Tsilhqot'in Nation v British Columbia: Aboriginal Title, Indigenous Resurgence, and the Politics of Recognition

By

Louis-Alfredo Garcia

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Ottawa, Ontario

Abstract

This thesis situates *Tsilhqot'in Nation v British Columbia* (2014) within the discourse of the politics of recognition and argues that *Tsilqhot'in* is a limited victory. *Tsilhqot'in* altered the test for Aboriginal title to include semi-nomadic Indigenous lifestyles. In doing so, it provides leverage to Indigenous groups that never could have acquired Aboriginal title within common law's previous *intensive use* of land criteria. However, *Tsilhqot'in* does not completely alter the structures of settler colonialism's law because it fails to dismantle the law's hierarchical and assimilative nature. The Supreme Court reaffirmed the Crown's unjustified sovereignty over Indigenous peoples by establishing a test to infringe Aboriginal title. Perhaps the courtroom is not the space for finding justice. This thesis attempts to re-conceptualize ideas about Indigenous resurgence, law, and recognition through the use of critical discourse and Indigenous politics.

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Introduction

In this thesis I interpret the discourse in the landmark Supreme Court case of *Tsilhqot'in Nation v British Columbia* (2014). I argue that *Tsilqhot'in* is a limited victory that stays confined to the parameters of the liberal politics of recognition, whose solutions only provide the "institutional accommodation of societal cultural differences"[1] rather than affirmation of the self-determination of marginalized individuals. I argue that the *Tsilhqot'in* decision alone may not completely transform the topography[2] of the common law, as it does not dismantle common law's oppressive nature that seeks to (re)construct, and assimilate Indigenous subjectivities into its own language and parameters. [3] Nonetheless, the decision provides Indigenous groups valuable insight into how their own interests in land can be constitutionally recognized and affirmed. *Tsilhqot'in* alters the test for Aboriginal title to include semi-nomadic Indigenous lifestyles. It provides leverage to groups that never could have acquired Aboriginal title over large sections of traditional territory due to common law's previous *intensive use* of land criteria.[4] The decision also states that even if there is a potential to make an Aboriginal title claim, the government must consult with and accommodate the Indigenous community.[5] Moreover, the Crown must gain *consent* and not just consult with Indigenous communities when it has an interest

[1] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 27.
[2] By topography, I mean the structural relationships of Canada's legal system, which include but are not limited to the common law's relationship to colonialism, bio-politics, and sovereignty.
[3] Some scholars like Taiaiake Alfred suggest that by simply participating in the confines of settler colonial institutions we are legitimizing the false sovereignty of the state and the continued dispossession of Indigenous peoples. See, Alfred, T., and E. Tomkins. "The Politics of Recognition: A Colonial Groundhog Day." *Chiefs of Ontario Discussion Paper* (2010), 6; Alfred, T. *Peace, power, righteousness: An indigenous manifesto*. Canada: Oxford University Press, 2009, 48.
[4] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 28.
[5] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 78.

in the land. Thus, Indigenous groups wishing to protect traditional lands from unsustainable exploitation have potentially been provided with stronger laws to do so.

The chapters that follow will be a journey that actively accesses the ideas and issues surrounding settler colonialism, the politics of recognition, and the importance of acknowledgement of Indigenous tradition. At the same time, I hope to bring reflection into our own positions[6] within Canada in order to deconstruct our own prejudices that can often impede solidarity with Indigenous peoples, and resistance to Canada's continued colonial abuse.

This thesis is divided into five segments. The introduction outlines my methodological approach and the analytical frameworks I use in order to deconstruct and problematize the *Tsilhqot'in* decision, and its relationship to settler colonialism and the politics of recognition. It also defines some of the key terms that are used throughout this thesis such as settler colonialism, bio-politics, self-determination, and the politics of recognition.

The first chapter presents a case analysis and overview of *Tsilhqot'in Nation v British Columbia* (2014), investigating the decision and the future of Aboriginal title claims. Chapter two serves as a basis for understanding the ways in which *Tsilhqot'in* has engaged with common law. Primarily, I clarify how *Tsilhqot'in* has created new laws, and reaffirmed existing laws, that undermine Indigenous agency on titled land. I explain what is at stake in the decision. Arguably, the lack of discussion about Indigenous self-determination and self-governance, and simultaneous accordance to the Crown of the right to infringe titled land, makes the decision problematic.

[6] Here, I mean the perspectives of the settler population on Turtle Island.

Rather than being 'transformative' in nature, *Tsilhqot'in* is confined to a slow and steady form of 'inclusionary' law. I provide a literature review that demonstrates the various ways in which *Tsilhqot'in* embraces the narratives of accommodation and multiculturalism that plague the liberal politics of recognition. Indigenous rights are different from cultural rights since they existed before Crown sovereignty. Affirming an Indigenous right, such as title, is not a form of cultural difference that can simply be accommodated alongside a settler political order forged on stolen land. *Tsilhqot'in*, like the liberal politics of recognition, fails in viewing Indigenous rights as part of a unique political or legal system that is much older than the Canadian common law. The Supreme Court argued that titled land without the inclusion of provincial or federal law would create a "legal vacuum."[7] This implies that Indigenous laws are incapable of governing modern territories on their own. My literature review is also significant because it introduces the various voices and debates that are already present within the discourse of the politics of recognition. In addition, the literature review provides a nuanced understanding of strategies that have failed, and those that have the potential, to challenge the settler colonial state. I hope to expose certain weaknesses in the liberal politics of recognition by revealing important questions and intersections that require further investigation. Ultimately, the politics of recognition can be strengthened, first by locating which liberal strategies about Indigenous peoples and social justice are problematic, and then by attempting to transform them through ensuring the prioritization of substantive rights to Indigenous autonomy and self-determination.

[7] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 147.

The third chapter delves deeper into criticism of the politics of recognition. I problematize the elements in *Tsilhqot'in* that manifest a broader colonial apparatus of power. This apparatus is not one that the liberal politics of recognition can engage with as, for the most part, it is concerned with reform strategies and not with the understanding of Canada's social ontology[8] that operates by co-opting Indigenous life into the bio-politics of settler colonial institutions. In Canada, legal Indigenous recognition through the common law is based on a structure of *exclusion through inclusion*.[9] The various elements and processes constructive of Indigenous identities are recognized (included) by the settler state, only to be transformed (excluded) into what the state considers to be political.[10] Such was the premise of the *Indian Act*, and of Aboriginal title. This chapter therefore engages in a discussion about governance, and the judiciaries' role in re-legitimizing Crown sovereignty.

The fourth chapter turns to a more practical discussion about *Tsilhqot'in*. In it, I examine the strategies that the Tsilhqot'in Nation and other Indigenous communities have pursued, both inside and outside the courtroom, following this landmark decision. These

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[8]By social ontology I mean the forces thought to underlie the existence of a phenomena under investigation. More specifically, I am interested in the interplay between agency, structure, constraint and the relations of power and authority. See, Rampton, Ben. Language in Late Modernity: Interaction in an Urban School. Vol. 22. Cambridge University Press, 2006, 390.

[9] Exclusion through inclusion is an idea expanded by Giorgio Agamben who links sovereignty to a power to designate subjects of the law as *homo sacer*, the sacred man who may be killed without being sacrificed or made subject to homicide. The placement of *homo sacer* in a zone of 'bare life' establishes European liberal philosophy as a logic, which sustains this phenomenon. Essentially, the sacred man enters a 'state of exception' to the law that simultaneously reinforces its rule. Agamben argues that by forming a permanent space for bare life, the state materializes the state of exception' as 'the rule'. This can be attributed to the ways in which the colonizers did not believe they were committing murder or the genocide of a peoples or how the construction of Indigenous subjectivity as *homo sacer* and the constant infringement of Aboriginal rights is actually entrenched with the formation of government and its constitution. Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen. Stanford University Press, 1998. See pages 9-12 and 89.

[10] See Agamben's analysis on the distinction between biological (*bios*)/political life (*zoe*) and *homo sacer*/bare life. Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen. Stanford University Press, 1998, 9-14.

include renegotiation, litigation, the issuing of eviction notices, and declarations of sovereignty. I examine whether these strategies make significant changes to common law's structure, and what they imply about the future of decolonization. For instance, is formal litigation the primary avenue for pursuing action to reclaim Indigenous land, rights, and space? One obvious problem is the cost of such legal processes. However, if Treaty negotiation with the Crown lacks the possibility of recognition of the spirit of Indigenous law and society, what other options are available? One alternative is to resist negotiations and dependence on the state altogether. Nevertheless, I argue that this autonomous approach can leave unchallenged the institutions that perpetuate social relations of colonialism, as well as its despotic methods of economic development that also affect non-Indigenous peoples. In order to decolonize Canada, a massive transformation of political, legal, cultural, social, and economic orders must be pursued in order to extend the concerns of Indigenous communities beyond their current localities.

Decolonization as a multi-faceted project cannot be done without both Nations, Indigenous and non-Indigenous, actively recognizing one another and participating in settler colonialism's deconstruction. I suggest that perhaps the Tsilhqot'in Nation's *Tribal Park* project can be viewed as an Indigenous space that disrupts the colonial state, in ways that the courtroom cannot, through traditional Indigenous governance and principles of co-existence and reciprocity. In various ways, *Tsilhqot'in* has provided Indigenous peoples a means to disrupt current policies that harm the composition of the land; indeed, the threshold for consent, consultation, and accommodation is greatest when Aboriginal title is in question.[11] Without meeting the requirements of consent and consultation,

[11] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 79.

development projects, for example, cannot be pursued. Moreover, even if development projects have already started, *Tsilhqot'in* found that these projects could be shut down at any moment if Aboriginal title is established. Thus, justice and recognition should be thought of as concepts always in progress and not as finite ideas. Leanne Simpson argues that self-governance or ordering principles based on Indigenous thought/theory cannot be distinguished from the act of living. In essence, "[r]esurgence is our original instruction."[12]

Remembering Tsilhqot'in

On October 26, 1864 at 7 a.m., as the High Sheriff read the sentences, trap doors opened and five Tsilhqot'in Chiefs fell the distance between life and death. "It seems horrible to hang 5 men at once," wrote Justice Matthew Baillie Begbie, "yet the blood of 21 whites calls for retribution."[13] Law had triumphed over savagery, colonial power stood victorious over the wild Indian. The retribution was "[l]ittle short of marvelous,"[14] stated Governor Frederick Seymour. Yet in hanging the Tsilhqot'in Chiefs, the colonizers had recognized that an independent group lived alongside the settlers. In fact, Begbie, while sentencing the Tsilhqot'in warriors, asked them what the punishment was in their *law* for murder. The Tsilhqot'in replied "death."[15] The settlers of British Columbia applied Tsilhqot'in *law* and with that the Chilcotin War was finally over, or so history books say. However, the government officials failed in mentioning that the Tsilhqot'in Chiefs were

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[12] Simpson, Leanne. *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence*. Arbeiter Ring Publishing, 2011, 66.
[13] Lutz, John. "October 26, 1864 [Chilcotin War]." *The Beaver* 84.5 (2004),1-8.
[14] Lutz, John. "October 26, 1864 [Chilcotin War]." *The Beaver* 84.5 (2004), 1-8.
[15] Swanky, Tom. "How Tsilhqot'in Sovereignty Was Usurped – A Story of Colonial Genocide and Treachery". July 2 2014. *TML Weekly*. Retrieved from: http://www.cpcml.ca/Tmlw2014/W44022.HTM.

tricked into meeting with the government for what were to be unarmed peace agreements only to be ambushed, arrested and sentenced to an unjust death.

One hundred and fifty years later, Tsilhqot'in cheers and cries are heard all across Canada. But they are no longer war cries or tears of sorrow. June 26, 2014 was a day of celebration for the Tsilhqot'in Nation. In a unanimous 8-0 decision, the Supreme Court of Canada, for the first time in Canadian legal history, affirmed Aboriginal title[16] to the Tsilhqot'in Nation of more than 1,700 square kilometres of land in British Columbia.

Although the Supreme Court decision stems specifically from a recent twenty year provincial logging dispute involving Carrier Ltd. and the Xeni Gwet'in First Nation, it cannot be separated from the resonance of the 'Chilcotin War', a battle over the rightful ownership of a territory. The Chilcotin War did not end in 1864. The war highlighted the tension between the settlers' ideology of economic development and Indigenous peoples' relations to land. To this day, the Tsilhqot'in people continue to resist the same forms of settler expansion they experienced during British Columbia's industrialization, though no longer with guns. For example, a series of blockades in the 1980s and 1990s impeded resource extraction operations in the Chilcotin region of British Columbia.

