigenous justice in light of challenges faced by Indigenous communities when negotiating with the state. As articulated by Coulthard and Audra Simpson, I examine how a liberal notion of recognition promotes a settler agenda of dispossession. In line with this approach, I examine the weaknesses inherent in majoritarian democratic processes within a liberal state and the potential for consensus-building to accommodate lateral relationality, complexity and polarity.

6.2 Recognition

6.2.1 Recognition in Law, International Instruments and Policy

In the Canadian legal landscape, the language of recognition is found in section 35(1) of the *Constitution Act, 1982*:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Further, recent legislation engages the language of recognition in preambular sections and in substantive sections. In the *Indigenous Languages Act* the first paragraph of the Preamble provides the following:

> Whereas the recognition and implementation of rights related to Indigenous languages are at the core of reconciliation with Indigenous peoples and are fundamental to shaping the country, particularly in light of the Truth and Reconciliation Commission of Canada's Calls to Action;

The *Act respecting First Nations, Inuit and Métis children, youth and families* p provides as follows:

> s. 18(1) The inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.

Further, the United Nations Declaration on the Rights of Indigenous Peoples explicitly recognizes the rights of Indigenous peoples as peoples. In the Preamble, the following statements about recognition are made:

> Recognizing the urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,
>
> Recognizing also the urgent need to respect and promote the rights of Indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,
>
> . . .

> Recognizing that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,
>
> . . .
>
> Recognizing and reaffirming that Indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that Indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,
>
> Recognizing that the situation of Indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration (United Nations, 2007)

In terms of policy, Crown-Indigenous Relations and Northern Affairs Canada has "Recognition of Indigenous Rights and Self-Determination Discussion Tables" (Canada 2017a) . The Department of Justice has put forward ten principles respecting the Government of Canada's relationship with Indigenous peoples. Each of the ten principles starts with a recognition statement. The first principle is most notable in that regard:

> **1. The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.**
>
> This opening Principle affirms the priority of recognition in renewed nation-to-nation, government-to-government, and Inuit-Crown relationships. As set out by the courts, an Indigenous nation or rights-holding group is a group of Indigenous people sharing critical features such as language, customs, traditions, and historical experience at key moments in time like first contact, assertion of Crown sovereignty, or effective control. The Royal Commission on Aboriginal Peoples estimated that there are between 60 and 80 historical nations in Canada.
>
> The Government of Canada's recognition of the ongoing presence and inherent rights of Indigenous peoples as a defining feature of Canada is grounded in the promise of section 35 of the Constitution Act, 1982, in addition to reflecting articles 3 and 4 of the UN Declaration. The promise mandates the reconciliation of the prior existence of Indigenous peoples and the assertion of Crown sovereignty, as well as the fulfilment of historic treaty relationships. [**bold** emphasis in original text] (Canada 2018)

The concept of recognition as used throughout international instruments, law and policy is a powerful tool and is not automatically problematic in and of itself. However, when engaged where there is a significant historical and current structural power imbalance, the concept of state recognition carries the potential to ignore and undermine other powerful forms of recognition that are important for promoting and addressing Indigenous justice claims.

6.2.2 The Concepts of Recognition and Distributive Justice in Moral Philosophy

Broadly characterized, recognition theory speaks to the moral harms that result from misrecognition of identity and disrespect of status. Recognition theory seeks a difference-friendly world where assertions of identity do not result in disadvantage, invisibility, social exclusion or treatment that in its sameness approach perpetuates disadvantage. In their book *Redistribution or Recognition?: A Political-Philosophical Exchange*, Nancy Fraser and Axel Honneth (2003) debate whether recognition theory on its own can address economic and other inequalities. Fraser's account of recognition differentiates distribution from recognition and sees them as separate axes where a particular experience of injustice has both recognition and distributional aspects that are imbricated with each other. Honneth has a broader view of recognition that encompasses all aspects of a person's life. His aim is to give a rich account of the importance of recognition to identity formation (Rogers, 2009). However, his theory relies not on interpersonal recognition in the political realm but rather on recognition by the state.

Both Honneth and Fraser speak about issues such as rape, racism, colonialism and invisibility when articulating theories of recognition. Both scholars assert that their conceptions of recognition are complete enough to address any claims of social injustice.

Fraser and Honneth theorize recognition in ways that capture injustice relating to lack of recognition. Though Fraser frames her definition of recognition around culture, it is not limited to positive identity claims. She also captures the situation of those who are claiming lack of justice based on misrecognition.

6.3 Critiques of Recognition

6.3.1 "Misrecognizing" the Value of Intra-community Recognition

In his article "Rereading Honneth: Exodus Politics and the Paradox of Recognition", Melvin Rogers (2009) points to a critical flaw in the dyadic approach to recognition. Honneth privileges a formal system of recognition in the political arena with the power-holder as the only sufficient basis for moral autonomy. In doing so, he does not acknowledge the ways in which individuals and groups sustain identity and integrity in the space and time prior to formal engagement with the power-holder and in the face of oppression. Rogers explores this problem by examining how black Americans employed religious practices to address the threat of identity annihilation posed by slavery. Rogers challenges Honneth's form of recognition that relies too heavily on the institutions and individuals who are the source of the wrong in the first place. He notes that Honneth's theory of recognition accounts for the development of self-esteem among the members of an oppressed group and would acknowledge, for example, the use of the "Black is Beautiful" statement that was used by the Black Power movement to affirm esteem within the group. However, despite acknowledging this form of recognition in the personal sphere, Honneth does not view intra-group recognition as political. According to Rogers, what is required in Honneth's conception is political recognition within the wider group

that has denigrated or misrecognized black people, according to the evaluation of the denigrating population.

6.3.2 Critiques of Recognition in the Dene Context

Vertical recognition from the state is partially what is expected with section 35 of the *Constitution Act, 1982* and UNDRIP. Both call for recognition by power-holders of various Indigenous rights, which are collective in nature, and focus on the relationship between those who have failed to recognize those rights in the past and on an ongoing basis, and Indigenous peoples. As such, there is no true shift in power from the oppressor to the oppressed. Though there is some acknowledgement of the significance of a relational source to esteem and identity within a group and in personal relationships, the binary between oppressor and oppressed asserts itself in other spheres of recognition, and only on the terms of the oppressor. This is not to minimize the intense advocacy and effort among Indigenous peoples to use the UNDRIP as a powerful tool; however, this analysis points out that recognition by the oppressor of the oppressed fails to explain how marginalized groups resist disintegration and oppression, and the value of intra-community recognition. Rogers (2009) emphasizes a relational understanding of resistance, but he does not linger with relationality as a core construct.

Rogers writes in the context of black resistance to white oppression. In *Red Skin White Masks: Rejecting the Colonial Politics of Recognition*, Glen Coulthard (2014) critiques recognition in the Indigenous context with heavy reference to Fanon's *Black Skin: White Masks* (1967) on subjugation and recognition in which Fanon examines black acts of resistance or refusal of recognition by the oppressive other. Coulthard's critique challenges the liberal politics of recognition as being a tool for the perpetuation of the

settler-colonial agenda and makes use of the dynamics around the Dene Declaration and its aftermath to highlight his critique. Coulthard's (2014) thesis is that colonial relations in Canada have shifted from unconcealed domination to a form of colonial governance that works through the medium of state recognition and accommodation, which are both focused on dispossessing Indigenous peoples of their lands and self-determining authority (25). He eventually concludes that the resurgence of practices of self-recognition is essential for true expressions of sovereignty (26).

In criticizing Charles Taylor's politics of recognition, which requires the state to grant recognition to Indigenous groups, Coulthard argues that the granting of recognition to a subaltern group that is dominated fails to transcend the power in colonial relationships (27-31). Coulthard argues that Taylor does not take on the structural and economic features of social oppression (34). The lack of attention to structural oppression in the dynamics of recognition is a significant issue for Coulthard, especially in light of the Dene land claims negotiations, which, he argues, whittled down a much broader vision of justice to only cultural aspects of Indigenous existence. In the Dene situation, the Crown negotiated the settlement based on the principle that the Dene claim to self-determination was invalid and that any settlement must achieve finality through the extinguishment of Dene rights and title. In exchange, the Dene would receive institutional recognition of aspects of Dene culture (66). Recognition by the Crown would not include recognition of Indigenous economies and forms of political authority (66). The chain of events and the position of the Crown is significant and will be explored in more detail later in this chapter with respect to the issue of fracturing within the communities facing the Crown in negotiation processes.

Like Rogers, Coulthard is getting at the fact that recognition relies upon the oppressor to define the standards of recognition; going further, he argues that recognition is in fact a tool of political oppression. By using recognition of status, certainty is created for the settler state, which now has the ability to quantify and commodify sovereignty within the broader state apparatus through land claims settlements and self-government agreements. In fact, no-recognition theorists deny that the state is the primary generator of political and legal recognition.

Coulthard reiterates that Indigenous claims for recognition encompass politics, economy, identity, autonomy, authority and relationality. Coulthard notes that both Fraser and Taylor leave intact the assumption that the settler state's claim to sovereignty is legitimate (36) and that this is a form of misrecognition of sovereignty (37). In summary, the politics of recognition reduces Indigenous claims to cultural claims and divorces them from the broader context of economic and political structures and institutions. Rights and identities are defined in relation to the state rather than in terms of Indigenous peoples themselves. Coulhard's critique of state recognition leads to an argument for Indigenous resurgence practices of self-recognition as a necessary pre-condition to restructuring relations between the state and Indigenous peoples (42-43).

Coulthard takes a close look at the Dene struggle for self-determination and the events preceding and following the Berger Inquiry report. As noted in chapter 2, Coulthard describes a move away from traditional ways of life and toward non-renewable resource development leading up to the 1967 decision to transfer the administrative centre of the Northwest Territories from Ottawa to Yellowknife. Consequently, there were more Southern settlers moving into the territory to administer the territorial government. He

describes the incursion of government jurisdiction over the Dene and Dene resistance that mobilized around the Mackenzie River Valley pipeline proposal. In developing the Dene Declaration, the Dene incorporated Dene land-centred values, governance and economic models into place-based practices that Coulthard calls "grounded normativity" (60). Relevant to the discussion of sovereignty that takes place in the next chapter, the Dene Declaration claimed sovereignty but did not demand the creation of a new state. Rather, they sought the ability to exist as a people in relation to their land and with a political relationship based on group autonomy that would be reflected in self-government arrangements. Recognition would thus be an ongoing relationship and mode of life that is not limited to cultural practices (65).

The state responded by circumscribing the terms of recognition such that the broad and undefined rights and title claims of Indigenous peoples would be exchanged for defined rights and benefits. The Crown's insistence on the extinguishment of Aboriginal rights and title prior to settlement was a hard position in the 1970s. Coulthard argues that though extinguishment is not a required precondition to settlement anymore, the driving impetus to create certainty for the market economy remains in place, an impetus that is problematic for the advancement of self-determination. While Coulthard's analysis has implications for an account of recognition, Audra Simpson draws out the implications of failed recognition in the case of the Mohawk refusal of the state's recognition and thereby explores a concept of recognition that is internal to the community.

6.3.3 Critiques of Recognition in the Mohawk Context—Refusal of Recognition

Audra Simpson (2014) explores the notion of recognition in depth in her book, *Mohawk Interruptus*. Simpson's research comprises an ethnography of the Mohawks of

Kahnawa:ke, who are currently located on the south shore of the St. Lawrence River, close to Montreal and the international border with the U.S. The site of her research is the physical, political and psychic space asserted by members of the Mohawk community of Kahnawa:ke. Simpson examines community members' political stance on the international border and community membership as examples of refusal of state recognition. In the case of the international border, the border itself is the boundary of the state, and the passport is a form of recognition of state citizenship. Both forms of recognition of citizenship are rejected by many Mohawks who assert their right to travel throughout their traditional territory and who refuse the passport as a signal of a type of citizenship that they consider imposed on them. Rather, they assert their own Iroquoian citizenship and their own passport. In terms of community membership, they deny the form of membership that is sanctioned by the *Indian Act* and instead assert their own membership code by determining for themselves who is eligible to live on reserve. Again, it is a form of state recognition that is refused, and in its place is an assertion of Mohawk sovereignty.

In repositioning individual actions vis-à-vis the state, Simpson defines political recognition as being seen by another "as one wants to be seen" (23). Further, it is to appear politically in formal and official forms, and to have rights that protect you from harm. In this iteration, to be unrecognized means literally to be free from recognition and operate as an unprotected identity. To be unrecognized politically is to be vulnerable to harm. Simpson argues that it is impossible to be free from context or to be free-floating, and entirely dependent upon recognition of the master, or in this context, the state. In her view, "settler colonialism structures justice and injustice in particular ways, not through

the conferral of recognition of the enslaved but by the conferral of disappearance in subject. This is *not seeing* that is so profound that mutuality cannot be achieved" (23). She then queries whether the rejection of an impossible form of recognition can be perhaps seen as a willingness to assert a greater principle such as sovereignty, and recognition by another authoritative nexus of one's own. In doing so, it negates the authority of the other's gaze (24). Simpson draws the link to Fanon and Coulthard in seeing the rejection of the master's recognition as an act of sovereignty and power in its own right. She says: "Glen Coulthard (2007) takes from Fanon's reading of Hegel the impetus to 'turn away' from the oppressor, to avert one's gaze and refuse the recognition itself" (24).

Resistance to state recognition is not defined for the individual by the oppressor or colonizer on its terms. The source of power to refuse is the web of relationships among the Mohawk, who assert a form of sovereignty and status unrelated to the colonizer. Simpson is not looking at recognition as something that is sought from the state, but rather something that is resisted and refused as a political act. Her positioning of significant political acts of refusal and intra-community recognition as central turns away from Honneth's and Fraser's conception of recognition in much the same way as Rogers and Coulthard do. The critique of recognition theory provided by Indigenous scholars may signal the difficulty with recognition theory in its dyadic and top-down approach.

The assertions that Simpson explores are both positive statements of identity and selfhood as well as a rejection of the hegemonic political, legal, social and economic forces imposed by the nation-state. Simpson sees the rejection of the use of Canadian or American passports, for example, as a reversal of the expected power relationship

between the Indigenous community member and the state. When an Iroquois Confederacy passport is used, it is both a refusal of recognition by the state of Mohawk citizenship in Canada or the U.S. and a positive assertion of connection among Iroquoian peoples. It is, as she says, a denial of a foretold cultural death (3). As such, it is a use of autonomy that reorients the self toward a different relational matrix other than the state. And it is a form of identity assertion and of autonomy that is collective and connects to accounts of self-determination of a people rather than of individual identity or autonomy.

In her description of the identity assertions among the Mohawks of Kahnawa:ke, Simpson engages with the language of relationality. The actions of community members are an entrenchment within their own form of relationality situated within the realms of genealogical and political connectedness, within a geographic place, to others, in memory and over time. Family and kinship ties and political identity are critical for locating a person and understanding who they are. She speaks of meeting an interviewee who she had not met before and having to situate him within family and kinship circles as well as within history and memory before she felt that the interview would be a good one (9). These ways of understanding selfhood situate recognition as squarely a relational concept. Recognition of the other in a web of relationships, in memory, in relation to territory, and within a political understanding of sovereignty creates a situated self that does not rely on the colonizer for identity. In its focus on relationships to land and others in relation to territory, Simpson shares a commonality with other Indigenous scholars.

Like Coulthard, Simpson argues that state recognition is a way for the state to manage difference in a way that is not a challenge to state institutions and, as such, is a tool of state co-optation (20-21). Simpson argues that the nation-state relies upon a sense

of “we-ness” where consent is essential to the legitimacy of the state. Indigeneity takes on minority status within the reified state. However, there is an impossibility of consent within governance systems that are based upon dispossession and denial of Indigenous peoples within the state regime (17-18). I would further argue that given that this denial is non-consensual, it does not have a moral basis. There is, in other words, a fundamental wrong that must be understood, one that precedes recognition by the state. Managing the lack of recognition within the dyad of the individual versus the nation state is itself maintaining relations of oppression.