The path to the formal court system was spearheaded by Xeni Gwet'in Chief Roger William, on behalf of the whole Tsilhqot'in Nation, when he filed action in the British Columbia Supreme Court seeking a declaration of Aboriginal title over 438,000 hectares in B.C.'s Cariboo-Chilcotin region. Litigation, however, only altered the space in which

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[16] Aboriginal Title means the inherent Indigenous right to a traditional territory. The Supreme Court of Canada has made it clear throughout jurisprudence that Aboriginal title existed prior to colonization of North America by European settlers. However, courts have often avoided specifying ideas of Indigenous self-determination. Moreover, Canadian development policies often trump the idea of Title. See, *Guerin v the Queen*, *R v Calder*, *Roberts v Canada*. McNeil, Kent. "The meaning of Aboriginal title." *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (1997): 135-54.

the dispute over territorial ownership took place. The battlefield was no longer the roads of the Cariboo-Chilcotin region, it was now inside the courtroom. The 'Colonizer' and the 'Indian' meet eye to eye once again. But this time, there would not be a quick and unjust trial. Indeed, the Supreme Court decision cements the truth of what the Tsilhqot'in people have always known: their traditional territory was never relinquished to colonial powers and Tsilhqot'in forms of order and governance existed in British Columbia prior to settler contact.

But how effective was the *Tsilhqot'in* victory in progressing and protecting Indigenous rights in Canada? Is it purely symbolic, like the 2008 Stephen Harper 'apology' in which the Prime Minister addressed the assimilation of Indigenous children through government funded, church run residential schools, yet ignored the structural issues of colonialism? In fact, Prime Minister Stephen Harper has declared that the issues pertaining to missing and murdered Indigenous women are not a sociological (systemic) issue but are rather crimes of domestic abuse.[17] Or does *Tsilhqot'in* have the potential to create new social relations between Indigenous peoples, the government, the economy, and non-Indigenous peoples? In answering this question, it is important to acknowledge that the Court ruled that the Crown could infringe Aboriginal title if it demonstrated a compelling and substantial objective for the benefits of the larger Canadian population, and if it acted consistently with its fiduciary duty.[18] The infringement is not too problematic, as even Canadian citizens' rights can be limited. The issue is that the Supreme Court still implies

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[17] Ditchburn, Jennifer. "Reports Contradict Stephen Harper's View on Aboriginal Women Victims: Prime Minister Said Issue of Missing, Murdered Aboriginal Women is Not "Sociological Phenomenon."" *CBC News*. Sep. 03, 2014. Accessed on: May 04 2015. Retrieved from: http://www.cbc.ca/news/aboriginal/reports-contradict-stephen-harper-s-view-on-aboriginal-women-victims-1.2754542.

[18] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 125.

that the Crown retains authority over Indigenous land, including that of the Tsilhqot'in Nation, due to Canada's underlying title that it gained with its assertion of sovereignty.[19]

The Supreme Court declared that the province of British Columbia had "breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations."[20] But at the same time, the Court created various tests that could justify and legitimize the provinces ability to infringe Aboriginal title. Specifically, it is the elimination of the inter-jurisdictional immunity doctrine that allows provincial governments to engage with titled land. Inter-jurisdictional immunity, along with the division of powers, suggests that the provincial and federal government have distinct and exclusive jurisdictions. Historically, Aboriginal rights have been at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act* (1867).[21] The Supreme Court argued that effective regulation requires cooperation between interconnected federal and provincial systems. Inter-jurisdictional immunity, therefore, may stall such productive cooperation.[22] Yet Anishinabe[23] scholar John Borrows argues that, throughout history, inter-jurisdictional immunity was one of the few checks and balances Indigenous peoples enjoyed to prevent further dispossession at the hand of local/provincial governments.[24] The British Crown notes that prior to 1763, local colonies were responsible for "great fraud and

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[19] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 75.
[20] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 153.
[21] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at p. 263.
[22] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at p. 148.
[23] There exists various spellings and pronunciations of this name with the different Indigenous languages on Turtle Island including: Anishinabe, Anishinaabe, Anishnabe, Anishnabai, Anishnawbe, Nishnaabe, Nishnabe, and Neshnabé. Plural forms also end in "g" or "k," such as Anishinabek, Anishinaabeg, Neshnabék or Nishnaabeg. I use the spelling of which scholars affiliate themselves with.
[24]Borrows, John. *Aboriginal Title in Tsilhqot'in v. British Columbia [2014] SCC 44.* August 19, 2014. http://maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqotin-v-british-columbia-2014-scc-44/.

abuses" in obtaining land from Aboriginals that had caused "great dissatisfaction."[25] The *Royal Proclamation* found that any future negotiation with Indigenous peoples was to be done in public by representatives of the British crown.

The *Tsilhqot'in* decision is both an important victory and a substantial loss for Indigenous communities in Canada. The Tsilhqot'in people are now the recognized owners of their claimed territory and can use their land as they "choose."[26] As will be made evident, *Tsilhqot'in* clarifies many legal questions surrounding Aboriginal title and provides guidance to other Indigenous communities wanting to prove ownership over their traditional territory. But the Court also creates precedent that makes it easier for the Crown and for provincial governments to infringe upon Indigenous interests when acting in a *constitutionally* prescribed manner that benefits the larger Canadian community.[27]

Methodology and Ethics: How to Analyze Settler Colonialism

Research is much more than *dialogue* between two voices or two scholars. A thesis is a project of active and dynamic writing in that "it is a multiparty conversation, or multilogue"[28] involving the researcher and their various resources. The thesis process becomes much more nuanced and complex when more than two voices are in conversation with one another. I find it hard to believe that a thesis can be a *dialogue*, since by definition this only involves two voices. If researchers have a particular question, often they attempt

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[25] *The Royal Proclamation, 1763*. Accessed on Apr 20 2015. Retrieved from: http://archiveca.com/ca/c/canadiana.ca/2014-02-05_3637863_47/Canada_in_the_Making_Aboriginals_Treaties_amp_Relations/.
[26] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 144.
[27] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 82.
[28] Unsworth, Len, ed. *Researching language in schools and communities: Functional linguistic perspectives*. A&C Black, 2005, 141.

to decipher how various scholars would answer that question. In this discussion about settler colonialism, a multiplicity of voices is the crux of my project. This includes interrogation of how these voices intersect, complement, and disrupt one another. For example, how does *Tsilhqot'in* engage with important elements within settler colonialism, including, but not limited to, sovereignty, governance, and bio-politics? Does Aboriginal title fall within the paradigm of the liberal politics of recognition? How do scholars describe the politics of recognition?

It seems the further we dig into specific questions (such as: what is meant by sovereignty? What is meant by governance?), the more we discover about history and politics itself. Inadvertently, we might think of new questions to ask and analyze. Thus, a *multilogue* analysis provides opportunities to make new connections with political discourse by opening up spaces for conversation that are not present in the limited context of *dialogue*. Even in the studies of the politics of recognition, the discussion is not solely between the state and the *Other*. The *Other* is not a homogenous entity. To assume homogeneity is to undermine the agency of different groups and communities within Canada. In the context of Indigenous peoples in Canada, my project must be cognizant of various voices. For instance, the voices of the Tsilhqot'in Nation may differ from other Indigenous Nations in Canada. Even the opinions of Tsilhqot'in members can at times contest with each other. Politics is therefore a study of active discourses that cannot be homogenized by narrow research and literature. What I provide then is but a brief moment in the ongoing conversation between the Tsilhqot'in Nation, other Indigenous communities, the province of British Columbia, and the Canadian state.

Moreover, Maori scholar Linda Smith argues that:

> it is surely difficult to discuss research methodology and [I]ndigenous peoples together, in the same breath, without having an analysis of imperialism, without understanding the complex ways in which the pursuit of knowledge is deeply embedded in the multiple layers of imperial and colonial practices.[29]

Although in this thesis I explore a case study, the *Tsilhqot'in* Supreme Court decision, this thesis is also a critical discourse analysis that focuses on power relations of struggle and emancipation through the political discourse created by the Supreme Court. As I will make evident, the *Tsilhqot'in* decision becomes one about "the interests and ways of knowing of the West and the interests and ways of resisting of the Other."[30] For example, how does the Supreme Court legitimize or reproduce colonial structures of domination through legal text and talk in discussion about Aboriginal title? Likewise, how did the Tsilhqot'in Nation resist these narrow interpretations of Aboriginal title?

According to Norman Fairclough and Ruth Wodak, critical discourse analysis (CDA) can be summarized as followed:

1. CDA addresses social problems
2. Power relations are discursive
3. Discourse constitutes society and culture
4. Discourse does ideological work
5. Discourse is historical
6. The link between text and society is mediated
7. Discourse analysis is interpretative and explanatory
8. Discourse is a form of social action [31]

Indeed, as Smith points out, research has primarily functioned as an expression of Western ideology and epistemology. It carries offensive connotations for many colonized

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[29] Smith, Linda Tuhiwai. *Decolonizing Methodologies: Research and Indigenous Peoples*. Zed Books, 1999, 2.
[30] Smith, Linda Tuhiwai. *Decolonizing Methodologies: Research and Indigenous Peoples*. Zed Books, 1999, 2.
[31] Fairclough, N. L., and Wodak, R. (1997). "Critical Discourse Analysis". In T. A. van Dijk (Ed.), *Discourse Studies*. *A multidisciplinary introduction*. *Vol. 2*. *Discourse as Social Interaction*. Sage Publications, 271-80.

peoples. Furthermore, research methodologies often privilege Western voices and subjugate, mis/re-represent, or fail to recognize the legitimacy of traditional Indigenous knowledge systems. Thus, Smith emphasizes the need to develop research frameworks that focus on Indigenous knowledge and priorities if we are to engage in discussions about Indigenous politics. However, in my opinion, the foundational elements of CDA do not privilege Western ideology *per se* and can be used as analytical tools to problematize the current Canadian legal system and its treatment of Indigenous peoples. For instance, if discourse constitutes society, perhaps we can uncover the main narratives that influenced the ontological foundations of settler colonialism in Canada. This is why I turn to John Locke as a prominent voice ultimately influencing the colonial nature of North American nation state building and its treatment of Indigenous peoples.

Although discourse may be viewed as simple text, through his political writings, Locke was able to challenge the monarchy of his time and influence agents who would create a new social structure based on ideologies of the liberal individual, democracy, and private property. Frank Hinkelammert argues that "[t]he result was rapidly accepted by the English bourgeoisie, and later by the worldwide bourgeoisie."[32] Consequently, Locke's philosophy legitimized slavery and the expropriation of Indigenous land in the New World. This is why discourses that emphasize Indigenous traditions are important; they too have the potential to foster new social relationships that can subvert Canadian settler colonialism.

In approaching this project, I apply an intersectional approach in attempt to understand the various social relationships in Canada between Indigenous peoples and

[32] Hinkelammert, Franz. "The Hidden Logic of Modernity: Locke and the Inversion of Human Rights." *Worlds and Knowledges Otherwise* 1 (2004), 4.

settler institutions. In doing so, I hope to avoid essentialist and universalist claims about Indigenous identities and colonial dispossession. This is not to say, however, that Western academia such as Marxism does not highlight "the ways in which power is structured through ownership" exposing the state's role "in the accumulation of capital and the redistribution of wealth from the many to the few."[33] In my discussion and critique about the *liberal politics of recognition*, these are the relations that the liberal politics of recognition sometimes overlook.