Listening to these critiques of recognition is an important opening to disorientation, so that those in power can become irresolute in their own vision and take some direction on the type of analysis that can shift an understanding of recognition as binary between oppressor/oppressed, and to a lateral and intra-communal understanding. The non-Indigenous Canadian public and those in power in the public sector can then perhaps be open to supporting the broader relationships surrounding these participants engaged in relationships of moral accountability and mutual recognition. The change in perspective may provide a broader understanding of the moral responsibilities held by those with power, the possibilities for shifting that power and a more nuanced understanding of the harms and remedies within the web of relationships.

6.3.4 Moral Repair for Past Harms—Not Being seen, Not Being Heard

The claim that is being made by both Coulthard and Audra Simpson is that the politics of recognition is engaged by the state to perpetuate a vanishing of sovereignty, as defined by Indigenous communities themselves. It attempts—unsuccessfully in many cases—to erase or not see the power that exists within the relationality of Indigenous community

members who refuse recognition. The fundamental harm imposed by the state is the imposition of the dyad of the state versus the individual and through the interference and attempted erasure of relationality within Indigenous communities. In this view, the colonial project of residential schools was a deliberate undoing of relationships between children and their families and communities so that the state could control the identity of Indigenous children. Recognition theory that sees the state as the key player and saviour will fail to fully grasp the harms that are experienced by Indigenous community members in Canada. The state's act of the vanishing of identity and of the sovereignty claimed by Indigenous peoples themselves among their own multilayered and complex webs of relationality is a past and ongoing phenomenon. As articulated by Coulthard and Simpson, a liberal notion of recognition promotes a settler agenda of dispossession.

It would seem, however, that what Simpson and Coulthard are calling for is a disruption of liberal notions of recognition and repair. As Simpson states:

> What is a Mohawk to oneself and to others? . . . . Who are we now; who shall we be for the future? Retrospectively, these questions are deeply modern but signal a fear of disappearance, to be on the receiving end of an elimination story, disappearance at the hands of global capital, and an ongoing settler project that attempts to move Indigeneity away, to eliminate it. (181)

Relational approaches emphasize the role of relationships in identity formation. It allows for an understanding of power dynamics in relationships, and for agency within relational matrices. It also allows for a level of complexity along various dimensions. It is not dyadic in the sense that it is not only one form of relationship; for example, the relation between the individual and the state, which operates to set identity or a power relationship. It also allows for an understanding of ourselves as a multiplicity of identities over time, within our relationships and within memory (Lugones 2003). If relationality is not the central notion, however, there is the risk of lapsing into cooptation by the

powerful partner in a dyadic relationship, the definition of the terms of recognition by the oppressor, and the use of recognition to perpetuate a vanishing of Indigeneity. The dyad excludes the multiplicity of relationships that allow the oppressed to turn away from oppression.

6.4 How Should the State Address the Problems Associated with Vertical Recognition?

How should the state address the issues that arise from the dyadic framing of state/Indigenous relations, and in which the state is the power-holder always at risk of perpetuating oppressive practices? In the remainder of this chapter, I discuss three issues that arise from the assumption of a binary relationship between the state and Indigenous peoples: 1) purity and certainty; 2) fracturing within Indigenous communities and the issues relating to it; and 3) informal consensus-based practices.

6.4.1 Purity and Certainty

A theme that arises in the discussion of recognition theory is the emphasis on the dominant as the distributor of resources and its recognition of the less powerful. In the case of Indigenous/state relations, the state is one half of the binary. This is a default position that focuses only on a vertical relationship of power with one type of responsibility vested in the powerful and does not recognize the reality of lateral, intra-community relationships and the power that is inherent in multidirectional and multilateral relationality. It does not leave political room for resurgence or for Indigenous communities to be a source of political power within themselves and among themselves, beyond what the state recognizes and does or does not do.

There are other challenges with binaries. They have us believe that we require a result or nothing, or that there is certainty or chaos. It leads to a demand for the kind of purity of analysis that comes with a one or a zero. The tendency to seek clarity at the expense of complexity can lead us away from embracing some degree of ambiguity, entanglement, ongoing dynamic relations that change, and movement forward that may be good but that may not be the ultimate goal. The idea of imperfect progression is similar to Harbin's (2016) notion of doubling back actions that I discussed in chapter 3, where one must revisit and retread old ground to learn and adjust to current manifestations of colonialism (138-39). Alexis Shotwell's (2016) analysis around purity is also helpful here. Shotwell recognizes that the notion of purity is problematic and for us to acknowledge our "co-constitution" and "co-contamination" is important so that we understand the complexity of our role, our complicity and our own impact on the world around us. As she points out:

> often there is an implicit or explicit idea that in order to live authentically or ethically we ought to avoid potentially reprehensible results in our actions. Since it is not possible to avoid complicity, we do better to start from an assumption that everyone is implicated in situations we (at least in some way) repudiate. …. Thinking about politics, … 'our' problem in this world is how to have *simultaneously an account of radical historical contingency* of the conditions under which we take ethical action and political action, critical practices for accounting for our own situatedness in histories that have shaped the conditions of possibility for our actions, and a *no-nonsense commitment* to the kind of real, possible world…That world is partially shared, offers finite freedom, adequate abundance, modest meaning, and limited happiness. Partial, finite, adequate, modest, limited—and yet worth working on, with and for. (5, emphasis in original)

What Shotwell calls for is acknowledgement of our complicity in an impure world, where taking the position of seeking a non-oppressive future also means that we acknowledge that we ourselves benefit from oppression or are imperfect in our attempts

to live in a non-oppressive way. Kakfwi used the same term—entanglement—in his interview in describing the struggle to deal with the incursions of industry. He said:

> Where I come from we were less than 700 in the world of my people, the K'asho Got'ine of Fort Good Hope, Colville Lake. We'd been decimated by disease over the last 100 years before that ... and so it became—it's almost inherent I guess that if we're going to survive in the big world and we're going to take on Canada and Imperial Oil and Arctic Gas and the RCMP and the church, those are huge forces and some of our people love those forces. They were quite willing to stay subject to those forces. There was a fluid entanglement of we're liberated one moment, totally colonized the next moment. (S. Kakfwi, personal communication, March 6, 2020)

Kakfwi described the burgeoning Indigenous movement in the 1970s; there was "fluid entanglement" between being liberated and being colonized. The concept of fluid entanglement is reflected in Shotwell's account where we are starting from a point of being implicated in Indigenous injustice while also seeking the possibility of justice for Indigenous peoples. Along this line of thinking, it becomes important to acknowledge that though we may wish to promote an ideal of Indigenous self-determination and existence, there are many ways to advance this goal while acknowledging the complexity of colonization and its impacts on both non-Indigenous and Indigenous peoples. Shotwell's (2016) approach is focused on collective action and the dynamic between our impure selves and the world around us. She speaks about the creation of a "field of possibility that might allow us to take better collective action against the destruction of the world in all of its strange, delightful, impure frolic. Purism is a de-collectivizing, de-mobilizing, paradoxical politics of despair" (9).

Shotwell's conception of complexity and of existing in a continuity in the world that surrounds us through porous borders gives a sense that we exist not as distinctly encased individuals, with a capacity for pureness of action, but rather within systems—

both ecological and institutional. The paradigm shift away from the binary of self versus the external world is an important way to see the problem of ethical action within an oppressive institution. Shotwell's contributions also help us with thinking about an alternative to the liberal autonomous self, existing often in contradistinction to the other, and thus often in competition with the other. Creation of a new world from within a messy imbricated and interrelated position vis-à-vis the other is more challenging but carries with it dynamic possibilities for collective movement forward. The co-constituted nature of our selves with our world is also reflected in Indigenous scholarship and is explored in chapter 7.

6.4.1.1 "Pure" Self-determination

The argument against purity and binaries is supported by many of the research participants on various issues, and in particular on the view of Indigenous self-determination. Self-determination, as pointed out by Iris Marion Young (2005, 141) is most often used in the realm of international relations such that it does not challenge state sovereignty. A conception of self-determination that is bound within a state territory has its limits, and I explore some of the tensions between state and Indigenous sovereignty and self-determination in the next chapter. For the purposes of this chapter, Indigenous self-determination is defined as "an ability, freedom or right to make decisions over one's own affairs both at individual and collective levels" (Kuokkanen 2011, 44). This very broad definition is implicitly limited by conditions and contexts within which those abilities, freedoms or rights can be exercised. As such, the ability, right or freedom to be self-determining is not absolute, and as Young (2005) argues, the idea of a right to be exercised in opposition to other rights has within it a liberal model of autonomy that is not

sufficient (143). However, beyond the difficulty identified by Young, three interview participants spoke to me specifically about how self-determination may manifest in ways that are not the full, pure expression of self-determination.

Kakfwi spoke about communities in the Northwest Territories that would not insist on Indigenous title and interests in land but would instead opt for other forms of self-determination. He also spoke of the Inuit negotiating for public government in the form of the Territory of Nunavut. He felt very strongly that those who are outside those particular communities could not judge them as "sellouts" when outsiders are in a position of relative privilege or have different circumstances than the people in communities who are making judgments about their own welfare.

The problem, though, is that in some instances the community may be significantly disadvantaged economically and thus be forced into a position where they must accept less than they might otherwise accept in a bid for self-determination. In this type of situation, the injustice of being in a worse negotiating position must be acknowledged, while still understanding the position of the community. What is the best way to deal with inequality of starting positions in a bid for self-determination?

Dene advocacy and development of the Dene Declaration was successful, the Dene Declaration was fully received by Justice Berger, he transmitted its message to the Canadian public and the Canadian government, and the recommendations were accepted. However, the negotiations that followed did not result in the implementation of the full vision articulated in the Dene Declaration. Why was that so? In answer, I point to Kakfwi's statement on several key factors that played a role in the difficulties with implementation. Apart from loss of key personnel within the Dene organization who

could have advanced the vision, different communities faced different pressures. More remote communities had few resources and opportunities. In his own words:

> I always figure there's the High Priest of Rights. There's people who pontificate, I guess, about what people should do and they should never agree to extinguishment. That's a poor deal.... You sold out.
>
> . . . .
>
> I was there and the Inuit said, "Steve, you could talk about Denendeh, Dene government all you want. Us, Ottawa loves us. They're going to give us Nunavut, our own territory and all we have to do is agree to a public government and we're going to do it. We don't care. We'll make it work for us. It's just another tool. I like it.… Quit trying to push for the Cadillac because you ain't going to get it. Try for something else.... And you'll get the Cadillac anyway. Agree to a public government. Don't ask for Indigenous government." That's what they did and that's what they got. I supported it. I pushed a boundary. We negotiated a boundary and I helped create Nunavut.
>
> My answer to . . . all these other High Priests—or whatever you call them—on rights is this: a man wants to survive and "he says, all I need is five thousand bucks, a truck, some traps, Ski-Doo and I'm ready to go". Somebody else will say, "nope, I need <u>all</u> my rights negotiated first, and then we'll talk treaties." And I find if you're not living in communities, if you're not living in the front lines, it's a different issue. For instance, the Gwich'in, they waited from before Berger. Said we'll push off the pipeline. We're not going to get any jobs but we gotta get our land claim. We gotta get our land rights. That was fine. I mean, you live around here.... Yellowknife hasn't changed.
>
> They got everything they need. There's jobs for their people, their families. Fort McPherson, there's no jobs there. Good Hope? There's no jobs and people are saying, "you know what, if there is a pipeline proposed again, if they're going to open up the valley to oil and gas exploration on the scale that they were thinking about back in Berger, we are dead. We haven't got a frickin' prayer. And so we have to get whatever deal we can and we'll just make sure it's enough for us." One man can make five thousand dollars mushroom into a million bucks and have a thriving, healthy family.
>
> Another guy can say, "look I want three million dollars and all these other things" and not survive. So, what do you do? That's always been my attitude of it. You can't say, people it's up to you except if you start to choose these things [laughs]. All people can do is say, "you know what, Steve, we need it. We can't wait anymore we're going to get caught with our pants down. We gotta make a deal. Yellowknife doesn't need it, they're never going to settle unless they have half a million square miles, all their rights and a new government. We can't wait. We gotta go with what we got. We ain't gonna survive." (S. Kakfwi, personal communication, March 6, 2020)

Kakfwi pointed to several key things: self-determination, if it is to be truly respected, has to mean that the wishes of different communities need to be respected, because they are coming from different situations, in different territories, and with different levels of need. As pointed out by the Second Senior Official, this does not mean that their needs are static and that in taking over jurisdiction over certain aspects of Indigenous life, there is no possibility of taking jurisdiction on other aspects. In discussing treaty negotiation, the Second Senior Official said the following:

> People [in government] are making progress. The way we negotiate and things about treaties is way different than it was before, but for somebody like me who has been part of those discussions and worked on treaty negotiations, for example, I always was impressed by the fact that people were always saying "well, we need to have everything together and sign the treaty with all the certainty that makes sure that nothing's going to happen after". When actually—normally—a treaty could be one page. It could be two pages. It's just normally establishing the relationship that could help a lot with the duty to consult. The court told us that. You guys are supposed to be gentlemen with each other and ... or gentlewomen with each other. You're supposed to talk to each other. You're supposed to be neighbours. (Second Senior Official, personal communication, June 29, 2020)

In discussing the approach to self-government negotiations with the Dene and in the 1980s and 1990s, the Second Senior Official said the following:

> Interviewer: The Declaration was accepted—as you know—the government accepted the recommendations but when it came down to the negotiations—and, I mean, I wasn't there but—when it came down to it, when you read Glen Coulthard's analysis of it—and you look like you're aware of that—he's basically saying that the government whittled down what they were willing to talk about in the actually comprehensive claims negotiations.
>
> You're just not going to get anywhere near a full interpretation or a full response when you can't even listen or deal with most of what the claim is about. Is it fear-based? Is it.... Why is it that we can't.... I know it's huge and it really disrupts government but why are we not willing to be disrupted?
>
> [Pause]
>
> Because you talk about certainty before and certainty has been a big thing.

Interviewee**:** It was. It was for years. The only objective that the federal government was looking at in those negotiations.... When I was a student in the 90s—even in the 80s—at university and I was looking at it, what I looked at was just the federal government wanting to confirm its sovereignty on the land. So, we're going through the treaty negotiation as.... I'm going to give you money and some land in exchange for certainty and development. That's it, that's all.

Whatever you can say, that's what drove the.... And of course, certainty forever, not for five years, ten years, or fifteen years. That was the regime. That was the philosophy. All the negotiators during those years, that's exactly how they approached. Their mandate was based on that.

Interviewer**:** But has it changed?

Interviewee**:** Yeah. It has. It has. It has, but I'm not sure it has been completely understood by all parties. I still believe that there are some officials in the federal government who still believe that at the end of the day what we want to achieve is certainty.

. . .

I do understand that you have to be frank and honest in saying to First Nations groups, look our interest is also that we can continue to develop the land or some of the land. Our interest is to make sure that the economy is going to continue to grow for this and this reason. There's nothing bad for one of the parties to go to a treaty or to a negotiation expressing exactly what you're looking for. That for me is not necessarily bad.

The issue is just when it becomes the only bottom line. That's what was the issue. I think we evolve. If I look at, for example, some work we have done with the Haida Nation on "let's agree to disagree" on some elements.... When I look at what the Inuvialuit were proposing recently on self-government, we want a ten-year agreement. We didn't want something that's going to be forever. And people were like, why would I sign something for ten years? Because ten years is better than nothing. Just do ten years.

When I look at processes where we're thinking about how you reopen a treaty or how the treaty would evolve over the years . . . I think, yes, we're getting there. It takes time. It's not going to be easy but I think we're getting there. We're talking about tectonic changes here and not just for Canada. I think even other countries look at it and it's not the way states deal with land and people.