Yet, scholars such as Glen Coulthard argue that in order to make Western theories like Marxism relevant to a comprehensive understanding of settler colonialism and Indigenous resurgence, it must be "transformed in conversation with the critical thought and practices of Indigenous peoples themselves."[34] Consequently, reducing Indigenous subjectivities to economic determinism can be avoided by "contextually shifting our investigation from an emphasis on the capital relation to the colonial relation."[35] Coulthard argues that by shifting to an analysis about colonial relationships we can "occupy a better angle form which to both anticipate and interrogate practices of settler-state dispossession justified under otherwise egalitarian principles."[36]

A study about colonialism is at the very least two-fold. On the one hand, scholars such as Vivek Chibber argue that capitalism "generates an assault on some basic needs that

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[33] Menzies, Charles. "Indigenous Nations and Marxism: Notes on an Ambivalent Relationship," New Proposals: Journal of Marxism and Interdisciplinary Inquiry 3, no. 3 (2010), 5.
[34] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 41.
[35] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 45.
[36] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 49.

all people have in common."[37] Although this may be true, I would argue that colonialism pre-exists modern capitalism. Therefore, a study about Canadian settler colonialism and its relationship with Indigenous peoples would suggest that *colonialism* generates an assault on some basic needs that all Indigenous peoples in Canada have in common. The assault was, and still is, Canada's declaration of Crown sovereignty and ownership over traditional Indigenous land. On the other hand, a study about colonialism suggests that resistance to colonial structures will not always take the same form because of local, regional, and even individual identity.[38] In Canada, not all Indigenous communities experienced colonialism in the same way. For instance, because of the Tsilhqot'in Nation's reluctance to meet with settlers in the years preceding the British Columbia Gold Rush, Tsilhqot'in life was almost unaltered from colonial domination. This meant that the community suffered less from the epidemic outbreaks that cost the lives of many Indigenous peoples across Canada. In addition, they suffered less from the effects of alcoholism, as there was less intensive contact with fur traders. Nevertheless, the Tsilhqot'in would eventually suffer a heavy population loss in a smallpox epidemic shortly after the Gold Rush.[39]

Since many Indigenous histories exist throughout Canada, I must avoid constructing a dominant Indigenous discourse that undermines and reduces Indigenous subjectivities to a *one size fits all* colonial narrative. In fact, scholars like Taiaiake Alfred have also emphasized that the white elite population even manufactured a Native elite, which have benefitted from colonialism.[40] This further proves the complexity of imperial

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[37] Chibber, Vivek. "Capitalism, class and universalism: Escaping the Cul-De-Sac of Postcolonial Theory." *Socialist Register* 50.50 (2013), 67.
[38] Chibber, Vivek. "Capitalism, class and universalism: Escaping the Cul-De-Sac of Postcolonial Theory." *Socialist Register* 50.50 (2013), 66-67.
[39] Hewlett, Edward Sleigh. "The Chilcotin Uprising of 1864." *BC Studies 19* (1973), 52.
[40] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 12.

and colonial practices in Canada.

Bio-Politics and Methodology

Because of the complex and multilayered colonial practices in Canada, this thesis uses a bio-political framework alongside CDA to examine the relationships between the settler colonial state and its governance over Indigenous communities. In terms of governance, a bio-political framework functions well for exploring a settler colonial apparatus that intertwines various political and legal institutions to advance its relationships with its populace. A bio-political approach can be both a macro and micro level analysis that illuminates the various ways in which certain bodies within the population are disassembled and (re)organized in different spaces, locations, and time to perpetuate a specific political order.

Essentially, bio-politics was a term coined by Michel Foucault that refers not only to the governance of populations, but also to the shift towards life as the central subject of politics.[41] Essentially, he creates new inquiries into understanding the organizing principles of society and its multiple relations with power, sovereignty, and control. Foucault, by means of genealogical method, wants to move beyond the normalizing effects of universalizing and formal scientific discourse. Geneaology, according to Foucault, examines "the constitution of the subject across history which has led us up to the modern concept of the self."[42] The genealogist deals with complex processes, which cannot be

[41] Foucault, Michel. *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*. Trans. Graham Burchell Basingstoke. Palgrave Macmillan, 2009. See pages 1 and 107 for a more in depth discussion on life and population.
[42] Foucault, Michel. "About the Beginning of the Bermeneutics of the Self: Two lectures at Dartmouth." *Political theory* (1993), 202.

subordinated by general narratives. They must be dealt with in their specificity and locality. Moreover, the subject is not a universal, unchanging entity which endures social change; there exists many subjectivities and many histories. In other words, identity is a fluid concept that is unique to every individual. Genealogy also differs from historical analyses in that it is concerned with understanding the present. Foucault describes his genealogical work as a "history of the present"[43] or "effective history."[44] Accordingly, genealogy's concept of time, much like identity, is not linear. This debunks the assumption, underlying conventional historiography, that there are *facts* to be interpreted.

Bio-politics, therefore, supplements rather than undermines Indigenous methodologies because the goal of genealogy is to *transform* reality by understanding the history of today in order to open up new possibilities for thought and action. For example, if we interpret time not as linear but rather as a continuum, then Foucault's analysis fits with the literature surrounding settler colonialism. Patrick Wolfe argues that settler colonialism is a structure and not an event.[45] In other words, settler colonialism should not be understood as an event confined to the past, nor as a series of individual and isolated events. Rather, settler colonialism constitutes a way of thinking that continually informs social, legal, and political frameworks of the state. Moreover, Wolfe suggests that "[s]ettler colonialism destroys to replace,"[46] in the sense that settler colonial processes eliminate Indigenous subjectivities in order to take their place and access their territories. This "logic

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[43] Foucault, Michel. *Discipline and Punish*. Trans. Alan Sheridan. Vintage Books, 1979, 31.
[44] Foucault, Michel. "Nietzche, Genealogy, History." In *Langauge, Counter-Memory, Practice: Selected Essays and Interviews*, eds. D.F. Bouchard. Cornell University Press, 1977, 153-155.
[45] Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* Vol.8, no. 4, (2006), 388.
[46] Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* Vol.8, no. 4, (2006), 388.

of elimination."[47] that Wolfe emphasizes is the main distinction between colonialism and settler colonialism. Settler colonialism was primarily concerned with emigration and settlement rather than the extraction of labour or resources. However, the latter could still be secondary objectives of settler colonialism.[48] Lorenzo Veracini has also argued that wealth opportunities that were not viable in the Old World motivated settlement and necessitated the process of Indigenous dispossession and elimination in order to legitimize settler sovereignty over land and people.[49] Furthermore, "colonisers cease being colonisers if and when they become the majority of the population."[50] In fact, it was the gold rush in British Columbia that motivated immigration from the Old World into the New World. As the search for gold extended farther up the Fraser River, it led to a demand for roads. But construction meant having to cross Tsilhqot'in territory.

Necro-Politics and Methodology

Foucault's work brings insight as to why, through certain power mechanisms like those embedded in colonialism, some knowledges are marginalized while others are legitimated as truth. Furthermore, by genealogical method, he looks for intelligibility from multiple causes and from a variety of relations. Similarly, colonialism is a multi-faceted structure that requires multiple angles of inquiry to understand its complexities. Yet, whereas Foucault asserts that the "ancient right to take life or let live was replaced by a

[47] Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* Vol.8, no. 4, (2006), 388.
[48] Russell, Lynette. *Colonial Frontiers: Indigenous-European encounters in settler societies*. Manchester University Press, 2001, 170.
[49] Veracini, Lorenzo. *Settler Colonialism: A Theoretical Overview*. Palgrave Macmillan, 2010, 60-61.
[50] Veracini, Lorenzo. *Settler Colonialism: A Theoretical Overview*. Palgrave Macmillan, 2010, 5.

power to foster life or disallow it to the point of death"[51] scholars such as Achille Mbembe expand on Foucault's methodologies to argue that the concept of bio-power, that is the notion of managing or fostering life, is insufficient to explain the contemporary forms of subjugation of life to the power of death.[52] By focusing on the notion of death, Mbembe brings insights to the relationships within contemporary society and the normalization of violence.

Achille Mbembe's work draws on the concept of bio-power and explores its relation to notions of sovereignty and to the state of exception, while using death as the underlying premise of political production. In his article "Necropolitics," Mbembe argues that politics of death profoundly reconfigure relations among resistance and subjugation. Mbembe agrees that politics is about the preservation of life. However, he suggests that life, security, and liberty often require the death of the *Other*. Necro-power thus differs from bio-power in that it is not technologies of discipline or policing but rather "technologies of destruction [that] have become more tactile, more anatomical and sensorial."[53]

I argue that necro-politics is a suitable approach to understanding Patrick Wolfe's articulation of settler colonialism and its "logic of elimination."[54] Wolfe argues that settler colonialism performs genocide through a variety of techniques that legitimize the elimination of Indigenous peoples. Although the elimination of Indigenous peoples may be established through physical violence, elimination may also include practices that do

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[51] Foucault, Michel. *The History of Sexuality: An introduction*. Random House LLC. 2012, 138.
[52] Mbembe, J-A. "Necropolitics." Trans. Libby Meintjes. *Public culture* 15.1 (2003), 39.
[53] Mbembe, J-A. "Necropolitics." Trans. Libby Meintjes. *Public culture* 15.1 (2003), 34.
[54] Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* Vol.8, no. 4, (2006), 388.

not physically destroy bodies but produce new life by assimilating and organizing Indigenous peoples into the body politic of the settler nation.[55] This will become more evident in my discussion about the *Indian Act* in subsequent chapters. Finally, in my necro-political analysis I utilize Giorgio Agamben's work on the state of exception to find that "Europeans establish Western law and a new People on settled land by practicing an exception to the law that permits eliminating Indigenous peoples while defining settlers as those who replace."[56] I argue that this is the primary narrative that the Supreme Court wishes to re-establish, despite recognizing Aboriginal title. How can Aboriginal title be assimilated into the organizing principles of the current settler colonial state? As I will make evident, the infringement test, and its justifications for the larger Canadian society, are one way of reaffirming Crown sovereignty over Indigenous land. This eliminates the logic that Indigenous peoples are the sole proprietors of their traditional land spaces.

Liberal Politics of Recognition and Methodology

My thesis is influenced by the work of Dene scholar Glen Coulthard. In his most recent book, *Red Skins, White Masks*, Coulthard challenges the idea that the legacy of colonialism between Indigenous peoples and the Canadian state can be adequately reconciled and transformed via a *politics of recognition*.[57] By the term politics of recognition, Coulthard means the "range of recognition-based models of liberal pluralism that seek to "reconcile" Indigenous assertions of nationhood with settler-state sovereignty

[55] Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* Vol.8, no. 4, (2006), 388.
[56] Morgensen, Scott Lauria. "The Biopolitics of Settler Colonialism: Right here, right now." *Settler Colonial Studies* 1.1 (2011), 52.
[57] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 27-28.

via the accommodation of Indigenous identity claims,"[58] and that ultimately create renewed social relationships with the Canadian state. However, the liberal politics of recognition assumes that Canadian institutions are neutral and is premised on the ideals of reciprocity or mutual recognition. But Coulthard argues that the politics of recognition in its contemporary liberal form (re)produces "the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples' demands for recognition have historically sought to transcend."[59] As I will make evident through my case study of the *Tsilhqot'in* decision, the Supreme Court, despite recognizing Aboriginal title, grants Canadian governments the ability to pursue development projects on titled land. Furthermore, the Court re-legitimized the *fact* that the Crown has sovereignty over all land in Canada. In addition, Aboriginal title was argued to be a "burden on the underlying title asserted by the Crown at sovereignty."[60]

Although *Red Skin, White Masks* can be critiqued for lumping various scholars under the term liberal. I find that it does so to accentuate a point that was made earlier, namely that research methodologies and their solutions often privilege Western perspectives about reconciliation such as "economic development initiatives, and self-government agreements."[61] In the end, these methodologies and solutions overlook traditional Indigenous knowledge systems and ideas about justice. Consequently, I provide a literature review of some of the more prominent scholars that are writing within the literature of the politics of recognition, drawing attention to how they often overlook

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[58] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 28.
[59] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 28-29.
[60] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 75.
[61] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 29.

Indigenous ideas. I begin the literature review after the *Tsilhqot'in* case study to emphasize how the landmark decision can still fall under the problematic ideas about liberalism, multiculturalism, and cultural accommodation.

Making Connections with Methodology

If methodology is a way of decontextualizing an issue, a procedure for inquiring social relationships, then an understanding of Aboriginal titles and its significance to the Tsilhqot'in Nation and Indigenous resurgence must take into account a network of other factors. For example, an understanding of the Tsilhqot'in Nation's history, the politics of recognition, and governance, as well as a comprehension of settler colonialism, are important elements in advancing a critical approach to uncover the complex relationships encapsulated not only in the *Tsilhqot'in* decision, but within settler colonial relationships in general. The production of a critical discourse can illuminate how certain aspects of *Tsilhqot'in* can inspire a re-imagining of the very nature of the common law, while highlighting both the weaknesses and strengths of litigation and the politics of recognition. Although *Tsilhqot'in* is primarily concerned with ownership and title, the submissions of all parties contain arguments relevant to capitalist production, self-determination, stewardship, and sovereignty. Clearly, title is more than simply quantifying and identifying the borders surrounding a portion of land.

By analyzing *Tsilhqot'in* in order to answer how significant recognizing Aboriginal title is to the process of decolonizing Canada, it is important to investigate whether 'title' opens up new legal spaces for Indigenous self-determination, and why a reawakening of Indigenous tradition is important for the decolonization of Canada. When investigating

Tsilhqot'in, one must not be confined to the often rigid and neutrally assumed structures within the discourse of the liberal politics of recognition; rather, one must investigate "the interdependence and indissoluble connection between the actors involved in the phenomenon under investigation," [62] and how relations are consistently interrupted, deconstructed, reformulated, and acknowledged. These principles must also be supplemented by Canadian-Indigenous scholarship in order to account for specific relations unique to Canada. Canadian-Indigenous scholarship also directly examines the ways in which to reconcile and rebuild relationships with the colonial state and Indigenous peoples, rather than simply analyzing policy and law. Essentially, Indigenous literature is important to my methodology because it provides a framework for answering whether *Tsilhqot'in* alters the topography of Canadian colonialism, law, and the politics of recognition. I will be using the voices of Indigenous scholars and leaders that have experienced colonialism and know firsthand what is best, perhaps not for all Indigenous communities, but at the very least for their own communities. Moreover, Indigenous literature situates the *Tsilhqot'in* decision not in a legal or political vacuum; rather, it places *Tsilhqot'in* in a conversation about Indigenous resurgence that exists beyond British Columbia and the Tsilhqot'in Nation.

Key Terms and Concepts

Since this project is primarily focused on whether the affirmation of Aboriginal title can formulate new relationships that can foster Indigenous resurgence, it is important to define what is meant by resurgence, and the elements in which resurgence is most

[62] Anderson, Kevin. *Lenin, Hegel, and Western Marxism: a critical study*. University of Illinois Press, 1995, 24.

interested. Borrowing from Coulthard, resurgence is a rebirth of Indigenous cultural practices, direct political action, and self-actualization that is "attentive to the subjective and structural composition of settler colonial power."[63] In fact, some Indigenous scholars such as Taiaiake Alfred and Leanne Simpson "start from a position that calls on Indigenous people and communities to "turn away" from the assimilative reformism of the liberal recognition approach and to instead build [Indigenous] national liberation efforts on the revitalization of "traditional" political values and practices."[64] Coulthard adds that this also means abandoning the political orientation "around attaining a definitive form of affirmative recognition from the settler state and society."[65]

As will be made evident in subsequent chapters, the lack of a critical discussion on the importance of Indigenous self-expression in relation to Aboriginal title or self-determination strategies on titled land, while re-constructing Aboriginal title to justify and legitimize infringement by resource development, *demands* that academics and citizens alike radically re-conceptualize the ideas about Indigenous resurgence, law, and recognition. Thus I suggest that in order to fully "turn away"[66] from the state apparatus that dominates these realities, we must focus on concepts of autonomy. Yet, autonomy

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[63] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 79.
[64] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 386. Also see, Alfred, Gerald T. *Wasase: Indigenous Pathways of Action and Freedom*. Broadview Press, 2005; and Simpson, Leanne. *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence*. Arbeiter Ring Publishing, 2011.
[65] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 140.
[66] This has been the concept that Indigenous and post-colonialist scholars use to reference an abandonment of the state and an inward self-reflection to understand settler colonialism and then dismantle its oppressive nature through praxis of traditional ways of life. See. Fanon, Frantz. *Black Skin, White Masks*. Grove press, 2008; Fanon, Frantz. *The Wretched of the Earth*. Trans Patrick Neate. Grove Press, 1968; Alfred, Gerald T. *Wasase: Indigenous Pathways of Action and Freedom*. Broadview Press, 2005; Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*.University of Minnesota Press, 2014; Simpson, Leanne. *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence*. Arbeiter Ring Publishing, 2011.

from the Canadian state does not necessarily mean a complete refusal to acknowledge others, which would create an exclusive, isolated space. Instead of finding peace and justice, a politics solely based on refusal, isolation and anger towards the state can actually do more harm for a community. Rather, we must refuse the bio-political constructs that perpetuate the logic of elimination, assimilation, or exclusion, and accept/welcome the differences that at once make us unique, but at the same time strengthen and highlight "the social and political conditions that intensify the felt need for recognition, and…attempt to transform those, where possible."[67] I believe this approach still fits within Coulthard's "resurgent politics of recognition."[68]

This is why, within the resurgent politics of recognition, it is also important to define concepts such as self-determination, which is different from self-government. Alfred argues that when Aboriginal politicians accept self-government as the end game of their struggle, they are accepting a subordinate power. In fact, Indigenous politicians are simply recognizing and supporting the authority and legitimacy of the colonial state's control over their peoples and their territories.[69] Likewise, it is political hypocrisy to condemn Canada as an unjust and colonial power while simultaneously accepting its political gifts that nevertheless reinforce its illegitimate sovereignty. In other words, self-government delegated by the Crown cannot recover "self-determining nations unbound from colonial authority."[70]

Scholars should be focused on re-conceptualizing decolonization as a process of

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[67] Markell, Patchen. *Bound by Recognition*. Princeton University Press, 2009, 185.
[68] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 79.
[69] Alfred, T., and E. Tomkins. "The Politics of Recognition: A Colonial Groundhog Day." *Chiefs of Ontario Discussion Paper* (2010), 6.
[70] Alfred, T., and E. Tomkins. "The Politics of Recognition: A Colonial Groundhog Day." *Chiefs of Ontario Discussion Paper* (2010), 6.

regeneration. In doing so, self-determination becomes even more important than concepts such as self-government, which are arguably extensions of colonialism. Self-determination, according to Alfred is:

> the physical manifestation of nationhood; it is about (re)constructing individual, collective and social identities in ways that reflect Indigenous values and teachings. Therefore, self-determination is a self-actualizing notion: it exists if First Nations believe it does and comes into reality when they act as nations. Self-determination is not contingent on the approval of Canada, and it is not dependent on the understandings of power reflected in European and Euroamerican notions of sovereignty.[71]

Sovereignty, as is often portrayed in cases about Aboriginal title, is an organizing principle that is based on hierarchical social relations of complete ownership. As I mentioned earlier, Aboriginal title is subordinate to the underlying title of the Crown. In the final chapters, when I examine political activism post-*Tsilhqot'in*, I use the word Indigenous sovereignty. This form of sovereignty is not premised on superior-inferior relations; rather, Indigenous sovereignty emphasizes that governments and their institutions have not respected traditional land space. Thus, Indigenous sovereignty is better understood as self-governance, which is the ability to exercise Indigenous political systems based on traditional values, not on the colonial state's conception of law, politics, and order.[72] This form of Indigenous self-governance also incorporates the possibilities of

[71] Alfred, T., and E. Tomkins. "The Politics of Recognition: A Colonial Groundhog Day." *Chiefs of Ontario Discussion Paper* (2010), 6.
[72] Alfred, T., and E. Tomkins. "The Politics of Recognition: A Colonial Groundhog Day." *Chiefs of Ontario Discussion Paper* (2010), 17.

First Nations and Crown relationships (Nation-to-Nation) built on the elements of peace, friendship, and respect as proposed by the *Two Row Wampum Treaty*.[73]

My attempt to recuperate/retain a concept of recognition that does not fall within the confines of Western liberal thought is based on Cherokee scholar Jeff Corntassel's analysis on a politics of welcoming, and on Patchen Markell's emphasis on a politics of acknowledgement. Although I will elaborate these ideas in later chapters, according to Markell, the impossibility of sovereignty, identity, and recognition is already implicit in the politics of recognition itself because liberalism's idea of recognition is one that eliminates the experience of tragic vulnerability, or of refusal.[74] However, it is important to note that to welcome or to acknowledge does not mean to surrender one's identity to a universal truth, nor to be locked into a social contract; rather the new social relations created must continuously be worked at, between all individuals in the given social interaction.

In an effort to situate myself within my research, I characterize my approach as interdisciplinary, and as one of ongoing learning. I do not 'study' Indigenous peoples; I leave that to the old anthropologists who still dwell in such objectifying paradigm. Rather, I wish to tell a story that needs to be heard, and build on the narrative of what it means to be Indigenous or a settler in Canada/Turtle Island.[75] I do not 'research' Indigenous peoples,

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[73] For a more elaborate discussion on the Two Row Wampum, see, Borrows, John. "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, eds. Michael Asch. UBC Press, 1997. pp. 155-172.

[74] See. Markell's discussion on the reductionism of identity, vulnerability, agency and active discourse in: Markell, Patchen. *Bound by Recognition*. Princeton University Press, 2009. pp. 14-15, 18, 23, 27

[75] I often use the word Turtle Island throughout my thesis. By referring to North America as Turtle Island we are simultaneously using and recognizing both Indigenous and non-Indigenous identities. Turtle Island, as a concept, finds its roots in the creation stories of various Indigenous communities; however, by translating the Indigenous concept into non-Indigenous language such as English, not only do we recognize

rather I am myself 'in-search' of what it means to be an active participant in re-building Indigenous social relations that can dismantle settler colonialism. Upon taking up this thesis, I have also learned much about my own Indigenous Mayan roots to Central America, and about the similar abuses faced by the Indigenous peoples of El Salvador. Thus, what I hope to provide is an understanding, not only of the importance of Aboriginal title and Indigenous politics, but also of our own positions inside the settler colonial apparatus.

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and (re)discover that another way of life exists beyond our own, but perhaps we can bring new meaning to the way in which we conceptualize North America all together.

Chapter 1: Constructing Aboriginal Title

1.1 Introduction: Recognizing Aboriginal Title

On June 26, 2014, the Supreme Court of Canada issued a landmark decision in *Tsilhqot'in Nation v British Columbia*. In an 8-0 unanimous decision, the Court declared that the Tsilhqot'in Nation held Aboriginal title over certain lands in central interior British Columbia. This chapter is an overview of the ways in which *Tsilhqot'in* engages with and constructs the parameters that establish Aboriginal title. *Tsilhqot'in* creates a complex question: how does the decision impact the Canadian Constitution and Indigenous land claims about Aboriginal title? In reference to Indigenous land claims, the Supreme Court decision demonstrates that oral history is a significant element that enables the Courts to understand and take into account a more authentic assessment about the territory under investigation. Similarly, the Court affirms that the test to establish title is open to various Indigenous ways of life, and is not exclusive to groups who settled and intensively used specific areas. Recognizing nomadic and semi-nomadic ways of Indigenous life eliminates the postage stamp (specific sites of settlement) theory and takes into consideration "the nature of the land and the manner in which it is commonly used."[76] This would suggest that more Indigenous groups could now make a claim whereas, prior to *Tsilhqot'in,* they would have failed to meet the standard of intensive and exclusive occupation.

Tsilhqot'in strengthens section 35 of the *Canadian Constitution* by recognizing broader title claims, which include the test of sufficient occupation. Moreover, the decision increases the threshold of the duty to consult and accommodate. It clarifies how

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

governments may infringe and regulate lands that are declared to have Aboriginal title through a discussion involving the *Sparrow* test[77] and the doctrine of inter-jurisdictional immunity. Consequently, this marks a significant change in the division of powers as the Supreme Court essentially traded off the jurisdictional protections under the 1867 Constitution for what are likely stronger protections under section 35 of the 1982 Constitution.

1.2 Central Issues Surrounding Aboriginal Title

The Tsilhqot'in Nation is one of hundreds of Indigenous groups in British Columbia with unresolved land claims. They are a Nation that moved with the seasons; their movements were resource-dependant. Care was taken not to deplete a resource in any given area, however the Tsilhqot'in would return to areas of previous use when the resources and land could accommodate them.[78] Yet, "[h]ow should the courts determine whether a semi-nomadic [I]ndigenous group has title to lands?"[79]

Since the Supreme Court prior to *Tsilhqot'in* had never directly answered this question, the unanimous judgement of *Tsilhqot'in* concentrates on three main issues based on clarifying the doctrine, content, and scope of Aboriginal title: (1) determine how a court should decide whether an Indigenous group has title to claimed lands; (2) delineate the rights that Aboriginal title creates, and outline the corresponding rights and duties of the Crown; and (3) clarify how these new rights and duties can be limited, if they can be at all.

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[77] The *Sparrow* test is a two-part test for determining whether an infringement can be justified: (i) the government must be acting pursuant to a valid legislative object; and (ii) the government's actions must be consistent with its fiduciary duty toward Aboriginal Peoples. See, *R v Sparrow*, [1990] 1 SCR 1075 at pp. 1113-4.
[78] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 380-397.
[79] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 24.

These elements are all interconnected. First, the Court has to establish the correct jurisprudential test for making an Aboriginal title claim. Next, the Court clarifies what rights and duties become associated with a claim that meets the test for Aboriginal title. Finally, the court outlines how these rights can be limited or infringed.