States like to define, like you said, their sovereignty. They are defined by what? They are defined by as old Max Weber used to say, by the authority to exercise violence and control over land and the people. It's really hard for states to accept that actually it's maybe different. We accept it through the federation with

> provinces but that's the move from [the] old-fashioned way to self-government. (Second Senior Official, personal communication, June 29, 2020)

This statement is full of concepts related to purity and to the pitfalls of resoluteness and not being disoriented, but also it raises the issue of identifying what cannot be abandoned when negotiating for self-determination. The Second Senior Official states that government negotiators have changed their approach away from certainty and extinguishment and are now looking at shorter agreements. He reiterates, however, that there is an underlying interest in developing land, or securing the ability to control land. Though not seeking extinguishment of the ability of Indigenous peoples to assert future rights, there is the goal of seeking agreement over land use and development. The non-Indigenous relation to land is still one of resource exploitation and extraction for wealth, and so there is a limit to the scope of what types of disorientation will be considered. The Second Senior Official also points out that the understanding of sovereignty as domination and control over land, territory and people within defined borders is malleable, and can shift. How much it has shifted, and where it should shift toward is an open question. The nature of the possible shift will be explored in the next chapter.

Among some senior officials, it appears that there is an understanding of the complexity and non-purity associated with approaches to self-determination and some movement away from absolute control by the state in terms of certainty and extinguishment. However, the fact that Indigenous communities can be significantly disadvantaged in the power dynamic with the state was not overtly recognized as part of the negotiation dynamic that was described to me. Additionally, though finality and certainty are not sought in negotiations, it is not clear how the state achieves its goal of economic growth without ensuring that Indigenous peoples are aligned with that

particular goal. If economic growth is not the Indigenous model, then what happens to the negotiations?

Kakfwi described significant economic disparities that affected how different communities negotiated, or might negotiate in the future. According to Kakfwi, who sees the reality of economic and social impoverishment in Indigenous communities in Dene territory, self-determination must be practised in the context where people are situated, regardless of the power differential with government. Though a full vision of political self-determination might not be sought by a community that has more fundamental economic needs, he felt that this vision of less-than-ideal self-determination must be respected as right for that community, and in that time. His description of a complex dynamic with an impure or imperfect result that actually allows a community to achieve its more immediate goals, while perhaps also keeping an eye on another more complete idea of self-determination, reflects Shotwell's idea of working in a dynamic and complex situation toward a prefigurative vision of society.

Regardless of the fact that undoubtedly economic disadvantage and inequality can be attributed to the impacts of colonization, there are two normative principles that apply, according to Kakfwi and the Second Senior Official: 1) communities must be respected for their self-determination wishes, regardless of whether they fulfill the requirements of a full vision of justice; and 2) the particularity of different communities, in different language groups, regions, governance models and economic models should be respected in light of the fact that each group will develop in its own way. This latter principle is aligned with the notion that there is no single definition of Indigeneity though there may be similarities among peoples in their responses to European incursion. Instead,

there will be different concepts of how it is to exist as a people, and also different histories and visions of the future. It will be important, however, that any response from the government be mindful that certainty and finality cannot be an aspect of the response. As with the recommendations in chapter 3, the power-holder should not take a position of resoluteness. Only by conceding resolution and being open to disorientation and revision can the oppressive relation of power between the government and economically and politically disadvantaged communities leave open the possibility of resurgence over time. However, as mentioned, if the underlying goal of government is to promote economic growth based on extraction of resources, it might be at odds with economic models that Indigenous peoples would prefer to assert. If this is the case, then an underlying problem exists, despite an incremental approach that does not overtly seek formal extinguishment and certainty.

Watts provides guidance on the criteria for supporting self-determination while meeting Indigenous peoples where they are:

> . . . I think a lot of things are kind of viewed as all or nothing rather than being stepping-stones for Indigenous communities from a capacity point of view and from a governance point of view to return to fully functioning, fully self-governing, perhaps even autonomous or semi-autonomous bodies that are implementing Indigenous law that's been developed with community.
>
> Sunga: What do you mean by all or nothing? I'm looking at the notion of purity as well. Do you mean that they are looking for 100% success? What do you mean by....
>
> Watts**:** What I mean by "all or nothing" is that I think too often the process gets defined by whatever the outcome is … is it going to be an expression of the inherent right to self-government or expression of section 35? There's no revisiting that. It's not like well, this is going to be half of section 35, or this is going to be a stepping-stone to section 35. We still need to unpack section 35 or this is without prejudice to the inherent right to self-government.
>
> Sunga: Oh, okay.

> Watts**:** And I think that, one, many communities right now aren't prepared to go to like a full expression of the inherent right to self-government and want to do these confidence-building types of things but I think too often it gets framed as, "you know what, either we're working on this full expression of section 35 or you have this other program that's available to you that's just sort of a status quo with a special little ribbon wrapped around it or something".
>
> That's sort of the "all or nothing" and so "nothing" becomes sort of a default and things don't move. Although we do see some things. Like, I think if you asked Mary Ellen Turpel about the *Child and Family Services Act*—I think that was C-92—all the special things that she had put in there in terms of really Indigenous authority—Indigenous self-government—the hierarchy of laws that get expressed within that Act, she would probably say this might be sort of the most advanced piece of legislation with respect to Indigenous people within Canada.
>
> Sunga**:** So there's been steps forward.
>
> Watts**:** Yeah. Many steps forward. I think that the box that people are playing in is important to consider in terms of the questions that you're asking. (B. Watts, personal communication, July 1, 2020)

Watts points to another area for failure in the binary or pure approach to self-determination; if the possibilities inherent in a nuanced and progressive approach are not visualized, and any advancement that is less than 100% is considered to be a 0, then there is no actual advancement that is visualized. Watts sees this all-or-nothing approach as a peril that exists with government officials, who will then not explore conceding control to an Indigenous community with whom they are in discussions. And, as articulated by both Watts and the Second Senior Official, there needs to be the possibility envisioned in every new movement forward that there will be further possibilities and expressions of self-determination. Without that, the state is in the position of taking advantage of inequality and poverty that is itself a consequence of colonization, dispossession and in some cases relocation. If a community seeks to assert jurisdiction in a particular area, then support must be provided for that exercise of jurisdiction while remaining open to further assertions of Indigenous jurisdiction. In other words, the assumption of jurisdiction by

Indigenous communities may not be complete or even pure, but it is still a move toward Indigenous justice. That movement should not be assumed as crystallized and fixed, but should be part of an ongoing journey and relationship between the state, which cedes jurisdiction, and Indigenous peoples who may claim more jurisdiction in the future. This complex understanding of exercises of self-determination is reflected on by Watts:

> It's not binary. It's not like this is justice and that's not justice. I think that's true and I think that's part of our problem. You know, it goes back to ... we talked a little bit about failure and I think that's true too. Like, if all the.... If, as Indigenous people, we're satisfied with the Sechelt model of self-government is the Sechelt model of self-government a failure? Because it's not a full expression of international notions of self-determination?
>
> I don't know. I think you go talk to the Sechelt people and they'd say "we're doing really good." You know, in time, maybe we want to do some other things but things are pretty good. And everybody made fun of the Sechelt for a long time because they went for what was viewed as a municipal style of self-government. . . . Sechelt—that community just rocks and they probably have better language retention and culture retention than most communities in Canada. (B. Watts, personal communication, July 1, 2020)

6.4.1.2 The Impossibility of Extinguishment within Indigenous Knowledge Systems

Coulthard and others have criticized the state's need for certainty and resoluteness when trying to negotiate the outlines of Indigenous interests in land. Shiri Pasternak (2017) argues that efforts at quantifying various aspects of territory are used to dispossess Indigenous peoples of their territory and control over their own resources such as traplines. She uses the examples of mapping, census and land surveying (108-10). With respect to extraction resources such as oil and pipelines, the Berger Inquiry and negotiations with Coastal GasLink in British Columbia, the Crown seeks certainty in order to enable pipeline companies to negotiate the ability to proceed with their projects

where *Constitution Act, 1982* section 35 Aboriginal title and rights are claimed or in question.

As mentioned above, one of the means of establishing certainty within the constitutional jurisprudence of the Euro-Canadian legal order has been to seek consensual extinguishment through agreement or treaty with Indigenous communities, such as through a self-government agreement or modern treaty (McNeil 2002, 304). Kent McNeil has reiterated an argument made by Blackfoot scholar Leroy Little Bear that Indigenous peoples did not have a concept of land that would include the authority to transfer absolute title to the Crown (305). He quotes Little Bear as follows:

> In summary, the standard or norm of aboriginal peoples' law is that the land is not transferable and therefore is inalienable. Land and benefits therefrom may be shared with others, and when Indian nations entered into treaties with European nations, the subject of the treaty, from the Indians' viewpoint, was not the alienation of land but the sharing of land. (Little Bear, 1986, as cited in McNeil 2002 at 306)

So, McNeil argues, consensual alienation must also be possible within the relevant Indigenous legal order for it to be valid. In his interview, Peters made the same point:

> Treaties—in my mind—were central to the fact that we—as Indigenous people—we had these. This is our land and everything that we have flows from this land. So how was it possible for us to sign a treaty and give away all of our land that the federal government says we did. Not possible. (G. Peters, personal communication, July 9, 2020)

From the above, it appears that obtaining certainty as a policy and economic goal of the state is morally problematic. First, if certainty is a precondition for jurisdictional dispossession as described by Pasternak, then it is being used to alienate Indigenous people from their ability to exist as Indigenous peoples on their territory. Second, if extinguishment is required by the state as an absolute precondition to achieving agreement on a modern treaty, as occurred with the Dene, then the terms of agreement preclude the possibility of *evolution* toward Indigenous self-determination related to

Indigenous interests in land, and corresponding notions of Aboriginal title in the Euro-Canadian legal tradition. Finally, if Indigenous legal orders do not capture a notion of property that contemplates alienation of land, then extinguishment means requiring an Indigenous community to work outside their legal order and collective epistemic system in order to obtain benefits under treaty. As such, a notion of certainty that requires giving up interests in land so central to self-determination will likely curtail or limit efforts to address Indigenous justice claims that are centred around existence as Indigenous peoples.

Watts and the Second Senior Official were clear that it is important to have the assumption of Indigenous jurisdiction over specific matters in line with the direction of and within the capacity of communities, while being open to further assumptions of jurisdiction. Given the ongoing nature of the journey toward self-determination, the state and industry should move away from a focus on certainty of the kind of claims and the definition of Aboriginal rights and move toward a commitment toward strong relational practices. Such practices must include engagement and dialogue that is meaningful and properly done.

6.4.2 Consultation and Fracturing

Engagement and dialogue are important aspects of strong relational practice. However, historically the Crown has been found not to have consulted properly and has received direction from the Supreme Court of Canada. The Supreme Court of Canada has found that the Crown has not only a moral duty but also a legal duty to consult Indigenous peoples prior to making decisions that might adversely affect as yet unproven Aboriginal rights and title claims *(Haida Nation v. British Columbia [Minister of Forests]*, 2004

SCC 73 at para 9 and 10). This duty is grounded in the principle of the honour of the Crown. My concern is with the political and ethical framework and not the legal framework around the honour of the Crown. Assuming that the Crown wishes to engage in consultation as part of a dynamic and ongoing relationship, what kind of engagement or consultations is ethically robust and supports the full meeting of Indigenous justice claims?

6.4.2.1 Fracturing

The Supreme Court has imposed on the Crown a legal duty to consult. The need to impose a duty to engage with Indigenous peoples implies a significant power differential in a binary between the Crown and Indigenous communities and the need to address the differential. I agree that the power differential between the state and Indigenous communities is significant and can operate in oppressive ways. And, as I have argued, the binary itself is problematic. One of the challenges that arises from assuming that the binary is the only format for the exercise of power is that it does not lead to relational practices that incorporate acknowledgement of the issues that arise in lateral relationships within and among communities.

One such issue is fracturing within communities that have traditional or hereditary governance structures as well as governance structures imposed by the *Indian Act* and integrated into communities. Watts gives a strong account of the issue:

> So, I drive … through ... Alderville and the signs in the community said, all cannabis shops closed by order of Chief and Council. By order of Chief and Council. This an *Indian Act* First Nation and the cannabis shops aren't operating pursuant to Alderville law, they're a business collective almost like the law society or some sort of medical society. They're self-regulating. Council shut them all down. By order of Chief and Council and they were shut down.
>
> So, I thought, well, that's really cool. And you see that in a lot of Ojibwe communities and some of the Cree communities. By order of the Chief and Council,

> or under the authority.... Now, I'm trying to imagine if I saw that sign at Six Nations, by order of Chief and Council because that sign wouldn't last very long because the fracturing is self-evident here. You see it creeping into some other communities in terms of, well, you know, what did our clan system look like? And does Chief and Council really represent the principles and values that our ancestors lived by?
>
> What did our matrimonial property law look like? Or, what did our child welfare law look like? But I think right now there's—with some communities—there's still a greater confidence in Chief and Council—*Indian Act* Chief and Council—than there is in many Iroquoian communities where I think in pretty well all Iroquoian communities there has been the parallel government. The Indigenous government has survived the colonization of the community.
>
> So there's already the fracturing and because of that fracturing it's difficult to do anything by consultation. Well, consultation is a Supreme Court of Canada and a federal government notion that doesn't apply to us because we aren't subject to the *Indian Act*, we're not subject to federal law—Canadian law—we're different than that. So we'll set our own rules on consultation. Well, part of the community is like, you know this consultation process looks pretty good. We're going to participate. So even the ability to participate in reforms that might be good for the community become difficult because—even though we're all cousins—there's this huge divide in the community. It's almost like the U.S. with the Republicans and the Democrats.
>
> And we see this in a lot of communities—a divide. We see it in a lot of B.C. communities. They've been able to—I think—figure out some ways of being able to have both Hereditary Councils and *Indian Act* Councils sort of work side by side but on some of the tough questions, it's pretty obvious that if the community isn't given the opportunity to figure out how they're going to be consulted then the federal government will probably get it wrong. (B. Watts, personal communication, July 1, 2020)

Indigenous forms of governance surviving colonization along with communities being governed through the *Indian Act* is an important issue that arises again and again.

The divisions within the community referred to by Watts are also reflected by the language used by different members of various communities. Some people use the language of termination to describe the government's stance and/or impact on Indigenous peoples in Canada. The distinction between "stance" and "impact" is an important one because government officials do not necessarily carry an intention of termination. When I questioned Peters, a long-standing advocate in Southern Ontario, about the use of the

language of termination when referring to the state's agenda vis-à-vis Indigenous peoples, and the lack of intention in current government officials to terminate Indigenous peoples as distinct peoples, Peters clarified as follows:

> The problem is that they were never intending that because they have gone through so much that they figure we're already on the other side of the table. They already think we're on their side. When they started that process—in the early 1830s and 1840s—they set out on a massive plan to be able to eradicate us. When they got to a certain point they even changed the *Indian Act*. They changed our forms of government. They got rid of our women. They did all this kind of stuff and everything and then when they thought it was moving too slow—that assimilation was moving too slow—they took our women—our kids, rather—and they sent them to residential school, you know? And then in the 60s they took our kids!
>
> And then, when they wrote the 1982 Constitution and all that kinda stuff, from their perspective, they're doing the right thing right now. They're doing the right thing by signing these agreements and by negotiating because, in their minds, we're Canadians and we're working together. Okay?
>
> It's fundamentally different from what I'm saying because I don't think ... nobody can ever tell me when I became a Canadian citizen. Nobody can explain to me when our nation joined Confederation. Nobody can explain to me why we have these discussions if we're all Canadian citizens.
>
> Sunga**:** I understand what you're saying. You're saying there's a presumption there. There's a presumption that's not correct.
>
> Peters**:** Absolutely! I mean, they're all trained that way! Like, the bureaucracy. They're conditioned already to know that what they're going to do is that they're going to make agreements with us. They may not be conditioned to know that what they're doing is terminate—trying to terminate our people—our existence off the land. They may not know that but they sure as hell should because they get . . . enough feedback from people to know that there's something not right about what they're doing (G. Peters, personal communication, July 9, 2020).

Peters represents a perspective within Indigenous political movements that is by no means uncommon, but it is a difficult perspective for non-Indigenous peoples to hear. People want to hear that they are doing something good, not that what they are doing is not good enough and for a reason that is hard for them to grasp.