1.3 Test for Aboriginal Title: Expanding *Delgamuukw*

In *Delgamuukw* (1997) the Supreme Court established the parameters for making an Aboriginal title claim. In order to make a claim, the group seeking title needed to fit the criteria of:

> i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[80]

Yet, as the appeal judge in *William v British Columbia* (2012) recognized, *Delgamuukw* "does not fully address the quality of occupancy necessary to support a title claim."[81] The British Columbia Court of Appeal took a narrow view on the legal test for title in their interpretation of occupancy. It concluded that previous Canadian law indicated Aboriginal title only existed at site-specific locales like village sites, salt licks and "particular rocks or promontories used for netting salmon."[82]

However, the Supreme Court of Canada notes that due to the Tsilhqot'in's semi-nomadic mode of life, the community inevitably comprehends "possession of land in a

[80] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 143.
[81] *William v. British Columbia*, 2012 BCCA 285 at para 220.
[82] *William v. British Columbia,* 2012 BCCA 285 at para 221.

somewhat different manner than did the common law."[83] Therefore, when considering an Indigenous communities ability to satisfy the test for occupancy, a culturally sensitive approach needs to take into consideration the communities size, manner of life, material resources, and technological abilities, as well as the character of the lands.[84] Otherwise, many Indigenous groups would fail the test for Aboriginal title. Consequently, this would frustrate "the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights."[85] Thus, the Supreme Court set out to define what kind of occupation would be sufficient to make out a title claim, while recognizing the various forms of Indigenous life.

1.4 Test for Aboriginal Title

Writing for a unanimous court, Chief Justice Beverley McLachlin affirmed and developed the *Delgamuukw* framework by explicitly setting out what each element of *Delgamuukw's* test for Aboriginal title contemplates and requires: sufficiency of occupation, continuity of occupation, and exclusivity of occupation. Sufficiency of occupation was the first element to which the *Tsilhqot'in* decision gives particular attention. The other two elements, continuity and exclusivity, stem from the first and remained largely unchanged from the trial judge's discussion.[86]

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[83] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 41.
[84] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 35.
[85] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 32. I also emphasize this quote as it will become particularly important and tie into the next chapters that expand on the concept of liberal/legal recognition as an extension of settler colonialisms logic to eliminate the 'Other' through an inclusion/exclusion apparatus. As the Supreme Court implies the objective of the law is to assimilate unique Indigenous laws into common law concepts. Whether they are in fact *equivalent* to one another is the problem that is explored in chapter three.
[86] For a more in depth discussion on the Justice Vickers' analysis of occupation, see *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 546-553.

McLachlin agrees that the concepts of sufficiency, continuity, and exclusivity are useful lenses through which to view the question of Aboriginal title. However, in their use and application one "must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices 'into the square boxes of common law concepts'."[87] Thus, by expanding the idea of property and ownership to include a more fluid conception of Indigenous stewardship, the Supreme Court opens the doors for the possibility of having more Indigenous Nations recognized as titleholders, and marks a turning point in Indigenous land claim procedures.[88]

Sufficiency of Occupation

The Court argues that the question of sufficient occupation must be approached from a unique perspective, one which incorporates both common law and Indigenous culture.[89] Sufficient occupation is, therefore, a context-specific inquiry that can be established in a variety of ways, including but not limited to: enclosure of fields, construction of dwellings, or regular use of land for sustenance purposes for the community.[90]

However, the Court implies that the most efficient way to establish sufficient occupation of a land, one that could run parallel to common law's idea of the exercise of effective control, was to construct a test that was bound by recognition. To sufficiently

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[87] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 32.
[88] I argue that stewardship and ownership as articulated by the common law are fundamentally different. Winona LaDuke argues that Indigenous people's relationship to the land embodied a natural essence, and that European colonization and industrialization brought about "a new economic order…forged on the land, not with the land."[88] See, LaDuke, Winona "Preface: Natural to Synthetic and Back Again," in *Marxism and Native Americans*, South End Print, 1983, iii.
[89] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 34.
[90] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 37.

occupy the land for purposes of Aboriginal title, the Indigenous group claiming ownership must demonstrate that it historically acted in a way that communicated to third parties that it held an interest in land for its own purposes.[91] This was a significant change to the criteria of Aboriginal title because it denotes that occupation is not "purely subjective or internal."[92]

Continuity of Occupation

The continuous occupation of a specific claim area is the second element explored. An Indigenous group needs to prove that current residents are connected to those people who were residents when the Crown asserted its sovereignty over the lands. This does not necessarily mean having to demonstrate "an unbroken chain of continuity."[93] The extent and nature of any break, if it were to exist however, is left open and could perhaps leave room for further infringement in subsequent litigation processes. The Court did not provide any new evidence to this second step; rather, it relied on the evidence gathered at trial. McLachlin concludes that the trial judge's "direct evidence of more recent occupation alongside archaeological evidence, historical evidence, and evidence from Aboriginal elders…indicated a continuous Tsilhqot'in presence in the claim area."[94] The reliance on Indigenous oral history is particularly important because it challenges the criteria of reliable evidence that is often based on fool-proof written documentation. It also suggests

[91] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 38.
[92] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 38. I emphasize this quote because it highlights an important idea that will be discussed in later chapters. Although scholars criticize the politics of recognition, it seems even concepts of self-determination and sovereignty are bound by recognition. i.e. someone has to recognize, accept or be forced to accept/recognize such claim.
[93] *Tsilhqot'in Nation v British Columbia*, 2014 at para 46.
[94] *Tsilhqot'in Nation v British Columbia*, 2012 at para 57.

that the Supreme Court is willing to view oral history as a political construct; thus allowing Indigenous communities to determine context to their own claims of tradition and identity.

During the trial case of the Tsilhqot'in Nation, Justice Vickers agreed with Chief Roger William's statements that oral history binds the community and creates a sense of belonging, as oral traditions are "told and retold while hunting or fishing, at camp, at gatherings or at home."[95] As testified by Chief William, "that's the only way that we were Tsilhqot'in."[96] Justice Vickers also states, "in order to truly hear the oral history and oral tradition evidence presented in these cases, courts must undergo their own process of decolonization."[97]

A dialogue about oral history is a significant step toward decolonizing the law. For instance, archaeologist Alexander Von Gernet, an expert who has provided evidence to the courts on behalf of the Crown, asserted in *Buffalo v Canada* (2005), that notwithstanding the Supreme Court's *Delgamuukw* ruling, oral evidence cannot stand alone. It must be validated with other lines of evidence and processes commonly applied in the social sciences. Von Gernet references anthropologist Bruce Trigger and argues that "public wrongs cannot be atoned by abandoning scientific standards in the historical study of relations between Aboriginal and non-Aboriginal peoples."[98] Yet Justice Vickers argues in the trial case that "[i]f a court were to follow the path suggested by Von Gernet, it would fall into legal error on the strength of the current jurisprudence."[99] He argues that the

[95] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 145.
[96] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 145.
[97] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 132.
[98] *Buffalo v Canada*, 2005 FC 1622 at para 454
[99] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 154.

assumptions that oral history is inferior to the common law may be based on science, but they are Eurocentric and, ultimately, illegitimate. Thus he is attempting to decolonize the courtroom by suggesting that the legal system is currently flawed, and that Indigenous oral traditions and histories can be given "independent weight"[100] that have similar legal significance to written evidence within the courtroom. Moreover, Indigenous peoples are not test subjects that can be explained through social science methodologies like Von Gernet suggests.

Despite the recognized importance of oral history, it was perhaps the Hudson Bay Company's extensive journals and census documents that provided the courts with confirmation by fellow settlers that the Tsilhqot'in had occupied the area for years. The journals presented at trial ranged between 1822-1838 and provide repeated references to the Tsilhqot'in people, albeit with variations on spelling.[101]

Exclusivity of Occupation

The courts have found that in order to make a title claim, an Aboriginal group must have had "the intention and capacity to retain exclusive control"[102] over the land in question. Regular use without exclusivity may give rise to usufructory Aboriginal rights. For Aboriginal title, the use must have been exclusive. Therefore, exclusivity should be understood in the sense of intention and capacity to control the land. Furthermore, exclusivity can be established by proof that others were excluded from the land, or granted

[100] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 154.
[101] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 460-62.
[102] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 156, quoting McNeil, Kent. *Common Law Aboriginal Title*, at p. 204.

access to the land through the permission of the claimant group. Finally, even the lack of challenges to occupancy by other groups may support an inference of an established group's intention and capacity to control.[103]

The findings at the Supreme Court support all of these requirements. Throughout the litigation process there were no neighbouring Indigenous groups that challenged the Xeni Gwet'in's claim to the land area under the Tsilhqot'in Nation. But as noted in the opening pages of this thesis, it is perhaps the Tsilhqot'in's continued resistance since colonial contact that proves the Nation's intent to retain exclusive control. Clearly, the 'Chilcotin War' began because the Tsilhqot'in were denying the settlers of British Columbia access to their territory –a territory that was needed for the settlers' expansion following the B.C. Gold Rush.

The Chilcotin War is thus sufficient in demonstrating and establishing intent to occupy a traditional geographical landscape while the Crown asserted its sovereignty in British Columbia. But the Tsilhqot'in people had been demonstrating their occupation over their land long before the settlers arrived. The trial court acknowledged that Tsilhqot'in trespassing laws are linked to exclusivity and, for that matter, are linked to the first step of sufficiency that indicate to neighbouring communities the claimants sole-interest in the land. The trial court found that "[t]o be safe" in Tsilhqot'in country, "one had to be accompanied by Tsilhqot'in, paying what in effect was a 'toll' to enter and 'rent' if you wanted to stay and settle down."[104] Trial evidence also found that fur traders and explorers

[103] *Tsilhqot'in Nation v British Columbia*, 2014 at para 47-48.
[104] *Tsilhqot'in Nation v British Columbia*, 2007 at para 917.

often offered presents to the Tsilhqot'in in order to develop a positive relationship with them, or to be given access to Tsilhqot'in territory.[105]

1.5 Rights and Duties in Relation to Aboriginal Title

In continuing its culturally sensitive approach in establishing the parameters of Aboriginal title, the Supreme Court also argues that title is not equivalent to "fee simple ownership; nor can it be described with reference to traditional property law concepts."[106] Nonetheless, the Supreme Court still juxtaposes the rights of Aboriginal title with ownership rights similar to those associated with fee simple, including:

> (i) the right to decide how the land will be used; (ii) the right of enjoyment and occupancy of the land; (iii) the right to possess the land; (iv) the right to the economic benefits of the land; and (v) the right to pro-actively use and manage the land.[107]

The point of departure for distinguishing Aboriginal title from fee simple is that *Tsilhqot'in* acknowledges that collective Aboriginal ownership existed on the land not only for the present generation, but for their successors as well.[108] Although this form of ownership recognizes a direct cultural relationship to the land and community members, it also poses limits on the way the land can be used. Specifically, Aboriginal title is restricted in two ways: (1) alienation (transfer or sale) is limited to the Crown and (2) it cannot be

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[105] *Tsilhqot'in Nation v British Columbia*, 2007 at para 917.
[106] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 119.
[107] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 73.
[108] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 74.

used in a way that would prevent future generations from enjoying the substantial benefit of the land.[109]

The Court also states that Aboriginal title-holders "can use their land in modern ways, if that is their choice."[110] Yet the ways in which Aboriginal title is limited stem from the fact that "Aboriginal occupancy at the time of European sovereignty attached itself 'as a burden on the underlying title asserted by the Crown at sovereignty'."[111]

Another duty that is outlined by the Supreme Court is the right of Aboriginal title to control land. This means that governments and third parties seeking to use the land must obtain the consent of the Aboriginal title-holders.[112] If the Indigenous group does not give its consent, "the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*."[113]

1.6 Justification of Infringement

The Court argues that once Aboriginal title has been recognized, consultation alone with Indigenous groups will not be enough to justify the use of the land by governments and others.[114] The Court makes it clear that consent will now be required, and will become the threshold for future relations with titled-holders.[115] This is one of the main reasons why the province of British Columbia was found by the Court to have overstepped its jurisdiction and could therefore not validate timber permits to third parties. It had failed to

[109] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 74.
[110] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 75.
[111] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 75.
[112] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 76.
[113] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 76.
[114] *Tsilhqot'in Nation v British Columbia*, 2014 at para 76.
[115] *Tsilhqot'in Nation v British Columbia*, 2014 at paras 76 and 90.

consult, accommodate, and receive the consent of the Tsilhqot'in Nation.

Yet, as mentioned in the previous section, if consent is not received but the Crown still wishes to pursue interest on the land, the government needs only to meet certain criteria, namely the demonstration of a broader public good. To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show:

> (i) that it discharged its procedural duty to consult and accommodate; (ii) that its actions were backed by a compelling and substantial objective; and (iii) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow* [Test].[116]

The first step is in relation to a duty that must be upheld even before title is granted. Due to the fiduciary relationship between the Crown and Indigenous peoples, if the Crown has real or constructive knowledge of a potential Aboriginal title claim, and has interest on the land that may adversely affect it, the Crown is obliged to consult with the potential title-holders. Moreover, in some instances, the Crown will have to accommodate the title-holders' right.[117]

The degree of consultation and accommodation that the Crown needs to meet in order to have adequately discharged its fiduciary duties is discussed in *Haida Nation v British Columbia (Minister of Forests)*. The Court found that the level of consultation and accommodation owed to the Indigenous group is proportionate to the strength of the claim

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[116] The *Sparrow* test is a two-part test for determining whether an infringement can be justified: (i) the government must be acting pursuant to a valid legislative object; and (ii) the government's actions must be consistent with its fiduciary duty toward Aboriginal Peoples. See, *R v Sparrow*, [1990] 1 SCR 1075 at pp. 1113-4.

[117] *Tsilhqot'in Nation v British Columbia*, 2014 at para 78.

and the seriousness of the adverse impact that the proposed government action will have on the Indigenous group's right.[118]

The required level of consultation and accommodation is greatest when Aboriginal title has been established. If this duty is not adequately discharged, the government decision can be suspended or quashed.[119] This is also where the second step of the procedure to justify an infringement takes shape and draws from the two part *Sparrow* test.[120] Where title is established, the Crown must also ensure that, along with its procedural duties, the proposed action is a compelling and substantial governmental objective.[121] In addition, "[t]he special trust relationship and the responsibility of the government vis-à-vis Aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."[122] In short, this is the Crown's fiduciary relationship with Canada's Indigenous peoples.

By compelling and substantial objective, the Court means an action that aims "at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown."[123] Furthermore, *Delgamuukw* notes that the *raison d'être* of the principle of justification is the reconciliation of Aboriginal interests with the broader interest of society as a whole. Aboriginals and non-Aboriginals are "all here to stay" and must by necessity

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[118] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 39; see also, *Tsilhqot'in Nation v British Columbia*, 2014 at para 79.
[119] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 79.
[120]The *Sparrow* test determines whether an infringement can be justified: (i) the government must be acting pursuant to a valid legislative object; and (ii) the government's actions must be consistent with its fiduciary duty toward Aboriginal Peoples. See, *R v Sparrow*, [1990] 1 SCR 1075 at pp. 1113-4.
[121] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 80.
[122] *R v Sparrow*, [1990] 1 SCR 1075 at pp. 1114.
[123] *R v Gladstone*, [1996] 2 SCR 723, at para. 72, quoted in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 81.

move forward in a process of reconciliation.[124] Essentially, a compelling and substantial objective must further the goal of reconciliation with the broader public.

In delineating the interests that are potentially capable of justifying an infringement of Aboriginal title, the Court borrows from *Delgamuukw's* expansive list of reasons, including but not limited to:

> the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.[125]

Finally, if a compelling and substantial public purpose is established, the government must demonstrate that the proposed infringement on the Aboriginal right is consistent with the Crown's fiduciary duty towards Indigenous peoples. This means that an infringement cannot be justified if it were to deprive future generations of the benefit of the land. The Crown's fiduciary duty also imposes an obligation of proportionality into the justification process established by the *Sparrow* test. Hence, in order to justify an infringement, the action must be:

> necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).[126]

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[124] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186 quoted in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 82.
[125] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 165 quoted in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 83.
[126] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 87.

Although these tests may seem long and tedious, the Supreme Court is of the opinion that they are necessary to ensure that the group holding Aboriginal title retains the "exclusive right to decide how the land is used and the right to benefit from those issues."[127] In addition, the tests also represent further checks against unfair treatment if title is found to exist.

1.7 Inter-Jurisdictional Immunity: Whose Jurisdiction does Aboriginal Title fall under?

In establishing the tests for Aboriginal title, the Supreme Court demonstrates that much of a claim's strength will be based on a "context-specific inquiry."[128] However, one area in which *Tsilhqot'in* does establish a clear and significant change to constitutional law is in its discussion on jurisdiction and the division of powers. The Court was tasked with answering whether or not provincial laws of general application apply to land held under Aboriginal title. The Court found that, consistent with the infringement and justification frameworks discussed in *Sparrow* and *Delgamuukw*, provincial laws of general application will apply to titled land. Generally, provincial laws of general application include policies aimed at protecting the environment; however, subject to *Delgamuukw,* they could fall under laws that regulate and advance economic development like the issuing of timber permits, as long as they pass the tests of justification.

To make this change, the Supreme Court argued that "[t]here is no role left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution*

[127] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 88.
[128] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 37.

Act, 1867."[129] The doctrines of inter-jurisdictional immunity and of the division of powers are interconnected in that the federal and provincial legislative powers under ss. 91 and 92 of the *Constitution Act* (1867) are exclusive. This means, "each level of government enjoys a basic unassailable core of power on which the other level may not intrude."[130] In relation to Indigenous-Canadian affairs, historically only the Crown could engage with Indigenous land relations. Consequently, the Supreme Court decision unilaterally changes the nature of the historical relationship without consultation of Indigenous communities.

The Court argues that the concept of inter-jurisdictional immunity is redundant, out-dated, and at odds with modern reality "premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments."[131] The Court argues that the inter-jurisdictional immunity doctrine would produce "uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests — some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all."[132] Therefore, the Court decides the *Sparrow* test should govern at both the federal and provincial level because the tension over Aboriginal title is not between competing government jurisdiction but rather between the jurisdiction of governments and Aboriginal title-holders.[133] Provincial laws of general application, including the *Forest Act*, should apply if they meet the *Sparrow* test of justification. In fact, the Court argued that the *Sparrow* test is the appropriate and sufficient "constitutional lens" to view and resolve any conflict between provincial laws and

[129] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at p. 263.
[130] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 131.
[131] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 148.
[132] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para147.
[133] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 144.

Aboriginal rights.[134] In other words, Indigenous groups can no longer challenge provincial laws on the basis of s. 91(24) of the *Constitution Act* (1867), or on the doctrine of inter-jurisdictional immunity. Indigenous communities must refer to the *Sparrow* test. But ,as noted earlier, the Supreme Court has created a comprehensive list of government initiatives that can justify an infringement of Aboriginal title.

1.8 Conclusion: Tsilhqot'in Implications

This chapter was an overview of the legal engagements and discussions pursued in the *Tsilhqot'in* decision. The landmark decision is more than symbolic; it has made some significant changes to the common law. Besides acknowledging that Indigenous ways of life, such as oral history or semi-nomadic lifestyles, are not irrelevant to the litigation process, *Tsilhqot'in* explains many of the legal questions surrounding the concept of Aboriginal title. *Tsilhqot'in*, through its elaborate tests, has clarified and expanded who is capable of making a claim to Aboriginal title. It seems for the most part that any Indigenous group, regardless of lifestyle, can make a title claim as long as they can prove sufficient occupation of their traditional territory. The Court also outlines what rights or incidents the accordance of title grants to successful groups, such as the exclusive right to decide how the land is used, as well as what duties are imposed on the Crown and third parties in light of those rights.

Most importantly, however, the Tsilhqot'in Nation's victory in the courtroom provides Indigenous groups valuable insight on how their own interests in land can be constitutionally recognized and affirmed. *Tsilhqot'in* also provides leverage to groups that could have never met the intensive use of land criteria to prove Aboriginal title to large

[134] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 152.

sections of traditional territory. In doing so, groups currently in negotiation processes with governments can strengthen their claims by reference to *Tsilhqot'in*. The decision also states that if Aboriginal title could potentially be established, the government must accommodate the Indigenous community. Thus, Indigenous groups wishing to protect traditional lands from unsustainable exploitation have potentially been provided with stronger laws to do so, even if title has yet to be fully proven.

Although, *Tsilhqot'in* is a victory, I argue that it is a limited victory. The problem is not the actual recognition of Aboriginal title into the common law. As we have seen, the new tests and procedures provide some guidelines for Indigenous groups to know if they will be able to meet the sufficient occupation test. Whether more Indigenous groups will take governments to court is debatable. First, litigation is expensive, so not all Indigenous communities possess the means to pursue it. My greatest concern, however, is the underlying tone of the court system and its relation to colonial hierarchies. Despite recognizing Aboriginal title, does *Tsilhqot'in* change the colonial structure of the law? This is also debatable. The Supreme Court still asserts the Crown as the Sovereign, even while affirming that Indigenous peoples had pre-existing legal rights.[135] In doing so, the highest court of Canada still asserts hierarchical tendencies, a reminder of its colonial past. The unilateral decision to eliminate inter-jurisdictional immunity, a Constitutional principle, without consultation with Indigenous peoples is also another issue as it demonstrates that the courtroom is not neutral and that it can at times work in conjunction with the interests of the State.

As mentioned, this chapter has provided a general understanding of *Tsilhqot'in*.

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[135] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 12.

The next chapter provides a critical and provocative engagement with the politics of recognition in order to demonstrate that the type of reconciliation and justice that *Tsilhqot'in* advocates falls under the same rhetoric as the liberal politics of recognition. Primarily, *Tsilhqot'in* fails in recognizing that the court is not a neutral space, and that law is not reciprocal. In addition, the decision also fails to engage with concepts of Indigenous self-determination and governance. In fact, these words are not mentioned at all.

Chapter 2: Literature Review

2.1 Introduction: Multilogue, *Tsilhqot'in*, and the Politics of Recognition

In this chapter I place *Tsilhqot'in* within a multilogue that interconnects many of the strategies, strengths, and weaknesses proclaimed by scholars within the discourse of the politics of recognition. Ultimately, *Tsilhqot'in* reaffirms the Crown's underlying title, justifies Crown and provincial infringement, and unilaterally eliminates the doctrine of inter-jurisdictional immunity, all in the name of 'reconciliation' with Canadians and Indigenous peoples.[136] Yet, prevention of the application of provincial laws on titled land was at the crux of the Tsilhqot'in Nation's demands. In this chapter I suggest that the law and the strategies within the liberal politics of recognition have the ability to (re)produce colonial subjects. Thus, for *Tsilhqot'in* to find justice, one that is separate from the hierarchies of colonialism's law, a discussion about justice and Indigenous resurgence must leave the courtroom, abandon the idea of asking for legal recognition, and return to on the ground political action.

[136] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 23.

2.2 Philosophy of Colonialism

To understand Canadian-colonial relations, and why the *Tsilhqot'in* decision does not question the Crown's underlying title that keeps intact the hierarchical relationship between the settler/Indigenous populations, I begin with a literature review that provides a discussion of the philosophical underpinnings of Western European democratic thought. I argue that it is the discourse of the Old World that influenced the colonial nature of North American nation state building. I use John Locke's *Second Treatise of Government* in which he expresses his philosophy on democracy, human rights, property, and government in order to demonstrate the continued problematic legacy of Enlightenment theory in North American affairs.[137] As noted in the introduction, Locke's ideas challenged the social structures of his time, eventually influencing the English bourgeoisie and those in search of new lands. Eva Mackey argues that Enlightenment philosophies articulated by Locke, for example, delineate colonial powers' assertions of sovereignty over Indigenous land, and articulate a philosophy rooted in the social contract and the state of nature, as well as productive labour and its link to civilization and recognizable government.[138] In other words, Locke's theories of property and personhood are premised on a foundation ensuring certainty and security in order to escape the anarchy that is the state of nature. Achille Mbembe elaborates on the colonizer's longing for security, which in fact stems from the fear of uncertainty, a fear commonly held by the colonizers, when he states:

> [Indigenous] armies do not form a distinct entity, and their wars are not wars between regular armies. They do not imply the mobilization of sovereign subjects (citizens) who respect

[137] By North American I mean Canada and the United States. Mexico is considered part of 'North America', however, its Indigenous peoples were colonized by the Spanish.
[138] Mackey, Eva. "Unsettling Expectations:(Un) certainty, Settler States of Feeling, Law, and Decolonization." *Canadian Journal of Law and Society* 29.2 (2014), 242.

> each other as enemies...colonies are zones in which war and disorder, internal and external figures of the political, stand side by side or alternate with each other.[139]

The 'unnatural' ways of Indigenous life needed to be redefined into terms with which the colonizer was familiar. As a result, the settlers redefined Indigenous peoples as inferior, basing their understanding on European conceptual frameworks that were considered to be universal.