However, this perspective on nation-to-nation status and how that impacts on the approach to discussions, engagement, consultations and negotiations is critically important because it means we, as non-Indigenous peoples, need to dig beyond assumptions of commonality and Canadian nationhood to understand specificity among Indigenous peoples, and what it means to exist as an Indigenous nation or people. It may mean that we do not expect a single position on any particular issue, but that the peoples who are related to a territory be given the space to work out governance formats that work for them. As Peters says:

> My message has been virtually the same for forty years. I've been trying to find a solution. Along the way I quit focusing on Canada. Gotta focus on our communities and what we have to do to be able to uphold our side of the treaty and uphold our land responsibilities and uphold our obligations because I felt very strongly that if we didn't do that we were actually starting to not uphold our end of the treaty … we were starting to . . . release to government in some way in the sense that we would not be able to hold them accountable.
>
> . . .
>
> I push communities to be able to look at trying to look at a different form of governance, you know? I looked at—said—you don't have to go all the way back and, you know, recreate your Indigenous governance. I said, it's great if you can do it but if you can't do it look at some blended form but you have to include the people. The will of the people has to be the most important part of consent. Consent can't be governed by the Chief of Council under the *Indian Act*. (G. Peters, personal communication, July 9, 2020)

Peters is implicitly rejecting a purity analysis around Indigenous governance practices. He advocates for a blended form of Indigenous governance where the important element is not the form of governance but the connection in and between the people through their consent. Indigenous conceptions of interrelations and connection are foundational. That is what makes it legitimate and real in the present-day context, where governance may not look exactly as it did many years ago.

Another key point is the spectre of bureaucrats holding up progress on addressing Indigenous justice that was raised in chapter 3. Politicians represent more or less progressive movement on any given issue, but it is perceived that bureaucrats hold back any desired progress that might be articulated. However, as argued earlier, bureaucrats follow existing structures, internal governance, procedures, policies and accountability frameworks. I have further argued that it is these operations of government that should be the focus for structural change so that there is not an embedded bias or weight against addressing Indigenous justice claims. It is the politicians who must provide the direction to address structural forms that restrict responses to Indigenous justice claims. Ultimately, it is the people of Canada who must give this direction to the politicians.

6.4.3 Non-binary Governance and Law: Consensus

On the issue of governance, Peters has raised the concern that Canadian governance assumes governance over Indigenous peoples. The state's governance practices, based as they are on majoritarian rule, may be a site of difficulty that is unacknowledged. The Canadian form of governance relies on majoritarian rule with constitutionally protected rights of Indigenous peoples, but these can be overridden if the broader interest is justified. Kahente Horn-Miller (2013) has looked at the participatory governance practices in Kahnawa:ke within the governance structure and legal order of the Kanien:keha'ka. She describes the governance structure and legal order as follows:

> The earliest records indicate adherence to a way of life that encompassed principles of peace, power, and righteousness incorporated into a functioning Constitution called the Kaienere'ko:wa, (9) or the Great Law of Peace. This Constitution is documented using mnemonic devices known as wampum belts. Recited every four years, these belts reference political, social, and spiritual aspects of life encompassed in the Constitution. Narrativized as The Peacemaker's Journey, the

> story describes the formation of the Confederacy and the principles inherent in the Kaienere'ko:wa. The Wampums or Laws in the Kaienere'ko:wa are based on natural relationship between plants, animals, and humans and developed into a functioning Constitution that served to guide the six nations through difficult times into a peaceful relationship. The relationship deepened further between the nations and became one of mutual respect and survival as colonization arrived in North America.
>
> The Kaienere'ko:wa: is where the principles of justice are codified, with the fundamental principles of peace and harmony at its foundation. The Kaienere'ko: wa: establishes rules for governing over matters such as adoption, emigration, relations with foreign nations, war, treason, succession, religion, laws of descent, funerals, and civil matters. As a true democratic document, the Kaienere'ko: wa describes a process in which everyone has a voice. Law is based on achieving substantial agreement and consensus in decision making since the Constitution focuses on resolving community or national concerns rather than individualistic ideals. In this way of thinking, each individual is part of a greater collective body; every act that an individual performs has direct or indirect impact on the world around them. Known as the Seven Generations Principle this doctrine serves as the basis for understanding that a person's responsibilities are more far reaching than the individual. This philosophy is inherently about accountability and respect for oneself and the future seven generations. This important principle at the heart of the Kaienere'ko:wa is also reflected in the procedures surrounding the enactment of the Constitution.
>
> . . .
>
> Decisions must be made that reflect the will of the people and be made with their welfare in mind. Thus the decision making process is not an adversarial one. It relies on calm deliberation, respect for diverse views, and substantial agreement. The main objectives are engagement, respect, and the peaceful resolution of all matters. (114-15)

Such a process incorporates the positions of those who are not in the majority, but there is also an obligation on each individual to act accountably to those in relationship with them, including the natural world and future generations. Thus, consensus governance values voice, but places that voice in a matrix of relational responsibilities. Horn-Miller reiterates Grand Chief Peters' point that governance flows from the will of the people. She also makes the important point that consensus decision-

making does not mean unanimity. Community members can have dissenting views, but they are asked if they can consent to the decision.

6.4.3.1 Consensus in Governance

Horn-Miller describes the process of law-making as well as the process within the legislature for approving laws. Through her work, we can see the community in Kahnawa:ke is taking jurisdiction of their own law-making processes, even as it is a work in progress. The Community Decision Making Process in Kahnawa:ke is a manifestation of contemporary values within an Indigenous community and their development into law and decisions using a consensus-based process. The nature of the process potentially avoids fracturing within the community and the type of adversarial polarity that arises in majoritarian processes. However, as pointed out by Horn-Miller (2018) in her discussion of the Community Decision Making Process's decision respecting adoption, entanglement with colonial concepts, definitions and structures relating to belonging and identity mean that the decision-making process remains implicated in fracturing despite a desire to reclaim Indigenous governance. To that, end she argues that it is necessary to create "irreconcilable spaces" which are beyond intersection with and apart from colonial thought (355). With respect to the adoption issue, where the decision by the Community Decision Making Process relied on a form of blood quantum to determine membership, traditional conceptions of inclusion into Mohawk communities were not taken into account adequately. Thus, resurgence of Indigenous values, legal orders and diplomacy practices in a non-colonial space are critically important along with the nature of the governance process itself.

6.4.3.2 Consensus within the Euro-Canadian Governance Structure

Because of my ongoing concern with polarization, binaries and oppression, I wanted to enquire about the possibility of shifting Canadian governance toward a more consensus-based or coalitionary style governance model. With this thought in mind, I asked Kakfwi about the possibility of integrating consensus-based practices into Canadian governance practices—perhaps through the use of modern European coalition government structures. As the former premier of the Northwest Territories, he had practised consensus-based governance at the territorial level. He felt that it would not work in the broader Canadian context, at least partially because of the scale of decision-making and perhaps more because of Canada's constitutional structure. As he pointed out, consensus-based decision-making within his Dene community operated on a small scale very effectively. But to scale it up nationally, given our constitutional structure and the status of provinces such as Ontario and Quebec, would be a major challenge. I acknowledge that shifting the Canadian state's governance model is a difficult concept to address, given that it requires significant structural, constitutional and electoral reform. However, I argue that it is possible to modify majoritarian practices in government through the use of informal coalitionary and consensus-based practices in strategic locations so that they shift the power dynamic in favour of Indigenous peoples.

6.4.3.3 Consensus Practices in Law

One such strategic location is in the development of legal opinions to support normative policy decisions. As described by Horn-Miller, in a consensus-based system the law-making process is transparent and open and the proposed law itself is subject to rigorous rounds of discussion. Those most closely affected by the laws are balanced through

discussion with others who represent broader community interests. Once the community decides to draft a law, it moves forward to the drafting and community hearing stages (Horn-Miller 2013, 123-24).

This process sounds very similar in some respects to the Canadian legislative process, except for one crucial factor. Within the Euro-Canadian legislative system, the policy drivers behind proposed laws mostly come from the government in power. The successful passing of a law almost always depends upon the support of the government in power. Power comes from winning elections. In the Kahnawa:ke system of law-making, there is room for the development of norms or policy among community members to build consensus at the first instance.

Aside from changing the entire legislative system in Canada, there is one way to modify one structural feature within the Canadian government that was highlighted by the Truth and Reconciliation Commission. TRC Call to Action 51 provides the following:

> We call upon the Government of Canada, as an obligation of its fiduciary responsibility, to develop a policy of transparency by publishing legal opinions it develops and upon which it acts or intends to act, in regard to the scope and extent of Aboriginal and Treaty rights.

The Minister of Justice and Attorney General of Canada are the same person, with dual roles. The roles are as follows:

> The Minister of Justice has lead responsibility for 46 Acts of Parliament and shared responsibility for another 6 Acts and areas of federal law by ensuring a bilingual and bijural national legal framework. The responsibilities include a number of legal policy areas, such as criminal justice (including youth criminal justice), family law, access to justice, Aboriginal justice, public law, and private international law.
>
> The Attorney General protects the interests of the Crown by litigating on behalf of the Crown and by providing legal advice to the Government, departments and agencies of government. (Canada 2015)

Thus, the chief law officer of the Crown has a role to develop and translate norms, as represented by policy, into law as the Minister of Justice, but also has a role to represent the interests of the Crown as the Attorney General. The role of Attorney General assumes at least an initial position of opposition or adversary to all comers whose interests may diverge from the Crown. If that fundamental assumption is unpacked, perhaps by situating legal opinions as addressing the interests not only of government but also of Indigenous peoples who may be challenging the government on a particular issue, the opposition between binaries can shift toward a listening stance and possible cooperation. In the context of addressing Indigenous justice claims through the development of opinions, the existence of the roles of law-maker and potential adversary, in the same institutional home, makes developing the norms for law-making with Indigenous people difficult to achieve.

In *Between Facts and Norms*, Jürgen Habermas (1996) explores the role of law in deliberative democracy as a tool of communicating norms into action:

> The need for regulation is not found exclusively in problem situations that call for a moral use of practical reason. The medium of law is also brought to bear in problem situations that require the cooperative pursuit of collective goals and the safeguarding of collective goods. Hence discourses of justification and application also have to be open to a pragmatic and an ethical-political use of practical reason. As soon as rational collective will-formation aims at concrete legal programs, it must cross the boundaries of justice discourses and include problems of value (that depend on the clarification of collective identity) and the balancing of interests. (154)
>
> . . .
>
> In the discursively structured opinion- and will-formation of a legislature, lawmaking is interwoven with the formation of communicative power. (162)

Habermas' focus on will-formation recalls the process in Kahnawa:ke where will-formation is a deliberative process grounded in consensus. Built into the foundational

development of community norms is the non-polarizing practice of deliberation and discussion, as opposed to reliance on political power. Linking TRC Call to Action 51 to the consensus-based practices in Kahnawa:ke and Habermas' description of the role of law in translating norms to practice, I argue that legal opinions developed by the Minister of Justice relating to Indigenous peoples may benefit from the norms of the Indigenous people most affected by the opinion being integrated into the opinion and law-making process. If Call to Action 51 is implemented, even this move toward openness and transparency—which is not necessarily fully consensual will-formation—will create a situation where legal opinion writers in government know that their opinions can be read by those they will impact. Thus, there will be awareness of a broader field of norms beyond the interests of the Crown. As such, a move in line with TRC Call to Action 51 supports a non-binary approach—and possibly a more consensus-style attitude—to the translation of norms to law in Canada. Thus, the structure within government can move toward stronger relational practices between the state and Indigenous peoples in Canada.

Essentially, from looking at the analysis around Indigenous collective existence and its place within Canada, and the types of processes used to build relationships between Indigenous peoples and non-Indigenous peoples as represented by the state, I am looking for a type of restructuring that simultaneously acknowledges the type of nation-to-nation status that Peters speaks of, while opening up the possibility for consensus-based processes as opposed to majoritarian and adversarial processes.

6.5 Conclusion

This chapter unpacked the concept of recognition, given its predominance in law and policies concerning Indigenous peoples internationally and in Canada. Indigenous

scholars such as Coulthard and Simpson provide a strong critique of state recognition. In building upon their analysis, I argued that recognition should not be only conceived of as binary and vertical in nature, with recognition being conferred by the dominant upon the oppressed. Intra-community recognition is an important source of political power that should be acknowledged and supported, and not be diminished through practices that contribute to fracturing within communities. I also applied Shotwell's notion of purity to allow for complexity and imperfect goals and a move away from certainty, while understanding that a more robust vision of justice exists simultaneously with the reality of lived injustices. I provided an analysis of two other strategies that can be employed by the state: 1) avoid fracturing the governance practices within Indigenous nations; and 2) build consensus-based practices in law-making to allow for a broader base of norms that can rectify the majoritarian structures that oppress Indigenous peoples overwhelmed by settler-colonial political power.

The next chapter delves more deeply into structural reform at the macro level.

Chapter 7 Rethinking Sovereignty

> So, you know, in our world, when we talk about justice, we talk about making things right. That's as simple as it is. It's called restoring balance. For us, when we look at it ... because everything that we do starts with us as an individual because we hold what we understand as sovereignty, that sovereignty is not like boundaries and stuff. You know, like, for Indigenous peoples it's our mind and it's our heart. It's a feeling. It's a state of being that we collectively share together and so we create that notion of sovereignty amongst us.
>
> And so, when something goes out of balance, you have to fix it. Right now, our relationship with Canada is out of balance. That's our form of justice is to say we have to bring that back into balance. So, Canada, you're out of line. You've done these things, you have to stop that, you have to remove those things, you have to get back to a place where you could be a participant again, and we can start to build and figure out how we work together again. (G. Peters, personal communication, September 9, 2020)

7.1 Introduction

Earlier chapters have examined the role of the individual working toward justice while being situated within an institution that is structured to perpetuate oppressive power relationships with Indigenous peoples. I suggested that an important way to open space for institutional change is to allow for disorientation and irresolution on the part of institutional officials, while conceding to the resolution and vision of Indigenous advocates. I focused on two commissions and inquiries tasked with listening to Indigenous justice claims and analyzed their work. I also examined recognition theory as one of the main constructs that is used in relation to state-Indigenous relations. I looked at some conceptual frames that limit our thinking around recognition, and explored some practical challenges associated with the binary and vertical construct of recognition that tends to underpin state policy and action. My analysis moves toward the last outstanding issue concerning state responses to claims for Indigenous justice that I will address in the dissertation: the fundamental difference between the state's interests in economic growth

and Indigenous peoples' interest in existing as self-determining Indigenous peoples. These two sets of interests are often framed in terms of competing sovereignties.

This chapter will examine sovereignty in more depth by starting with the claims of the Mohawks of Kahnawa:ke before the Oka Crisis and the work of the Royal Commission on Aboriginal Peoples (RCAP), which arose largely because of the Oka Crisis and claims to Indigenous sovereignty. I advance possible ways of understanding sovereignty that are distinct from the liberal notion of sovereignty, ones that may help to navigate beyond an adversarial positionality between self and other and competing state sovereignties. In so doing, I present a way to work towards full Indigenous justice, despite the economic, political and structural injustices that exist today. I also look to the reformed constitutional structures that exist in Colombia and Ecuador for some ideas of the types of structural reforms that can better reflect different visions of Indigenous justice.

7.2 Indigenous Resistance/existence

7.2.1 The Oka Crisis

There is a long history to the dislocation and dispossession of Mohawk community members in and around Kanesatake going back at least as far as the 1670s, when Catholic missionaries displaced the Mohawks who lived on the Island of Montréal (then known as Hochelaga) (Obomsawin 1993). Relocated to Kanesatake, at the confluence of the Ottawa River and the St. Lawrence River, the Mohawks continued to face dispossession and harassment by the church, which appropriated land that had been granted to the Mohawks. When challenged by Chief Joseph Brant in the mid-1800s, church officials threatened him with police action and imprisonment (Obomsawin 1993). As noted by

Obomsawin, this scenario played out once again in 1990. The 1990 conflict had its roots in municipal development that had started in the 1930s. At that time, the people of Oka started using Mohawk territory for playing golf. In 1947 the municipality appropriated this land, including Mohawk burial sites. In 1961 a golf course was created. In March 1990 the Municipality of Oka approved a housing development and the expansion of the existing golf course. The Mohawks of Kanesatake protested the incursion into their territory, which included sacred burial grounds. The mayor of Oka gave an ultimatum that the Mohawks must obey a court injunction to stop the blockades by July 10 or he would bring in the police. The Mohawks did not obey and the police were brought in on July 11, 1990. In a gunfight where shots were fired from both sides, a Sûreté du Québec corporal was shot and killed. The Mohawks of Kahnawa:ke supported their relatives in Kanesatake and closed the Mercier Bridge. Many Indigenous peoples found common cause and travelled to provide support to the Mohawk people. The resistance continued through the summer, and in mid-August 1990 the Canadian Armed Forces were brought in with weaponry and armed vehicles. By August 20, 1990, 4,000 soldiers[6] had been brought in with 1,000 tanks, artillery trucks, other armoured vehicles and helicopters to replace the Québec police ("Oka Timeline" 2017).

The level of escalation and violence that the state was prepared to exert upon the Mohawks of Kanesatake is shocking in a country that was not ostensibly at civil war. As well, images of effigies of Mohawks being burned by their non-Indigenous neighbours

[6]There are varying numbers provided for the armed forces on the Canadian side and the Mohawk resisters. Audra Simpson (2014) states there were 2,650 soldiers deployed to handle fifty-five Mohawk Warriors (152). Dennis Nicholas and Kathy Skye refer to thirty Mohawks behind the lines at a later point in the conflict, likely because some left the encampment. By all accounts, there was a disproportionate military and police presence to control fewer than sixty Mohawk resisters.

and other overtly racist actions by police, army and the public brought to the fore the reality of Indigenous/non-Indigenous relations when a specific municipal act of dispossession came up against Indigenous resistance and assertions of sovereignty. It shocked everyone who believed in the national narrative of peaceful co-existence among Canada's various peoples that dispossession was an historical artifact and not a current reality.

The standoff lasted seventy-eight days. It resulted in the death of a Sûreté du Québec corporal during a gunfight on the first day of the protest,[7] and a stalemate respecting Mohawk land that has not fully been resolved to this day. It also resulted in political responses from Indigenous people across the country, and eventually the establishment of the Royal Commission on Aboriginal Peoples.

I interviewed Dennis Nicholas and Kathy Skye, both of whom were among the thirty or so Mohawk people who held their ground in Kanesatake to defend the cemetery of their people against incursions by developers and the Crown. I asked what motivated them to take a stand and to continue in the face of armed aggression on the part of the police and then the army. Nicholas said the following:

> My part of the story goes back when I was playing with my toys on the floor at my grandparents' place. The guys would come in and come visit my grandparents. What they talked about always focused on what was going on. Why things were the way they were in our country, the hardships that built the people to really be strong and to thoroughly understand why things were the way they were.
>
> . . .
>
> I would say that that is the foundation of the teachings that I gathered way back.
>
> . . .

[7] It is not clear which side was responsible for the death.

> And then when this whole story of what had happened … about what was to take place in the Pines and what they were considering on doing … the people, the families, said no. No, don't touch that graveyard. The people that are buried there.... It carries a lot of history. It carries a lot of hard-working people that have passed on the responsibilities, the knowledge, the language, everything that we have. We're not about to let anybody bother those people because they're resting now and they've earned it.
>
> That's the foundation of what helped me very easily say, "sure then we'll see to it that they're never molested or bothered because it isn't the thing to do". Neither will they start building—expanding—this project they had of this golf course and these houses—these mansions—that they had intention to build around it so we're going to have all that around something as sacred as that cemetery and of course the answer was no. No, that's not going to happen. (D. Nicholas, personal communication, September 2, 2020)

Nicholas' motivation for resisting the incursion of the Municipality of Oka and then the armed aggression of the police and army was based upon the knowledge passed down for generations about the importance of the land, and the pre-existing injustices. His actions were motivated by that history and his place among his relations and ancestors. His location among his ancestors, people and land sustained him through the terrifying attacks in July 1990:

> And you see, in this natural world and in the world of real medicines, and how this world really is that we live in … many, many times there was a lot of cheap tricks that were tried to hit us with, and mislead us, and put the fear in us, and none of that ever worked. Because if we use a few examples on that morning in July that really sealed the reality and the truth of all the times you stood at that fire and you gave thanks.
>
> When they started blasting away with the tear gas and concussion grenades and all that to carry out what they thought was going to happen, the wind picked up and it pushed all that tear gas back to the main road. Then the wind shifted and it pushed all the tear gas down into the village below us. As a result, I think there's one fellow that lived at the bottom of the hill that died from it. He just got overcome with all that stuff that came down.
>
> But, you see, that is the spirit that never died. What holds true to this very, very moment as we speak—that spirit that was given to us, honoured by us, and guided us, what was created at one point in time.... And a spirit created never dies. And that we understand and that we know. That we teach our children, our grandchildren, our great grandchildren to make sure that they get the full story of how those

> teachings get, and where it brings us, and how it helps us really submit into the back of our mother earth.
>
> That is our responsibility. It's to make sure that the women who have been given the responsibility to take care of our mother earth and what responsibilities we have. All that comes into the picture of all the reasons why everyone that took this step forward and made sure that those people—our ancestors who are buried there—were never molested and were never, ever touched.
>
> That's what happened there. So, yeah. From those times to thirty years later, I am ever so grateful, and happy, and honoured that the greater medicines saw to it that I experienced that and that I passed that knowledge on to my family, and friends, and the greater part of everybody that I come across who asks, "so what happened?"
>
> There's no sadness. It's an honour. Yeah, it was quite a morning. It wasn't the kind of mornings that I was used to waking up to, but that was the real deal happening. All the different stories I heard.... "Well, this is how they do it, you know? This is how it goes, you know?" So yeah, today I'm happy. I'm happy that I was honoured that way and I'm happy that—in this moment—I'm happy to share that story with you. (D. Nicholas, personal communication, September 2, 2020)

In the interview, Nicholas spoke of a profound connectedness and responsibility to territory, the past and the future, and maintenance of knowledge and relationships. His connectedness is what grounded him and sustained him during the attacks. His existence as a Mohawk on that territory, and the existence of all that relates to being Mohawk, was at stake. Recalling the concept of the field of justice that was introduced in chapter 5, his claims were centred in his relationship to land. The potential for addressing his claim in the moment was significant, in a temporal sense. The Government of Québec could have chosen a different and more just and ethical course of action and avoided the violence. As the conflict escalated and the event moved temporally on the field of justice, the potential for addressing justice claims decreased. Later on, RCAP became retrospective with respect to the events at Oka, but also looked forward to address broader underlying issues.

Resistance to domination and the protection of relationships to land, knowledge and kin are exercises of Indigenous sovereignty. It is important to recall the reasons for

Nicholas' efforts to defend Mohawk territory and the nature of his conviction when the Royal Commission on Aboriginal Peoples is examined.

7.2.2 The Meech Lake Accord

In the late 1980s the federal government was in discussion with provincial governments in order to obtain an agreement acceptable to Québec concerning the 1982 amendments to the Constitution of Canada. Under the constitutional formula set out in 1982, amendments required the approval of provincial legislatures within three years of the proposed amendments in the Meech Lake Accord (Mackey 1998 124). In 1990, the draft Meech Lake Accord was in provincial legislatures for debate and approval. In Manitoba, the legislature required unanimous assent of the members to allow for an expedited process for approval of the Accord in order to meet the deadline for the constitutional process. Elijah Harper, a Cree Member of the Legislative Assembly, did not assent. He stood up and blocked the constitutional amendment on the basis that Indigenous interests, rights, claims and voices had been completely disregarded in constitutional discussions (124). Standing alone, Harper defeated the Meech Lake Accord and raised the profile of Indigenous justice claims across the country. This act of resistance within Canadian legislative power structures was another way to advance Indigenous sovereignty by refusing the silencing of Indigenous voices in constitutional amendments.

7.3 The Royal Commission on Aboriginal Peoples (RCAP)

The Oka Crisis and the defeat of the Meech Lake Accord were important moments of resistance and challenge to the ongoing business of government and corporate interests. The constitutional process itself was challenged as inadequate, and municipal actions to advance corporate interests at the expense of the Mohawks of Kanesatake were pushed

back. The Oka Crisis and Elijah Harper's resistance to the Meech Lake Accord both highlighted a failure of the part of state to account to Indigenous peoples and resulted in calls for an inquiry into Indigenous reality.

In response, in April 1991 the Mulroney government announced that the Royal Commission on Aboriginal Peoples would be established. There was concern at the lack of consultation with Indigenous peoples, and so Mulroney appointed noted jurist and former Supreme Court Chief Justice Brian Dickson as Special Representative to consult and set the terms of reference for the commission (Hughes 2012, 105).

7.3.1 Mandate Interpretation and Process

The mandate of the commission was as follows:

> The Commission of Inquiry should investigate the evolution of the relationship among aboriginal peoples (Indian, Inuit and Métis), the Canadian government, and Canadian society as a whole. It should propose specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships and which confront aboriginal peoples today. The Commission should examine all issues which it deems to be relevant to any or all of the Aboriginal peoples of Canada. (RCAP 1996, 1:24)

The terms of reference continued to direct the commissioners to examine in particular a number of areas, including the following:

- The history of relations between aboriginal peoples, the Canadian government and Canadian society as a whole
- Recognition of aboriginal self-government and models of self-government
- The significance of the land base
- The interpretation of section 91(24) of the Constitution and the responsibilities of the Crown
- The legal status, implementation and evolution of treaties
- The constitutional and legal position of Métis and off-reserve Indians
- The difficulties of aboriginal peoples in the North
- The Indian Act and the Department of Indian Affairs and Northern Development
- Special issues of concern to aboriginal peoples
- Economic issues of concern
- Cultural issues of concern

- The special role and position of Elders
- Educational issues
- Justice issues
- The situation of aboriginal women
- The situation of aboriginal youth. (RCAP 1996, 1: 917-21)

The terms of reference were extremely broad and comprehensive and allowed the commissioners wide scope in interpretation. Dickson also intended that the commissioners be able to expand their mandate as necessary; thus the instruction that the RCAP can "examine all issues which it deems to be relevant to any or all aboriginal peoples in Canada" (Hughes 2012, 105).

Dickson's consultation process and the balance in the appointment of commissioners between Indigenous and non-Indigenous members contributed to positive reception by Indigenous communities and organizations. Like the Berger Inquiry, the RCAP went into communities and spent time meeting with many people about any issues of concern. They then developed their report and recommendations around issues that coalesced out of the hearings and research.

Of note, the framing of the terms of reference by a former Supreme Court judge focused heavily on constitutional arrangements and the legal underpinnings of the relationship between Indigenous and non-Indigenous Canadians and the state. The commission did indeed examine a wide number of issues across the spectrum of Indigenous experiences in Canada. It also produced a significant body of research material. The commission broadly interpreted its mandate to be focused on developing reforms within the existing legal and constitutional framework that would address the relations between Indigenous peoples and the state and the policy framework for delivery of programs (Hughes 2012, 112; RCAP 1996, vol. 5). In that respect they sought to work

through practical solutions to long-standing issues in contention. The report continues to be an important reference, source of research and touchstone for ongoing advocacy and movement forward.

7.3.2 Analysis of the Process

7.3.2.1 Audience for Commissions and Inquiries

The RCAP's recommendations are written in the language of government and seem designed for a government audience. The specific focus on the policy and funding decisions that must be made, as well as opinions concerning the nature of constitutional obstacles or lack thereof, seem designed to preclude criticism that the vision of the RCAP commissioners is not possible to implement. When I mentioned to Sinclair my sense that the "voice" in RCAP in contrast with the Berger Inquiry report and the TRC seemed very different, he said that each inquiry or commission was geared at a specific audience. Sinclair said that the commissioners and staff of the TRC had had an extensive discussion about who the report should be written for. He said:

> Everybody would say, well, you know, it should be written for a Grade 7 audience so that everybody can learn from it, should be written for the politicians, it should be written for cabinet, should be written for government, should be written for lawyers.... So we had all of this dialogue. I said, actually, it's all wrong. The purpose of this report is to arm the reasonable people. That's really what we need to do. There are people out there who are asking themselves what is this all about and what do we have to do about it? They're looking for an answer for themselves. The purpose of the report was to arm the reasonable.
>
> . . .
>
> The approach was to make sure that the people—the voices of the people—are heard by the members of society. That's really the key. I can remember in the early 70s sitting for hours every day listening to the testimony of the Dene people during the Berger Inquiry. I listened enthralled by what they were saying. It was the first time as a young Indigenous man that I heard Indigenous people saying, we are more than this, we are entitled to this, we have always had this, we have always been here. I remember thinking, where are our teachings? Where are our Elders? What are they saying, that kind of thing?

The RCAP report has been hailed by many Indigenous organizations and individuals as an important blueprint for moving forward. However, the government and the Canadian public did not use the report as a catalyst for responding to Indigenous justice claims. Interestingly, government has in fact implemented some RCAP recommendations though not within the framework set out by the commissioners. The government did not make a political statement accepting the recommendations at the time of the report's publication.

Much like the Berger Inquiry recommendations, the RCAP recommendations touched on many interrelated areas of injustices and inequalities in the lives of Indigenous peoples. However, the RCAP commissioners approached their task by investigating a number of identified issues, in line with their mandate, and integrated the analysis in developing clusters of recommendations and methods of implementation to align with them. On the other hand, Berger was tasked with examining a single issue, but in doing so encompassed a wide variety of potential unjust impacts resulting from the construction of the pipeline. While both approaches come to a global description of the numerous aspects of Indigenous reality where injustices must be addressed, Berger's description and recommendations are more seamless in their portrayal, more directly related to the underlying reason for the inquiry, more aligned with the voices of the Indigenous peoples it heard, and perhaps more impactful for that reason.

7.3.3 Analysis of Three Substantive Areas in the RCAP Report

7.3.3.1 Violence Against Women

The RCAP report discussed at length domestic violence and violence faced by vulnerable persons such as women, children and the elderly. As well, the RCAP commissioners

commissioned research reports—one of which was entitled "Violence against Aboriginal Women" (Zellerer 1993), which likely fed into the final report. However, the discussion about violence against women in the Zellerer paper and the final report focused almost exclusively on domestic and intra-community violence and not violence perpetrated upon Indigenous women by non-Indigenous perpetrators (RCAP 1996, vol. 3) despite the findings of the Manitoba Aboriginal Justice Inquiry in 1991, which examined the flaws in the criminal justice system as they related to the deaths of J.J. Harper and Helen Betty Osborne, the latter of whom was victimized by racist perpetrators who were strangers and who targeted her because of her Indigenous identity (Hamilton and Sinclair 1991). The phenomenon of the extraordinarily high rate of violence faced by Indigenous women in all circumstances including human trafficking and targeting by serial killers as well as within families and communities ended up being the focus of the Missing and Murdered Indigenous Women and Girls advocacy movement and the eventual Missing and Murdered Indigenous Women and Girls national inquiry, which was established in 2016 (MMIWG n.d.).

In contrast to RCAP, in 1977 the Berger report took into account and quoted extensively from the submissions of Dene and Inuit women and included in the final report their concerns that women would be sexually exploited because of the influx of pipeline workers. Thus, at the same time as the land was denigrated through extraction of resources, women were also at great risk of violation and exploitation. Though limited to the impact of industrialization and an influx of male temporary workers, and though the language used was not perhaps as explicitly about violence, the concerns about exploitative treatment and the undervaluation and sexualization of Indigenous women in

the community were directly conveyed to and by the inquiry (Berger Inquiry 1977, 156-58). Interestingly, the Conservative Harper government refused to recognize race and multiple sites of oppression as factors in the violence suffered by Indigenous women; rather, the issue was characterized as an issue of domestic violence within communities. Once elected in 2015, the subsequent Liberal Trudeau government accepted that Indigenous women suffered disproportionate rates of violence as a broader social phenomenon relating to racism and the devaluation of Indigenous women in society. On this basis they established the National Inquiry into Missing and Murdered Indigenous Women and Girls.