The 'state of nature' as articulated by Locke was indeed a European construct that purposely but mistakenly labelled Indigenous inhabitants as uncivilized because they were not organized as a State, and therefore had not yet created a human world. In the eyes of the colonizer, savage life was equivalent to animal life, and therefore part of the 'natural world'.[140] In fact, according to Arendt, what makes the savages unique is not their skin colour, but rather their behaviour. It is as if they are a part of nature; "they treat nature as their undisputed master."[141] In addition, settler 'peace' is created with rigid boundaries of private property, which enables the cultivation of, and extraction of resources from, the land. Since 'savages' did not view property in the same way as Europeans, the cultivation of land, and the creation of space defined by rigid boundaries of ownership, meant the appropriation/destruction of Indigenous identities by replacing Indigenous traditional systems with colonialism's law.

Definitive boundaries and private property are not only fundamental elements of capitalism, but in European Enlightenment theory they also explicitly become a mark of the liberal individual. Without private property, there is no progress, no civilization, and

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[139] Mbembe, J-A. "Necropolitics." Trans. Libby Meintjes. *Public culture* 15.1 (2003), 24.
[140] Mbembe, J-A. "Necropolitics." Trans. Libby Meintjes. *Public culture* 15.1 (2003), 24.
[141] Arendt, Hannah. *The Origins of Totalitarianism*. Houghton Mifflin Harcourt, 1973, 192.

no government; thus, the 'liberal democratic' state is inconceivable if it remains in the state of nature. Likewise, without liberal democratic theory, the settler colonial state would not have been able to construct a benevolent image of 'civilizing' the 'savages'. For Locke, private property is a natural right because it is an extension of an individual's liberty through labour. Locke clearly states this when he says, "God, by commanding to subdue, gave authority so far to appropriate. And the condition of human life, which requires labour and materials to work on, necessarily introduce private possessions."[142] The legitimation of private property within liberal democracy thus rests on the idea that it is inseparable from the individual. Secondly, private property consists of appropriating the commons. For example, Locke explains that things in nature are given to man in common, but whatever "he removes out of the state of Nature… he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property."[143]

Locke's development of the natural state is the basis for social life in the colonial apparatus. The civil state is no more than the appropriation by means of authority over the Indigenous population. But for the colonizers, the civil state is also a transfer of legitimacy towards the individual sphere. Interestingly, these liberal ideas also influence the modern idea that if individuals work hard enough (labour), their assets are legitimate. However, Locke's liberalism paves the way for European labour to dispossess and marginalize other individuals.

According to Locke, the natural state underlies the civil state; however, the natural

[142] Locke, John. *Second Treatise on Government, ed. with introduction by C.B. MacPherson.* Hackett Publishing Company Inc, 1980, 22.
[143] Locke, John. *Second Treatise on Government, ed. with introduction by C.B. MacPherson.* Hackett Publishing Company Inc, 1980, 22.

also exists where the civil state has yet to be constituted.[144] He even distinguishes between the commons in the Americas and the commons in England "where there is plenty of people under government, who have money and commerce."[145] In England, "no one can in-close or appropriate any part, without the consent of all his fellow-commoners"[146] This is due to the fact that private property, and thus a civilized society, has been solidified through law, representative government, and the nation state. However, America was an 'uncivilized' world, which meant that it was a universal common open to settlement by all of humanity, without the consent of its current inhabitants. Essentially, there was no limitations to individual accumulation and appropriation of the commons in places where a 'civilized,' Eurocentric model of government does not exist, because the land and its inhabitants remain animals in the state of nature and the commons are ripe for cultivation. I argue that in the context of *Tsilhqot'in*, the Supreme Court expresses similar ideas to the state of nature becoming civilized, only after European assertions of *development* have been established, when it argues that Aboriginal title as a modern legal concept remains a burden on the Crown's underlying/radical title.[147]

Settler colonization is a zero-sum project whose dominant feature is not simply exploitation but rather dispossession, elimination, and replacement of the Indigenous inhabitant.[148] In the next chapter, I elaborate in more detail, through the works of Michel Foucault and Giorgio Agamben, Canada's bio-political goal of transforming Indigenous

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[144] Hinkelammert, Franz. "The Hidden Logic of Modernity: Locke and the Inversion of Human Rights." *Worlds and Knowledges Otherwise* 1 (2004), 5.
[145] Michels, Steven. *The Case Against Democracy*. Praeger, 2013, 80.
[146] Locke, John. *Second Treatise on Government, ed. with introduction by C.B. MacPherson.* Hackett Publishing Company Inc, 1980, 22.
[147] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 75.
[148] Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* Vol.8, no. 4, 2006, 388.

identities into productive, political citizens. Settler colonialism has become embedded, justified, and perpetuated through legal structures of the state. In Canada, this is evident in policies such as the *Indian Act*. Bhikhu Parekh notes that when a certain degree of development was evident in certain Indigenous groups, for example, when they enclosed their traditional territories or demonstrated advanced modes of agriculture, new arguments had to be created to portray them as inferior. In essence, Indigenous peoples were never seen as equal with a fair chance of prosperity in the New World because they remained "not industrious and advanced enough to make *the best possible* use of [the land] and produce as much as the English could."[149] Thus, the colonizers retained their superiority over the Native by claiming they had a much better understanding of stewardship. Arguably, this is also the underlying tone when the Supreme Court argues that Aboriginal title must be supplemented with the common law in order to avoid a "legal vacuum."[150]

By relating the foundation of private property, namely the mixing of one's labour with land, with the omnipotence of 'God', the essence of colonialism harnessed a transcendent character. Along with private property, the colonizers were creating an unquestionable, unfettered, and 'natural' approach to settler sovereignty. One of the most important criticisms of *Tsilhqot'in* is that even while affirming Aboriginal title, it still does not question the way in which Canada gained its sovereignty, nor does it completely reject the concept of *terra nullius*. This is despite Indigenous peoples having to go through vigorous examination to prove something everyone knows: Indigenous peoples were on

[149] Nederveen Pieterse, Jan, and Bhiku Parekh. *The decolonization of imagination: culture, knowledge and power*. Zed Books, 1995, 85; emphasis in original.
[150] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 147

Turtle Island long before European explorers arrived.[151] Thus the relationships and structures that perpetuate colonialism remain unchallenged by the courts, political institutions, and for the most part the liberal pluralistic strategies inherent to the politics of recognition.

It may seem that litigation strategies leave little to no space for any kind of Indigenous resistance, as they are still part of the overall legal legacy of colonialism. In fact, even John Borrows, a proponent scholar of Indigenous resurgence through reforms to Canada's constitution,[152] is aware of the underlying negative relationships between the *Tsilhqot'in* decision, the state, and Indigenous peoples.[153]

In the next section, I highlight the weaknesses of the politics of recognition in its claims to a more 'democratic' Canada, particularly when applied to Indigenous questions of resurgence. My argument is that such politics do not challenge the colonial relations of the state and its illegitimate claim to sovereignty. Thus, it is problematic to assume that law is neutral and capable of recognizing the 'Other' equally. On the other hand, I also argue that even ideas of Indigenous self-determination that oppose the 'politics of recognition'

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[151]Borrows argues that "there is no explicit justification in the decision for why the Crown and not the Tsilhqot'in have underlying title to the land. The Tsilhqot'in people are its rightful, prior and present owners," which the Supreme Court acknowledges. Furthermore, it "[i[t 'does not t' to vest rights possessed by Indigenous peoples in other peoples through the mere act of assertion." See, John Borrows' discussion on the *Tsilhqot'in* decision in: Borrows, John. *Aboriginal Title in Tsilhqot'in v. British Columbia [2014] SCC 44.* August 19, 2014. Retrievable at: http://maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqotin-v-british-columbia-2014-scc-44/.

[152] Borrows, John. *Recovering Canada: The resurgence of Indigenous Law*. University of Toronto Press, 2002. at p. 123. Ultimately, Borrows believes that when First Nations laws are recognized into Canadian law, both systems will be strengthened to formulate a post-colonial society based on the ideal unwritten principles of Canadian constitutionalism. The 'oral tradition' behind the written words of the Constitution emphasizes the traditional legal principles of federalism, democracy, the rule of law, and the respect for minorities.

[153] See, John Borrows' discussion on the *Tsilhqot'in* decision in: Borrows, John. *Aboriginal Title in Tsilhqot'in v. British Columbia [2014] SCC 44.* August 19, 2014. Retrievable at: http://maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqotin-v-british-columbia-2014-scc-44/.

remain reliant on distinguishing 'traditional' spaces that inevitably include the participation of surrounding Indigenous communities. The politics of recognition may remain an abstract strategy for organizing the ideal community, be it the Canadian nation or an Indigenous Nation, but this is not to say that it does not provide insight into how to actually intervene in the affairs of the State. The discourse around the politics of recognition seeks to discover which institutions to criticize, what questions to ask, and how these questions can be tackled collectively. This is why I investigate how *Tsilhqot'in* can still be interpreted through a politics of recognition, albeit one that attempts to uncover the colonial past of Canada and its contemporary extractive apparatus.

2.3 Understanding the Politics of Recognition

Glen Coulthard argues that over the last thirty years, the self-determination efforts and objectives of Indigenous peoples in Canada have been confined to the language and discourse of 'recognition' — recognition of cultural distinctiveness, recognition of an inherent right to self-government, recognition of state treaty obligations, etc.[154] Moreover, the last fifteen years of Indigenous scholarship has been occupied with understanding the ethical, legal, and political significance of these types of claims. Consequently, the concept of 'recognition' becomes the foundation and apex for comprehending what is at stake in debates over identity and difference in settler colonial contexts.

In Canada, the 'politics of recognition' is synonymous with multicultural models of pluralism that seek to remedy injustices of exclusion and marginalization such as sex,

[154] Coulthard, Glen S. "Subjects of empire: Indigenous peoples and the 'politics of recognition' in Canada." *Contemporary Political Theory* 6.4 (2007), 437.

religion, gender, and race. But what does recognition mean? How is one recognized? And what is recognition's relation to law, identity, and justice?

The 'politics of recognition' has played a significant role in the identity politics of Canada's multicultural society thanks to Charles Taylor's inspiring essay on cultural difference and recognition.[155] Taylor's influence was such that Seyla Benhabib deemed recognition "the master concept for reflection upon what appeared at first sight to be a disparate array of sociocultural movements and struggles."[156] For Taylor, recognition and identity are interconnected. The discovery of identity does not happen in isolation; it is negotiated through dialogue with, and against, others.[157] Taylor's analysis of the politics of recognition finds its roots in the Hegelian 'master-slave' construct in which our identity is shaped by how others view us. Once we see and understand the 'Other' as a self-conscious subject, we lose our sense of individual uniqueness, which can only be returned by the gaze of the 'Other'. Thus Hegel emphasizes a mutual and equal exchange of recognition between two self-conscious subjects.[158] Hegel argues in *Phenomenology of Spirit* that "[s]elf-consciousness exists in and for itself when, and by the fact that, it so exists for another; that is, it exists only in being acknowledged."[159] In this dialectic, self-consciousness for both the master and the slave is only achievable through their inter-subjectivity, their 'mutual recognition' of each other.

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[155] See, Taylor, Charles. "The Politics of Recognition." in *Multiculturalism: Examining the Politics of Recognition*. Princeton University, 1994, 25-73.
[156] Benhabib, Seyla. *The claims of culture: Equality and diversity in the global era*. Princeton University Press, 2002, 50.
[157] Taylor, Charles. "The Politics of Recognition." in *Multiculturalism: Examining the Politics of Recognition*. Princeton University, 1994, 33.
[158] Hegel, Georg Wilhelm Friedrich. *The Phenomenology of Mind*. Courier Corporation, 2012, 104-107.
[159] Hegel, Georg Wilhelm Friedrich. *The Phenomenology of Mind*. Courier Corporation, 2012. p. 104

Taylor also argues that recognition is hierarchical and therefore "cannot answer the need that sends people after recognition in the first place"[160] The struggle for recognition can only be solved in a regime of reciprocal recognition. Taylor follows Hegel's reciprocal approach to political recognition in which society has a common goal: there is a We that is an I, and an I that is We.[161] The Hegelian dialectic therefore assumes that one can only become fully aware of one's subjectivity through the recognition of the 'Other'. However, Taylor remains wary of universal/essentialist claims that can homogenize cultural difference.[162]

Thus, Taylor argues that collective rights alone cannot protect group identities. Using the example of Quebec, Taylor argues that Québécois culture creates a shared horizon of meaning that constitutes a fundamental aspect of Québécois identity. The French language, in particular, has to be protected to preserve an authentic identity. Thus the Québécois people must be able to enact policy that allows them to remain true to the culture of their ancestors and "actively seek to *create* members"[163] of their community now and in the future. Indeed, the central focus of much of Taylor's work on multiculturalism and recognition is not the political and legal ordering systems of Indigenous peoples, but rather the language and cultural rights of French descendants in Quebec.