7.3.3.2 Impacts on the Land and Land-centred Sovereignty

The Berger report adopted an understanding of the ecology of northern territories and the impact of industrialization that centred Inuit, Inuvialuit, Métis and Inuit knowledge of relations with the land. As such, the report contained a strong environmental focus and included an understanding of the impact of non-renewable fossil fuel extraction on Arctic sea ice and climate change that resonates with our knowledge of climate change today. The RCAP report, however, though its task was broad, limited its discussion to environmental stewardship and co-management of resources—an approach that does not strongly challenge the existing resource extractive economic structure.

Nevertheless, the interrelated nature and variety of the RCAP recommendations reinforce the notion that no matter the starting point of the analysis into the injustices faced by Indigenous peoples, a whole system of negative impacts resulting from imbalances in the power relations between Indigenous peoples and non-Indigenous peoples emerges.

7.3.3.3 Constitutional Reform

In a paper called "The Right of Aboriginal Self-Government and the Constitution: A Commentary" (RCAP 1992), the commission outlined a possible way to set the stage for future constitutional negotiations between Indigenous peoples and the Crown. The commission saw that there was an impasse in negotiations in the late 1980s. The Assembly of First Nations laid it out as follows:

> Our Creator, Mother Earth, put First Nations on this land to care for and live in harmony with all her creation. We cared for our earth, our brothers and sisters in the animal world, and each other. These responsibilities give us our inherent, continuing right to self-government. This right flows from our original occupation of this land from time immemorial. (RCAP 1992, 6)

The response from the federal government as articulated by the Right Honourable Joe Clark, then Minister responsible for Constitutional Affairs, was as follows:

> Our concern with that term is straightforward. We believe that the word—undefined or unmodified—could be used as the basis for a claim to international sovereignty or as the justification of a unilateral approach to deciding what laws did or did not apply to Aboriginal peoples. (...) Our concern with inherency is not with the word but with the meaning. If we can be shown that an amendment can be drafted to ensure that an inherent right does not mean a right to sovereignty or separation, or the unilateral determination of powers, we will look at that. If Aboriginal Canadians can help define what inherency would mean in practical terms—in terms of authorities and jurisdictions and powers—in such a way that the integrity of this federation is not put in question, we would welcome that. We are not opposed to inherency. (RCAP 1992, 7)

In its paper, the commission points out that the Indigenous leaders such as the president of the (then) Inuit Tapirisat of Canada did not define inherent rights as the desire to separate from Canada. The commission focused on this point and in looking to the history of Indigenous/state relations in Canada defined Indigenous sovereignty as not being about challenges to Canada's status as a state in international law. Rather, the right to self-government is inherent in that its source is from within Indigenous nations and not

the constitution; it is circumscribed in that it does not include defence and international affairs; and it is sovereign in that within its sphere it takes precedence over federal and provincial laws.[8] In addition to clarifying the concept of Indigenous self-government and the nature of sovereignty, the commission emphasized the role of recognition. As noted in the previous chapter, my concern with the emphasis placed on state recognition of Indigenous justice claims or rights is that it reinforces the vertical relationship between the state and Indigenous peoples and the state's power to confer recognition as opposed to being responsive to Indigenous sovereignty as self-defined. Nevertheless, this is an important element for advancement for constitutional discussions, in the eyes of the commission. From this point on, the commission advances very specific recommendations such as preambular language for a constitutional recognition clause, a clause with listed powers, and a recognition clause with a treaty process.

The difficulty with such specific prescriptions is that they do not truly address the underlying nature of the *Constitution Act, 1982* as concerning two European founding nations. The addition of section 35 in 1982 provides recognition and affirmation of "the existing aboriginal and treaty rights of the aboriginal peoples of Canada". However, this section does not explicitly address the underlying dispossession of Indigenous lands, assumption of Crown sovereignty and division of jurisdictional powers among the provinces and federal government. Although the commissioners speak about the fact that Indigenous sovereignty is not the same as state sovereignty, Indigenous sovereignty as defined by them does not challenge the ways in which we understand state sovereignty. Rather, it formulates a way for negotiations to move forward to acknowledge a kind of

[8] The order of precedence of laws is the approach adopted in *An Act respecting First Nations, Inuit and Métis children, youth and families* (2020).

Indigenous sovereignty that is not subsumed within state sovereignty but is not a challenge to it either. In the balance of this chapter, I will explore whether working around state sovereignty is truly enough to address Indigenous justice claims.

7.4 Indigenous Sovereignty and State Sovereignty

7.4.1 What Is Indigenous Sovereignty?

Michael Lane, J. D., Menominee scholar, defines Indigenous sovereignty as follows:

> Indigenous Peoples have existed since time immemorial and have Traditional Indigenous Knowledge that informs Indigenous spiritual, social, and political frameworks that are intrinsically tied to lands, sky and waters and all upon and within them. This complex set of inter-relationships places Indigenous Peoples in the midst of inherent relationships that give rise to Indigenous Sovereignty. The very existence and identity of Indigenous entities have an inseverable connection with these inherent relationships. They continue to exist even when many of those in the specific Indigenous entity are not aware of them. (Lane 2020, unpublished paper, 1)

The use of the word "sovereignty" here is not meant to equate to the nature of Westphalian concepts of sovereignty implying dominance and control over a territory and all people and resources within that territory. However, it is meant to carry the weight and significance of the word "sovereignty" and the centrality of Indigenous inherent existence as a people. For example, Sinclair, in describing the right to exist as Indigenous people, said the following:

> if we don't have an evolution of the relationship to the point where Indigenous people feel that they are in a position that recognizes to a certain extent their inherent right to be—*I don't want to use the word sovereign*—their inherent right to be who they are and where they are, then you're going to find more and more young Indigenous people who are going to be becoming more resistant to what the government is doing. (M. Sinclair, personal communication, May 15, 2020, my emphasis)

Sinclair emphasized the centrality of being Indigenous. Sharon Venne (1998) defines sovereignty as also inherent and related to interrelational being:

> Our sovereignty is related to our connections to the earth and is inherent. The idea of a nation did not simply apply to human beings. We call the buffalo or, the wolves, the fish, the trees, and all are nations. Each is sovereign, an equal part of the creation, interdependent, interwoven, and all related. (23)

The reference to inherent and interrelational being as the centre of the analysis appears simple. It also can appear at first glance to support an idea of individual freedom, if you assume a liberal autonomous being, as we often do in a rights-based, liberal analysis. We assume that the ability to be as we are implies an ability to be self-legislating and to hold rights as against other rights-holders. However, Indigenous scholars and the people I interviewed see Indigenous sovereignty and the interrelational foundation of existence as being distinct from European notions of an autonomous individual who ought to be free to act without interference from others. In speaking about his involvement in the Indigenous movement in the early 1970s, Sinclair said:

> When we were in high school we were all gung-ho about equality for everybody and everybody needs to be treated the same—treated equally—and equality rights for women, equality rights for people of colour and yet I remember afterwards—particularly during the 70s, early 70s—when I was starting to recognize that as Indigenous people, we had this uniqueness about us that comes from our inherent presence in this territory. I said, this is not about equality. This is about something else. What is it about? It's really about equity. It's about equitable-ness. It isn't about wanting to be equal. (M. Sinclair, personal communication, May 15, 2020)

He went on to speak about how Indigenous rights do not fit within the human rights framework as we understand it. Rather, as Aaron Mills (2016), Anishnaabe legal scholar, points out, the Anishnaabe lifeworld differs from the underpinnings of Canadian liberal constitutionalism. The Anishnaabe lifeworld is a set of ontological, cosmological and epistemological understandings that situate the Anishnaabe people of his nation in a way that allows them to orient themselves in their relationships in a good way. In other words, in the Anishnaabe world of his people, the relationship of the self within creation,

which includes family, community, nation, land, other nations and other beings in the territory, is the key unit (852). Individuals and their freedom and rights is not the starting point. Glen Coulthard (2014), a Dene scholar, calls it "grounded normativity". He says that Indigenous anti-colonialism is a struggle deeply informed by what the land, as a system of reciprocal relations and obligations, can teach us about living lives in relation to one another and the natural world in non-dominating terms (13).

Being, in other words, implies relations to the specific territory of a people, the knowledge of living in that territory, the language to convey that knowledge, the governance practices related to the knowledge of that territory and the people, the economy derived from that land by the people, diplomacy and legal orders for dealing with difference and conflict, and many other aspects. It is co-constitution with the land and not an existence separate from or in domination of the land. It is a set of specific relationships between a people and the territory and the practices that take place in the context of that territory. The ethical component of this way of being is that relations must be conducted in a good way. Further, the significance of non-human agency and relationships in functioning society de-centres humans in this account. As Anishnaabe and Haudenosaunee scholar Vanessa Watts-Powless[9] (2013) says:

> Place-Thought is the non-distinctive space where place and thought were never separated because they never could or can be separated. Place-Thought is based upon the premise that land is alive and thinking and that humans and non-humans derive agency through the extensions of these thoughts.
>
> Given this, Indigenous perceptions of whom and what contributes to a societal structure are quite different from traditional Euro-Western thought. The evaluation of human interaction and culture has been a concern of traditional sociology since its inception and has led to the definition of what constitutes a society or various societies. The idea of "society" has revolved around human beings and their special place in the world, given their capacity for reason and language. Though this idea of

[9] Vanessa Watts-Powless published the article under "Watts".

> society is still largely attributed to human relationships, in recent times we can see the emergence of non-humans being evaluated in terms of their contributions to the development and maintenance of society. (21)

The idea that land and non-human beings are agentic participants in relationships among each other and with humans means that a different ethical framework is required. As Watts-Powless writes:

> Thus, habitats and ecosystems are better understood as societies from an Indigenous point of view; meaning that they have ethical structures, inter-species treaties and agreements, and further their ability to interpret, understand and implement. Non-human beings are active members of society. Not only are they active, they also directly influence how humans organize themselves into that society. (23)

Watts-Powless' analysis relocates for the non-Indigenous reader the role of women and the feminine earth as being intrinsically tied to the notion of sovereignty and governance. In Watts-Powless' work she explains that from an Indigenous perspective, violence done to women, is violence done to the earth.

The non-Indigenous societal system, based upon an extractive non-agentic understanding of the world surrounding humans, has been the practice of colonial nation-states that asserted sovereignty over vast territories of land simply upon arrival. In light of Watts-Powless', Mills' and Coulthard's articulation of a grounded existence within a matrix of relationships, the notion of a sovereign over subjects does not truly translate well to Indigenous ways of being in the world. Mills (2016) points out that if the concept of the sovereign is not intuitive within your framework of understanding, you may not appreciate what is at stake in a liberal constitution built upon the idea of Crown sovereignty (852).

7.4.2 European Conceptions of Sovereignty

European conceptions of sovereignty are very different. The Westphalian concept of nation-state sovereignty requires authority, domination, freedom from interference, and

control over people within the territory and exclusion. Kent McNeil (2019), law professor and Aboriginal law specialist, writes, "In international law, sovereignty entails exclusive authority over a territory and everyone and everything in it, independently of any other authority. In theory, at least, nation states are sovereign and equal. They are independent of one another and are not supposed to interfere in the internal affairs of other nation states." As he further states, "Sovereignty involves political jurisdiction—the authority to make and enforce laws and exercise administrative control over a territory" (1).

Colonization involved state-building and the reinforcement of an already existing international state system (Shadian 2006, 9). The state's push to solidify control over all people who live within the internationally defined territory is a manifestation of a colonial world order and comes into direct conflict with Indigenous assertions of what is required to exist as a people. European notions of sovereignty permitted claiming territory on behalf of the sovereign in the absence of a presence in the territory. European political powers justified claiming territory by negating the humanity of Indigenous peoples who lived, governed, operated economies, farmed and otherwise had relations to the territory prior to claims of European sovereignty.

The main feature of Glen Coulthard's concept of "grounded normativity" and of resurgence practices that are prefigurations of a decolonized world is that they are grounded in actual practices of relationship to territory. They push against an over-reaching concept of nation-state sovereignty where the state is seeking to protect its capacity to exert control over all people within the territory. The preoccupation of the state with protecting supremacy, power and control recalls to mind the preoccupation of liberal theorists with the freedom of the individual to act without interference. Both

concepts are equally ungrounded. In the case of sovereignty, control within a bounded territory by the sovereign does not acknowledge the foundational agreements between Indigenous and non-Indigenous peoples in settler-colonial states. With respect to the notion of the autonomous liberal individual, it does not acknowledge that relationships provide the capacity for individuals to act with agency.

7.4.3 "Reconciling" Sovereignties

7.4.3.1 RCAP and Oka: What Changed?

The crises that were the genesis of the Royal Commission on Aboriginal Peoples—the Oka Crisis and Indigenous resistance to the constitutional amendments of the Meech Lake Accord— called for some form of significant change. The RCAP report provided a detailed plan on overcoming the policy and legal hurdles to advancing toward some form of righted relationship without disrupting the way in which the majority of the population understood the economic, political and social fabric of Canada. However, some key facts remain. As pointed out by Skye:

> Sunga: Instead of tackling the whole Royal Commission Report—although you can comment on that too—but what specifically has happened in Oka—in Kanesatake—around that land dispute? It's pretty interesting in terms of what has actually changed there. How was that resolved? Or not resolved?
>
> Skye: So, it wasn't resolved. . . . It's still not resolved. It's a matter of fact. They are taking more land and building more houses not too far away which will cause another dispute. It's just not resolved.
>
> . . .
>
> In Kanesatake, whoever moved in one of those houses, stayed in one of those houses, fixed one of those houses, it then became their house. And the house I'm sitting in right now is one of those houses.
>
> Sunga: So the land is still held by the federal government?
>
> Skye: All of it. (K. Skye, personal communication, September 2, 2020)

Thirty years after the Oka Crisis and twenty-four years after the RCAP report, dispossession of the Mohawk people of Kanesatake that started centuries ago and hit a flashpoint during the Oka Crisis has not been resolved. Land has not been provided back to the Mohawk people (Lowrie 2020). If we hearken back to the "field of justice" as a way to conceptualize the likelihood of addressing Indigenous justice claims, the unwillingness of the Quebec government to address the injustice of the land developer and municipality dispossessing Mohawk people of their lands in advance of the harm was a critical point of failure. The municipal and Quebec governments did not hear Mohawk claims properly and committed the ethical wrong of not hearing. Then, though the government established RCAP to listen to Indigenous peoples, the harm to the Mohawk people were less likely to be addressed in a just way, given the great violence and trauma that had occurred during the Oka Crisis. The government was beyond the point of being able to satisfactorily address justice claims. In addition, as pointed out by Kathy Skye, the land at the centre of the acts of dispossession has not been returned.

This is exactly the type of problem that generated the core question of this dissertation. Why does the state response to the claims for justice made by Indigenous peoples, like the Mohawks of Kanesatake, fail?

The actions taken by the Mohawks of Kanesatake and their allies were acts of resistance to incursions by the state and developers. They were also acts to protect Mohawk values, knowledge, teachings and the land. In other words, they were not only defensive actions, but also assertions of Mohawk existence in relation to land.

Returning to Audra Simpson's (2014) work on the issues of the politics of refusal and nested Indigenous sovereignty, she writes, "like Indigenous bodies,

Indigenous sovereignties and Indigenous political orders prevail within and apart from settler governance" (11). However, assertions of Indigenous ways of being and existing with the land, through governance practices, political ordering and economic activities, push up against state sovereignty through acts of refusal. Does refusal generate an adequate response on the part of the state?

Assertions of Indigenous sovereignty that refuse state sovereignty do not necessarily lead to the state addressing the issue of dispossession faced by the Mohawk nation. Refusal of state sovereignty serves to support resurgence and intra-nation recognition practices that support Indigenous relational sovereignty. Similarly, resurgence of Indigenous social, political and economic practices will come up against state sovereignty as well. Indigenous existence has equal force, status and moral weight as state sovereignty. We call it Indigenous sovereignty when that is acknowledged. My question is whether or not this type of interaction between Indigenous sovereignty and state sovereignty calls for some form of reception on the part of the state that alters the notion of state sovereignty. My answer is: yes.

7.4.4 A New Concept of State Sovereignty

The Second Senior Official stated the following:

> When I look at processes where we're thinking about how you reopen a treaty or how the treaty would evolve over the years rather than just . . . its implementation, "sue me before the court if you're not happy". I think, yes, we're getting there. It takes time. It's not going to be easy but I think we're getting there. We're talking about tectonic changes here and not just for Canada. I think even other countries look at it and it's not the way states deal with land and people.
>
> States like to define, like you said, their sovereignty. They are defined by what? They are defined by as old Max Weber used to say, by the authority to exercise violence and control over land and the people. It's really hard for states to accept that actually it's maybe different. We accept it through the federation with provinces but that's the move from . . . old-fashioned way to self-government. (Second Senior Official, personal communication, July 14, 2020)

What the Second Senior Official points out is that the traditional definition of state sovereignty is changing, albeit slowly. The question remains: what conception of state sovereignty responds in a just way to Indigenous inherent and relational sovereignty?

7.4.4.1 State Sovereignty as Non-domination

Indigenous scholars use concepts of grounded normativity and rooted constitutionalism to centre relations to land and all beings in balance. Feminist relational approaches provide a version of state sovereignty that critiques the domination aspect of classical liberal sovereignty.

Iris Marion Young (2005) theorizes self-determination as non-domination to distinguish it from the concept of non-interference, which is more aligned with liberal notions of sovereignty. Young problematizes the existing notion of self-determination within a state that mirrors state sovereignty. An idea of self-determination that requires a bounded territory assumes a territory in which only members of a national group reside, the territory is contiguous and bounded, and a self-determining people exercise self-government rights, often in formalized relations to the state (139). She postulates that this model does not reflect the situation of conflicting peoples who often live among each other or are situated in various small, dispersed locations across a territory. As well, there are often relations among groups and fluid identities based on these relationships, which hearkens back to Lugones' notion of relational identity explored earlier in chapter 2. In Young's conception, non-domination calls for joint regulation of relationships. She explores non-dominant sovereignty in the context of Indigenous claims for self-determination and argues that Indigenous forms of sovereignty should be the norm, and not the exception. She claims that Indigenous claims seem anomalous only under the

paradigm of nation-state sovereignty. She notes that Indigenous claims for self-determination also often call for redistribution or subsidy by the state to enable the implementation of self-determination. She asks whether there is a conception of self-determination where such a subsidy is coherent with state subsidies (143). Young moves to applying a non-domination view of self-determination to the situation of Palestinians living in Israel as an alternative to the nation-state sovereignty regime that relies upon exclusion and non-interference.

Young's extension of Indigenous sovereignty to a model for non-dominant state sovereignty is one that requires structural shifts and a paradigm that centres a focus on non-oppressive relationships of cooperation and regulation. Young refers particularly to negotiation and means for joint decision-making and conflict resolution (146). She also argues that promoting non-domination requires support for poorly resourced self-determining peoples in order for them to exercise autonomy.

This particular reference to dispute resolution that is joint instead of subsumed within a state structure is interesting from a Canadian perspective, where there is no mechanism within the constitution for resolution of conflicts between systems of Indigenous law and European-based law.

7.4.4.2 An Example of a Possible Structural Adjustment to Reflect Non-dominant State Sovereignty: Indigenous Legal Orders

Napoleon and Hadley (2016) define indigenous legal orders as:

> fundamentally about Indigenous citizenry, self-determination and governance. They contain the intellectual resources and tools for public reason and deliberation that are essential for addressing both the internal and external challenges that Indigenous communities face today. (727)

Borrows (2016) states that indigenous legal orders are "constitutional, regulatory, and dispute resolution systems [that] contain vast resources for assisting individuals and communities in reasoning through tough problems." (797).

Napoleon, Hadley and Borrows and other Indigenous legal scholars see the law in any society as a dynamic and evolving instrument for social ordering. They place Indigenous legal orders on a similar footing as state legal orders and see both as embodying the social matrix in which they are embedded. Assertion of Indigenous legal orders is also an important exercise in the resurgence of Indigenous existence.

Some Latin American countries that have worked toward peace after civil conflict have developed constitutions that try to address injustices toward Indigenous peoples within their countries. In "Cultural Diversity, Legal Pluralism, and Human Rights from an Indigenous Perspective: The Approach by the Colombian Constitutional Court and the Inter-American Court of Human Rights", Felipe Gomez Isa (2014) examines one of the fundamental challenges that exists for Indigenous legal orders. How can Indigenous legal orders be applied within a state framework and within a broader universal human rights framework without perpetuating settler colonialism?

Isa begins his analysis by examining the history of human rights and their origins in the liberal revolutions of the eighteenth century. He quotes Maria José Fariñas, who asserts that in fact the universality of human rights is a "Western myth, an *a priori* or legitimizing fiction which conceals aspirations of domination and world hegemony" (724). He also points out that Indigenous peoples have been excluded from human rights instruments developed throughout the twentieth century; local realities and specific ways of protecting human dignity were not included (725). As he says, "indigenous people

have been rendered invisible for centuries … and have been unable to share their conception of human rights on an equal footing" (729). Isa's articulation parallels Audra Simpson's argument that recognition by the state erases or vanishes Indigenous sovereignty, and it parallels Stauffer's concern with the state's inability to hear claims of injustice. In fact, it was as late as the 1990s when discrimination suffered by Indigenous peoples became an issue. It was only in 2007 that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) genuinely recognized collective Indigenous rights. As Isa points out, the challenge is how to address Indigenous demands for justice within a human rights framework that had excluded them (728).

In challenging the presumption of the supremacy of the European human rights framework, Isa makes room for recognition of universal principles to arise from within Indigenous legal orders, and for the development of a conception of human rights that is more open to other forms of protection of human dignity. But he does so without discarding the notion of universal human rights entirely. He sees the potential for space to exist for mutual exchange and accommodation between specific Indigenous legal orders and the human rights framework.

In Canada, Borrows and others advocate for constitutional recognition of Indigenous legal orders beyond what currently exists. Isa describes the Ecuadorian approach, which explicitly incorporates Indigenous principles in its constitution. The Ecuadorian constitution confers rights on nature itself, not only on the humans who live in nature. Thus, the reciprocity and mutuality described by Pasternak and other Indigenous legal orders scholars is integrated into the highest legal instrument in Ecuador. The Ecuadorian constitution acknowledges the right to water, the right to food security and the

right of the population to live in an ecologically balanced way with the environment (Isa 2014, 729). Explicit acceptance of foundational Indigenous principles at the constitutional level is not a symbolic or empty gesture; it is an attempt to make visible the specific nature of Indigenous legal principles and to make reparations for centuries of injustice. Further, it opens up debate about the nature of the state, sovereignty and jurisdiction. And it elevates Indigenous legal principles and orders above the level of the local and replaces liberal constitutionalism with pluralist constitutionalism (Isa 730).

Linked with constitutional developments in Latin America, there have also been jurisprudential developments through the Colombian Constitutional Court and the Inter-American Court of Human Rights. In particular, the Colombian constitution contains a provision that provides for "special Indigenous jurisdiction" and grants that "the authorities of the Indigenous peoples may exercise their jurisdictional functions within their territorial scope, in conformity with their own norms and procedures, *as long as these are not contrary to the Constitution and the laws of the Republic*" (737, emphasis in original). The Constitutional Court has interpreted this to mean that the promotion of Indigenous autonomy is the interpretive principle when determining the extent of jurisdictional autonomy.

In particular, the court has found that some rights are sacrosanct in all circumstances. One of these is the prohibition of slavery. Isa looks at a particular case where the Embera-Chami community imposed forced labour as a form of punishment for a transgression against the community. Isa points out that for this Indigenous community, punishment is not only a form of social condemnation; rather it is primarily to seek restoration of harmony in the social life of the group and dissuade the community

members from committing offences in the future (745). In this case, the Constitutional Court heard the testimony of an Embera-Chami man in order to evaluate whether the punishment was appropriate. The witness explained that forced labour is a benefit to the community because you can still see your family and children, even though you cannot work on your own land. The community sees you working on community land and you are being warned not to commit the transgression. As well, the convicted person is not forced to work too hard, as there is a sense of empathy with the perpetrator (745). Isa notes that it is important to contextualize and particularize the community's own perception, norms, penalties and consequences respecting the transgression and the punishment.

The two important elements of the Ecuadorian and Colombian constitutions that align with Young's (2005) concept of non-dominating state sovereignty are:

1) central interpretative concepts in the highest form of law—the constitution of each country—integrate relational principles and centralize the significance of Indigenous conceptions of existence; and

2) the structure of the Colombian constitution itself is designed to align with recognition of Indigenous legal orders at the highest order of law and provides space for Indigenous legal orders and as well a dispute resolution mechanism of the highest order to deal with conflicts between the state system and the Indigenous systems of law.

In both these areas, the Canadian constitutional system does not reflect a cooperative and non-dominant concept of state sovereignty.

7.4.4.3 Non-dominant State Sovereignty: The Inuit Circumpolar Council, Sovereignty and Self-determination

Inuit sovereignty as articulated in the Circumpolar Inuit Declaration on Sovereignty in the Arctic (Inuit Circumpolar Conference 2009) and as practiced by Inuit is complex, rich and exemplifies ways to conceive of state sovereignty in non-dominating relation to Indigenous sovereignty. Though my field research is lacking Inuk participants because of the logistical limits of the dissertation project, I feel it is important to include the start of an exploration into Inuit conceptions of sovereignty.

Jessica Shadian (2014) has theorized how Westphalian state sovereignty comes up against Indigenous sovereignty with respect to the Inuit in the circumpolar region. Prior to European arrival, Inuit saw themselves as sovereign over defined territories, domestically and with others (8). With European arrival came the idea of the nation-state and the supremacy of the sovereign over territory, which necessarily excluded any other claims to sovereignty (9). As noted above, the Westphalian nation-state concept is the model used in international relations. International relations as practiced after the Second World War assumed that the state was the only legitimate form of political organization and that sovereignty was embedded in the state. Further, the maintenance of order and authority within the state disenfranchised Indigenous sovereignty such as Inuit sovereignty in the Arctic, which is not based on domination (9-10).

Concurrent with the release of the Berger report and the various issues relating to resource extraction and territorial claims in the North, the Inuit Circumpolar Council (ICC) was founded in 1977. The founder, the late Inupiaq Eben Hopson, invited other Inuit across the Arctic to discuss ways in which a common response could be developed

to address increasing attacks on the Inuit way of life, environment and human rights from industry, states and others with interests in the Arctic (Inuit Circumpolar Council of Canada, 2009). The Inuit approach to sovereignty exemplifies the type of cooperative and relational approach raised by Young.

The Inuit claim sovereignty in territory that is covered by four nation-states and is one of the more environmentally and politically sensitive regions in the world. The Inuit have developed a positive vision of non-state sovereignty in response to incursions into the region by state and non-state actors. Currently executive members of the ICC represent Canada, Chukotka (nation-state Russia), Alaska (nation-state United States) and Greenland (nation-state Denmark). The Inuit Circumpolar Council has published a Circumpolar Inuit Declaration on Sovereignty in the Arctic. It is conceived and drafted to fully explain the complexity of the sovereignty of the Inuit people who live in four major nation-state countries. The first sentence of each paragraph links multiple identities and situatedness of Inuit in the circumpolar region:

> Inuit live in the Arctic…. Inuit have been living in the Arctic from time immemorial… Inuit are a people. … Inuit are an indigenous people. …Central to our rights as a people is the right to self-determination. … Inuit are an indigenous people of the Arctic. Inuit are citizens of Arctic states. … Inuit are indigenous citizens of Arctic states. …Inuit are indigenous citizens of each of the major political subunits of Arctic states (states, provinces, territories and regions). (Inuit Circumpolar Council 2009).

These statements in the Declaration capture the complex and multiple nature of political relationships that exist for the Inuit at the local, regional, nation-state and international levels. The consistent centring in all of these statements is being Inuit. None of the affiliations at various political levels exclude or de-centre "being Inuit". These statements also recall Lugones' concept of multiple relational identities and "world-traveling" among them. As well, the idea that some of these worlds are oppressive, and

we are not seen as we wish to be seen—as described by Marilyn Frye (1983)—is applicable. Nation-states that do not recognize the Inuit as they wish to be recognized deny the Inuit the type of sovereignty that they are asserting. The Inuit Declaration situates sovereignty as a contested and changing concept:

> "Sovereignty" is a term that has been used to refer to the absolute and independent authority of a community or nation both internally and externally. Sovereignty is a contested concept, however, and does not have a fixed meaning. Old ideas of sovereignty are breaking down as different governance models, such as the European Union, evolve. Sovereignties overlap and are frequently divided within federations in creative ways to recognize the right of peoples. For Inuit living within the states of Russia, Canada, the USA and Denmark/Greenland, issues of sovereignty and sovereign rights must be examined and assessed in the context of our long history of struggle to gain recognition and respect as an Arctic indigenous people having the right to exercise self-determination over our lives, territories, cultures and languages.
>
> Recognition and respect for our right to self-determination is developing at varying paces and in various forms in the Arctic states in which we live. . . . In Canada, four land claims agreements are some of the key building blocks of Inuit rights; while there are conflicts over the implementation of these agreements, they remain of vital relevance to matters of self-determination and of sovereignty and sovereign rights. . . . These developments will provide a foundation on which to construct future, creative governance arrangements tailored to diverse circumstances in states, regions and communities.
>
> In exercising our right to self-determination in the circumpolar Arctic, we continue to develop innovative and creative jurisdictional arrangements that will appropriately balance our rights and responsibilities as an indigenous people, the rights and responsibilities we share with other peoples who live among us, and the rights and responsibilities of states. In seeking to exercise our rights in the Arctic, we continue to promote compromise and harmony with and among our neighbours.
>
> . . .
>
> The inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and Inuit self-determination and other rights require states to accept the presence and role of Inuit as partners in the conduct of international relations in the Arctic. (Inuit Circumpolar Council 2009)

In this Declaration, self-determination of Inuit people is a core requirement. The Declaration outlines the importance of recognition as it is unfolding in various state

contexts. It is clear that the Inuit assert intra-community recognition to push back against the assumptions of the nation-state institutional construct. Their assertion of Inuit sovereignty across nation-state borders, without denying the existence of the nation state, is another iteration of Indigenous sovereignty in a context different from those provided by Glen Coulthard and Audra Simpson. The Inuit emphasize working together to promote harmony while seeking self-determination. It is a cooperative approach. It is based upon self-determination and recognition among communities within an Indigenous people or nation as opposed to reliance upon recognition by the state. The Declaration speaks of the role of the exercise of jurisdiction to manage the relationships of Inuit among others and within states. The important contribution is that sovereignty is delinked from the Westphalian notion of a bound people under control of a state authority (Shadian 2006, 8). The Declaration also emphasized the role of land claims agreements in each jurisdiction to advance self-determination and recognition of Indigenous sovereignty, depending on each context. Thus, the various components of Inuit existence are coalesced in the Declaration.

The Inuit conception of Indigenous sovereignty relies upon self-determination. It calls for the state and non-state actors to engage with Inuit regarding any matters that touch upon the Arctic and that have an impact on Inuit peoples. The prioritizing of Inuit existence challenges the notion that the building of the nation-state is the prime directive. The Inuit vision is that the state need not infringe upon Indigenous sovereignty and it is not the only source of legitimacy in and of itself. Further, the Inuit do not need to function through the state to establish recognition or relationship among Inuit beyond nation-state boundaries. In fact, the assertion of the Inuit Circumpolar Council as a political

organization that legitimately can assert the interests of the Arctic circumvents the traditional requirement that states are the only internationally recognized bodies.[10] As Shadian (2010) says: "rather than seeking territorial integrity as a means of resource ownership, Inuit national-ism was argued on the basis of the right to a subsistence economy and as a means of ensuring cultural integrity" (499). In effect, with this statement she re-articulates Sinclair's emphasis on the ability to exist as Indigenous as being the core value.

Similar to other articulations around existence that have been raised in this dissertation, Inuit conceptions of relations to land are central to Inuit collective existence. Shadian describes self-determination "as more than mere political autonomy. It also represented a formal contract for maintaining cultural autonomy (cultural rather than territorial integrity). This cultural form of sovereignty included, in theory, the right to maintain a historical relationship to the Arctic land" (495). The intertwining of Inuit with the land is articulated by Paimiut Traditional Council in Alaska: "Everything has a soul—inua. It is from the worldview that the desire arose to protect the land—which is referred to as nuna.… [There is a] close relationship between inua and nuna in our worldviews" (Shadian 2006, 107). Self-determination based on relations with the land does not lead to secession from Canada because it is not a challenge to state sovereignty. Rather it is the basis for an Inuit conception of sovereignty that underlies the ability to exist as Inuit people.

[10] https://www.ctvnews.ca/sports/irish-lacrosse-team-withdraws-from-world-games-so-a-native-american-team-could-play-1.5095558 The International World Games Association would not allow the Iroquois Nationals lacrosse team to compete at the World Games because it was not a "sovereign nation", even though the team represents the Haudenosaunee (Iroquois Confederacy). The decision was reversed, but at that point there were no spots. The Irish team withdrew to allow the Iroquois Nationals team to compete.

Similar to Young's dispersed, local and plural collectivities with horizontal linkages, the Inuit use the concept of polities. The concept of polities allows Inuit sovereignty to exist peaceably in relation to state sovereignty. Shadian defines polities in the following way:

> polities are entities that have the political capacity to mobilize people and resources for political purposes. Polities also have distinct identities—although their members can be influenced by or associated with other polities at the same time. Nevertheless, people who are part of a particular polity perceive that they have common traits with the group—traits that separate them from other polities. A polity must also have the capacity to mobilize individuals and groups for political ends. In turn, the members of the polity concede authority over a particular domain that includes resources, the space its members occupy, and issues over which the polity asserts its influence. Put simply, the polity has the capacity to govern.
>
> . . . .Because polities are not limited to states or even to governments, they often overlap, layer, endure, or disappear. . . . Polities reconceptualize political space and are able to take into account the contingent and simultaneous manner which multiple levels of political space coexist and operate.
>
> . . . . Since polities always share space with other polities, they can attract the loyalty of people who are also loyal to other polities within that space. Ferguson and Mansbach refer to this phenomenon as nesting. (Shadian 2014, 7)

The fluidity of polities and the fact that they are based in relationships bring to mind Lugones' notion of relational identity. The distinction, however, is that polities are forms of identity that exist fundamentally to occupy political space and govern. Inuit polities exist always in reference to land as opposed to nation-states' focus on territorial integrity.

In describing the relationship between Inuit self-determining and sovereign polities with nation-states, Shadian uses the term "nested sovereignties". Recall that Audra Simpson also refers to the possibility of nested sovereignty. I would argue that although "nested sovereignty" captures the idea that Indigenous sovereignty does not conceptually clash with nation-state sovereignty, it also implies a form of "within-ness"

of Indigenous sovereignty to nation-state sovereignty. This is not necessarily the case and may not best capture the relationship of Indigenous sovereignty to state sovereignty, at least as articulated by the Inuit. Indigenous sovereignty is not akin to a form of municipal governance or some sort of lower order or delegation of Crown sovereignty. Rather, it is a type of sovereignty that is different in nature from Crown sovereignty. As members of a polity respecting issues relating to that polity, Indigenous people asserting Indigenous sovereignty can govern themselves beyond state boundaries—for example on issues of common concern across state boundaries such as climate change. In the Inuit conception, Inuit are sovereign over their affairs and are citizens of states with rights and obligations of citizens. They have multiple political identities, but at their core they are Indigenous. It is here where the state must shift from a vertical, hierarchical notion of sovereignty that engages a dynamic of "control over" to a co-operative model that acknowledges its relation to fluid polities as opposed to a single homogenous nation.

7.5 Sovereignty and the Land

Listening to Indigenous justice claims means being able to hear what sovereignty means, even if it leads to unsettling or disorienting arguments for structural and constitutional change. The idea of prefiguration is that we envision what the world should look like, while working toward that world at the same time, and knowing we may fall short. Prefiguration provides us with a way to live in an unjust world while listening for and striving for a better one. As Shotwell (2016) says: "To be against purity is to start from an understanding of our implication in this compromised world, to recognize the quite vast injustices informing our everyday lives, and from that understanding to act on our *wish that it were not so*" (204, emphasis in original). To be able to simultaneously live in an

unjust world in which we benefit from colonial relationships of oppression, while working against them, we need to also have an idea of what the world should be. This world is what we learn from listening to Indigenous claims for justice from Indigenous advocates.

Indigenous justice claims as described by research participants and through the research for this dissertation are about the continued existence of Indigenous peoples through self-determination. Self-determination is situated with respect to specific territory and the land, water and all beings in that interrelated system and in relation to past and future generations. The normative aspect of self-determination and sovereignty is to exist as a people within the web of relations in a good way. This entails the operation of Indigenous political, economic, governance, language and social institutions to fill jurisdictional space.

This idea of justice, however, is not bounded by territory, region or language. Climate change and the catastrophes related to it such as the Covid-19 pandemic arise from exploitation of resources without consideration of the impacts on the entire system and its future, and all that exists in an interrelated way within that system (Loske 2020, 1). In the case of the Covid-19 pandemic of 2020 and other illnesses, incursion into wild spaces brings humans into contact with dangerous viruses, and factory farming facilitates transmission (1). Though a virus may start in one limited location, it clearly does not respect boundaries, as is evidenced by the rampant transmission of Covid-19 around the world (Worldometers, n.d.).

Wildfires on the west coast of North America in 2020 and again in 2021 are linked with changes in worldwide weather systems related to climate change. For the

state to respond ethically to a claim for Indigenous justice to exist in harmony within a web of relations with land, air, water and within biodiversity, the state must be responsible to preserve the environment upon which we all depend. The nature of the definition of Indigenous justice and the co-constitution of Indigenous peoples with their lands and waters, coupled with the unbounded nature of the environment, means that Indigenous justice is also intertwined with environmental health. Climate change, therefore, is not simply a parallel or competing policy priority to Indigenous justice; it is primal. This idea is captured well by Indigenous environmental advocate Winona LaDuke (2016) in her famous quote:

> Someone needs to explain to me why wanting clean drinking water makes you an activist, and why proposing to destroy water with chemical warfare doesn't make a corporation a terrorist. (154)

The notion of justice is no longer limited to addressing only distinct claims of Indigenous peoples on bounded territories. Obligations toward collective goods such as water, land and air become a non-Indigenous responsibility and will require jurisdictional practices among our polity that respects and supports good health.

Structurally, however, our existing nation-state construct is problematic. As illustrated, the Canadian constitutional order creates a hierarchy with Crown sovereignty at the top. The constitutional ordering in Canada, where power over decision-making is split between the federal and provincial Crown, is a set of structures that does not allow for this decision-making power to be alienated beyond itself or shared. Aaron Mills (2016) describes Crown sovereignty as embedded within liberal notions of individual freedom; the ability to exercise agency free from interference and with dominion over territory. In any negotiation between the state and Indigenous peoples, this is the starting point, and by definition, it seems to require an adversarial polarity between the Crown

and any entity that is not the Crown. Within the international law definition of sovereignty there is embedded a conflict between a nation-state and any other entity.

In addition, in Canada the fundamental ordering is based on two founding nations—the English and the French. We have section 35 of the *Constitution Act 1982*, which recognizes existing Aboriginal rights, but the claim for recognition of Aboriginal rights must be established. At its foundation, the concept of Crown sovereignty in the Canadian constitution does not accommodate collective Indigenous being within its definition. Crown sovereignty requires a hierarchy between itself and non-Crown entities. It is not a set of lateral relationships such as those that are embedded in Indigenous notions of being.

To return to the definition of polities cited above:

> Depending on the circumstances—such as population changes, environmental pressures, economic changes, communication and transportation developments, and evolving relationships with other groups—polities can merge with other polities, become stronger, or simply disintegrate. In these ways, polities reconceptualize political space and are able to take into account the contingent and simultaneous manner which multiple levels of political space coexist and operate. (Shadian 2014, 7)

A notion of sovereignty that relies on non-domination and polities can provide us with the flexibility to understand when there is in fact a common purpose such as dealing with the impacts of climate change and efforts to reverse it. Occupation of this common political space by Indigenous and non-Indigenous peoples in Canada can avoid the polarity and adversarial default positions that otherwise exist between Indigenous peoples and the state. Coalescing around a common political purpose around climate change, biodiversity and other environmental issues does not negate distinct Indigenous polities in other political spaces, or on other issues. A more fluid notion of sovereignty, such as is conceived by the Inuit, permits movement into new political spaces that is otherwise more

difficult in the Westphalian nation-state construct. As well, a focus on an area of common concern as opposed to a theoretical fear of loss of control or of independence allows for productive cooperation toward well-being.

The bid for control versus the bid to exist as a people will not be resolved without a deep examination of structures that embed conflict within their definitions, such as exists within the European notion of state sovereignty. As Sinclair said:

> So long as the missions of Indigenous people to be what they were meant to be in accordance with the teachings of their Elders and the teaching of their traditions, there will be this constant interplay between tolerating what's happening, and negotiating with what's happening, and making do with what's happening, versus this overriding view that we are entitled to better than this. (M. Sinclair, personal communication, May 30, 2020)

Chapter 8 Conclusion

> We want your land. We want it all. We want it all and we want it *all*.
>
> But they never got our spirit. That's the only reason we're still here, and still fighting, and still able to fight. You know, there's times they want to know that the.... They want the key for that but it's not.... There is no key for that. You just have to live it, and believe it, and *be* it. They would love to destroy that. And that's all they have to do now. They did everything else but they can't have that. They'll never have that. You don't have to worry for us for that. They'll never have that. (K. Skye, personal communication, September 2, 2020)

Why the gap between what state officials think they are doing and what Indigenous peoples require of the state to achieve a just response to their claims? In this project, I have listened to a range of Indigenous voices to begin to understand what justice means, and their experiences in seeking justice from the state as a structure that represents the majority of Canadians who are non-Indigenous. I have interviewed two senior government officials who largely understand the challenges of trying to address Indigenous justice claims within a large system. However, perhaps because they do not have policy direction from politicians and the Canadians they represent to work on structural shifts within that system, they did not describe the types of structural limitations on their capacity to make change. I have also examined the state mechanisms of inquiries and commissions designed to listen around specific justice issues and the state's reception of their recommendations and calls to action. Throughout, I have applied Indigenous scholarship to better understand the nature of Indigenous justice, and a feminist relational approach as a tool to understand the relations of power within the structures that reinforce historical oppression, because those structures have not changed substantially from their original colonial design.

With this approach, I have started the work of outlining the types of strategic moves that are necessary to shift the relations of power between Indigenous peoples and the state in Canada, such that Indigenous justice claims can be ethically addressed.

In chapter 1, I outline the question that permeates the dissertation, as well as a methodology that attempts to reflect a form of justice that I pursue throughout the project. It is an attempt to listen well, maintain relationships that recognize the operation of power in the relationship, and the possibility of being disoriented by what I heard. My method is also intended to enable a good and reciprocal relationship with those with whom I engaged.

In chapter 2, I situate myself in relation to my work on issues relating to Indigenous justice. In this chapter I identify with a feminist relational approach and see it as a useful framework for understanding oppression and the operation of power in relationships. Indigenous scholarship and ways of being in the world are critical for understanding the centrality of co-constitution with the land, and the relationships of mutual obligation with lands, waters and all beings within Indigenous territories and generations past and future.

Chapter 3 explores what the individual can do within oppressive institutional structures to respond to Indigenous justice claims. It examines the role of disorientation as conceptualized by feminist relational scholar Ami Harbin and the moves that can be made to allow institutional actors to listen and properly hear Indigenous visions of justice even when they are unsettling or disorienting. This action of being willing to be irresolute and to stay in a place where one doesn't know how to proceed, is vital throughout state institutions, and especially vital where state officials have the opportunity to listen to

Indigenous advocates directly. This type of potential for change on the part of bureaucrats is limited, however, by the structures of accountability and principles of majoritarianism that undergird the government in Canada. It is also limited by how much direct engagement bureaucrats have, where they are actually in a position to listen in an unfiltered way to Indigenous advocates.

Chapter 4 explores the state mechanisms of inquiries and commissions that are specifically tasked with listening to justice claims and reporting on them after core government operations have failed to listen and their legitimacy is at stake. These bodies have the potential to produce work that specifically allows for direct listening by all segments of government and of the Canadian public to Indigenous advocates. They can be limited, however, in the degree to which they are successful. This chapter introduces two related concepts of invisibility as conceptualized by Dene scholar Glen Coulthard and Mohawk scholar Audra Simpson, who both critique recognition theory and the ethical wrong of not being heard, as conceptualized by feminist relational scholar Jill Stauffer. I describe the Berger Inquiry and the Truth and Reconciliation Commission, their mandates, approaches to listening and their recommendations and Calls to Action.

Chapter 5 examines in some detail the legacies of the Berger Inquiry and the TRC and some of the successes and challenges associated with that work. I introduce the concept of the field of justice, to better understand two things: 1) how the proximity of the subject area focus of an inquiry or commission to land can make a difference in how successful it is in capturing the nature of Indigenous justice claims; and 2) the inquiry or commission's location in time—whether it is primarily situated before harm is perpetrated and thus can allow for a forward-looking vision of Indigenous justice, or is redressing

past harms. Both aspects can affect the types of challenges it faces in successfully implementing its mandate. This chapter picks up the theme of epistemic injustice that was articulated in chapter 2 and examines the role of litigation and litigation-style procedures in inquiries and commissions, and the distortions that can happen as a result of litigation.

Chapter 6 examines the conceptual limitations of recognition theory through an examination of critiques outlined by Glen Coulthard and Audra Simpson. It also explores the ethical wrongs of not being heard and not been seen, first mentioned in chapter 4. Critiques of recognition theory then lead us to a conceptual pitfall that should be avoided within state structures that engage with recognition as a framework for addressing Indigenous justice claims. That pitfall is the assumption that recognition is necessarily a vertical and binary action that is conferred by the state upon Indigenous peoples. I provide arguments for practices that strengthen lateral and intra-community recognition applying Alexis Shotwell's critique of purity to unpack some of the issues relating to a binary approach to recognition, and in particular the state's tendency to seek certainty in treating with Indigenous peoples. This chapter also explores how vertical and binary recognition practices can work to undermine Indigenous governance which has been fractured through the imposition of colonial governance structures. Finally, I locate another place where a binary approach can be softened. It is where norms are developed prior to the creation of laws and legal opinions within government. In this space, before laws are made or interpreted within the state, there should be room for listening to Indigenous advocates for the purpose of creating norms that feed into the creation of laws and the interpretation of laws. Consensus-based governance practices can inform how the state operates, for the purpose of counteracting majoritarian governance practices. This is

required because Indigenous peoples in Canada were overwhelmed by settler-colonialism; there is no legitimate foundation for majoritarian Canadian governance practices in relation to them.

Finally, chapter 7 examines the Royal Commission on Aboriginal Peoples, its genesis in the aftermath of the Oka Crisis and the Meech Lake Accord, and its legacy. It is here where some of the structural reforms that would address Indigenous justice claims at the foundations of Canada's existence are examined. These reforms require the will of the Canadian people to be engaged. Canadians must be the ones who understand the nature of the injustices faced by Indigenous peoples, and what is required to address them. In understanding that there is anxiety around the notion that state sovereignty would be eroded through an ethical response to Indigenous justice claims, I examine relational and Indigenous ways to think about sovereignty. In particular, I start to explore Inuit conceptions of sovereignty and I recommend that we rethink sovereignty so that it reflects Indigenous ethical norms of good relations to land, water and all living and non-living beings within the lands and waters. I suggest that we learn to listen, be disoriented by, and adopt Indigenous visions of justice that rebalance these relationships within our governance, economic and political structures. For example, exploring the impact of Inuit sovereignty and other forms of Indigenous sovereignty through further field research and scholarly research that fully respects Inuit research protocols, may teach us how to address the common global imbalances that are at the root of climate change – a topic for further work that is beyond the scope of this dissertation.

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