Taylor argues that just as identities become 'true' through proper recognition, they can also "suffer real damage, real distortion, if the people or society around them mirror

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[160] Taylor, Charles. "The Politics of Recognition." in *Multiculturalism: Examining the Politics of Recognition*. Princeton University, 1994, 50.
[161] Hegel, Georg Wilhelm Friedrich. *The Phenomenology of Mind*. Courier Corporation, 2012, 104.
[162] Taylor, Charles. "The Politics of Recognition." in *Multiculturalism: Examining the Politics of Recognition*. Princeton University, 1994, 50.
[163] Taylor, Charles. "The Politics of Recognition." in *Multiculturalism: Examining the Politics of Recognition*. Princeton University, 1994, 58-59; emphasis in original.

back to them a confining or demeaning or contemptible picture of themselves."[164] This creates a politics of 'misrecognition' that is not only disrespectful and unjust, it "can inflict a grievous wound, saddling its victims with a crippling self-hatred. Due recognition is not just a courtesy we owe people. It is a vital human need."[165]

Nancy Fraser challenges Taylor's 'liberal' approach by claiming that "he effectively ignores distributive injustice altogether, by focusing exclusively on recognition."[166] Fraser argues that groups can suffer from two distinct types of injustices. The first type of injustice is 'socioeconomic', which includes inequitable distribution of material resources, and is manifested in economic exploitation, and deprivation.[167] On the other hand, cultural-symbolic injustices are associated with misrecognition, specifically, cultural domination and disrespect.[168] Racism and stereotyping would fall under this second category.

According to Fraser, socioeconomic injustices can be remedied through redistribution, while cultural-symbolic injustices can be remedied through providing proper recognition. However, these two types of injustices can reinforce one another dialectically by creating practices, norms, and processes that further marginalize groups. These injustices therefore compound one another.[169] Transformative remedies, according

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[164]Taylor, Charles. "The Politics of Recognition." in *Multiculturalism: Examining the Politics of Recognition*. Princeton University, 1994, 55.
[165] Taylor, Charles. "The Politics of Recognition." in *Multiculturalism: Examining the Politics of Recognition*. Princeton University, 1994, 25.
[166] Fraser, Nancy, et al. "Recognition, Redistribution and Representation in Capitalist Global Society: an Interview with Nancy Fraser." *Acta Sociologica* (2004), 376.
[167] Fraser, Nancy. "From redistribution to recognition? Dilemmas of justice in a 'post-socialist'age." *New left review* (1995),71.
[168] Fraser, Nancy. "From redistribution to recognition? Dilemmas of justice in a 'post-socialist'age." *New left review* (1995), 70-71.
[169] Fraser, Nancy. "From redistribution to recognition? Dilemmas of justice in a 'post-socialist'age." *New left review* (1995), 72.

to Fraser, are associated with "correcting inequitable outcomes precisely by restructuring the underlying generative framework." [170] In contrast, affirmative remedies can be conceptualized as initiatives that attempt to correct inequalities without challenging the underlying social relations that create them.[171]

Affirmative redistribution, which can include direct money transfers to the subjugated groups, can be critiqued for being quick-fix remedies and thus inadequate means for improving socio-economic situations. For example, the *Indian Residential Schools Settlement Agreement* (2006) sets aside $1.9 billion for survivors of residential schools. The settlement agreement entitles each 'eligible' former student $10,000 as well as an additional $3,000 for each year of residence beyond the first year.[172]

Unfortunately, the victims that have applied for the settlement, and accepted the terms of the agreement, cannot sue the federal government or the churches that were running the schools, except in cases of sexual and serious physical abuse.[173] Thus, the government frames the Indian Residential School System abuses as crimes against individuals, rather than institutionalized racism or colonialism. As noted earlier, this is a continuous issue in Canada, as Prime Minister Stephen Harper has declared that the issues pertaining to missing and murdered Indigenous women is not a sociological (systemic) issue, but are rather crimes of domestic abuse.[174] In fact, Harper has argued that Canada is

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[170] Fraser, Nancy. "From redistribution to recognition? Dilemmas of justice in a 'post-socialist'age." *New left review* (1995), 82.
[171] Fraser, Nancy. "From redistribution to recognition? Dilemmas of justice in a 'post-socialist' age." *New Left Review* (1995), 82.
[172] Indian Residential Schools Settlement Agreement 2006. Retrieved from: http://www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf.
[173] Indian Residential Schools Settlement Agreement 2006. Retrieved from: http://www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf.
[174] Ditchburn, Jennifer. Reports Contradict Stephen Harper's View on Aboriginal Women Victims: Prime Minister Said Issue of Missing, Murdered Aboriginal Women is Not "Sociological Phenomenon"

a country with no "history of colonialism."[175]

Clearly, affirmative redistribution does little beyond providing accommodation to marginalized groups because it does not "challenge the deep structures that generate class disadvantage."[176] Thus, transformative redistribution must promote economic change that seeks to promote equality through measures such as "redistributing income, reorganizing the division of labour, subjecting investment to democratic decision-making, or transforming other basic economic structures"[177] Yet, Fraser argues that the discourse between recognition and misrecognition should be interpreted in terms of the "institutionalized patters of value"[178] that affect the way in which subjectivities participate and interact as peers in social life. De-institutionalizing oppressive relations can be solved by providing "recognition of people's standing as full partners in social interaction [who are] able to participate as peers with others in social life" by ensuring participatory parity in political claims-making.[179]

Arguably, Fraser's criticisms about Taylor's lack of focus on redistributive justice can also be applied to the *Tsilhqot'in* decision. However, her strategies for advocating for greater participation in the decision-making process are also problematic. Participatory claims-making strategies run the risk of assimilating the Indigenous voice because political

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CBCNews. Sep. 03, 2014. http://www.cbc.ca/news/aboriginal/reports-contradict-stephen-harper-s-view-on-aboriginal-women-victims-1.2754542

[175] See. Stephen Harper's speech at the G20 Press Conference, found in Wherry, Aaron. "What He Was Talking About When He Talked About Colonialism." *Maclean's*. Oct 1 2009. Accessed on Jun 27 2015. Retrieved from: http://www.macleans.ca/politics/ottawa/what-he-was-talking-about-when-he-talked-about-colonialism/.

[176] Fraser, Nancy. "From redistribution to recognition? Dilemmas of justice in a 'post-socialist' age." *New Left Review* (1995), 85.

[177] Fraser, Nancy. "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age." *New Left Review* (1995), 73.

[178] Fraser, Nancy. "Rethinking Recognition." *New Left Review* (2000), 113.

[179] Fraser, Nancy. "Rethinking Recognition." *New Left Review* (2000), 115.

participation alone does not ensure Indigenous self-expression. In fact, an institution can still keep its colonial nature intact even if more identities were included in the claims-making process. For instance, in *Tsilhqot'in*, the Court expands the definition of occupation to include nomadic Indigenous cultures. This means that more communities can bring a land claim forward. However, the Court also argues that even if Aboriginal title exists, it is subservient to the Crown's underlying title. Furthermore, both the federal and provincial governments have the ability to infringe title if, for example, a development project would benefit the greater Canadian population. Indeed, the Court emphasizes that there are checks and balances that protect Indigenous interests, such as the duty for governments to seek consent and not just consultation. Yet, the Court provides a long list of initiatives[180] that would fall under the scope of benefitting the Canadian population. This undermines Indigenous interests, despite the increase in opportunities for Indigenous communities to make land claims.

Another prominent scholar who uses arguments about recognition within Indigenous discourse is John Borrows. His nuanced analysis is both theoretical and practical. For Borrows, Indigenous claims to nationhood and stewardship must be actively pursued through a reformed legal relationship between Indigenous and non-Indigenous peoples. One of Borrows' most significant claims is that Indigenous recognition is possible without dismantling the whole legal apparatus because certain legal elements of Canadian law can be used to the benefit of Indigenous peoples. Primarily, Borrows focuses on legal concepts such as *sui generis* law as an avenue for decolonizing the law. Arguably the

[180] The list draws from *Delgamuuk*w includes but is not limited to the development of mining, agriculture, forestry, hydroelectric power. In other words, projects that advocate the general economic development of British Columbia could easily pass the infringement test. See, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para 165; also quoted in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para. 83.

concept of *sui generis* law balances the common law with Aboriginal customs; it acts as an aid to the development of the common law in a manner which accommodates both cultural differences and similarities, while emphasizing unique Aboriginal legal rights.[181]

In *Canada's Indigenous Constitution*, Borrows also argues that Canada should be a multi-juridical country that embraces common law, civil law, and Indigenous legal traditions. In reference to the civil law, the emphasis on *sui generis* law and Canada's ability to incorporate Indigenous law is not too farfetched, given that civil law is unique to Quebec. Moreover, civil law is also historically significant to Canada's legal construction. Similarly, Borrows argues that "it is a mistake to write about Canada's constitutional foundations without taking account of Indigenous law" and culture, as they played a significant role in the construction of the state.[182]

But Borrows is aware that Indigenous legal tradition will not flourish to their full potential unless both Indigenous and non-Indigenous peoples actively work together. In fact, the root origin of the word 'tradition' comes from the Latin verb *tradere*, which means 'to transmit'.[183] Thus, traditions must be both given and received in order to be applied in their contemporary context. Ultimately, Borrows, though sympathetic to approaches that

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[181] John Borrows argues that the term *sui generis* in regards to Aboriginal recognition connotes uniqueness and difference; literally translated, it means "of its own kind or class." Borrows notes that Aboriginal rights were first labelled as *sui generis* by the Supreme Court of Canada in *Guerin v. R.* In this case, Chief Justice Dickson found that "any apparent inconsistency [between Aboriginals and the common law] derives from the fact that in describing what constitutes a unique interest in land the courts have found themselves applying a somewhat inappropriate terminology drawn from general property law." Interestingly, what the courts had done is acknowledged Aboriginal rights as unique and articulated the argument that the courts cannot use the common law alone to determine Aboriginal rights. See, Borrows, John. *Recovering Canada: The resurgence of Indigenous Law*. University of Toronto Press, 2002, 8-9; *Guerin v The Queen*, [1984] 2 S.C.R. 335 at p. 382; Borrows, John, and Leonard I. Rotman. "Sui Generis Nature of Aboriginal Rights: Does it Make a Difference" *Alta. L. Rev.* 36 (1997): 9-45.

[182] Borrows, John. *Canada's Indigenous Constitution*. University of Toronto Press, 2010, 15.

[183] Borrows, John. *Canada's Indigenous Constitution*. University of Toronto Press, 2010, 271.

emphasize a 'turning away' from the state,[184] advocates for more formal state-like institutions that can play a significant role in perpetuating Indigenous tradition, as it involves the participation of Indigenous and non-Indigenous peoples.[185]

2.4 Unraveling Recognition

Much like Fraser's critique of Taylor's failure to question the underlying redistributive injustices of a multicultural society, Patchen Markell also draws awareness to the fact that recognition theorists often fail to account for the role that the Crown and courts plays in mediating relations of recognition in contemporary politics.[186] In this sense, Fraser's strategies of income redistribution and a more democratic decision-making process fail to acknowledge the colonial characteristics of the state. These strategies assume that the decision-making process is neutral, or rather, that both parties have equal participation. Likewise, Coulthard argues that in terms of Indigenous recognition, Fraser and Borrows' approaches assume that the settler state constitutes a fair framework in which Indigenous struggles can be properly addressed.[187] As I will make evident in subsequent chapters, even the Supreme Court does not provide 'neutrality' in the decision-making process, as decisions are often lopsided and benefit the Canadian state in the long run. For

[184] By turning away Indigenous scholars mean not so much abandoning and succeeding from the state but rather it is a rejection of Canada's colonial structures. Turning away from the state, thus calls for a sense of autonomy by returning to Indigenous traditional praxis. See works such as: Alfred, Gerald T. *Wasase: Indigenous Pathways of Action and Freedom*. Broadview Press, 2005; Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* Minneapolis: University of Minnesota Press, 2014; Simpson, Leanne. *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence*. Arbeiter Ring Publishing, 2011.
[185] Borrows, John. *Canada's Indigenous Constitution*. University of Toronto Press, 2010, 271.
[186] Markell, Patchen. *Bound by Recognition*. Princeton University Press, 2009, 25-32.
[187] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* Minneapolis: University of Minnesota Press, 2014, 36.

instance, even though Aboriginal title exists on Tsilhqot'in territory, the Canadian state can intervene on the land when it pleases, as long as it can justify its purposes/interest on the land for the benefit of the larger Canadian society. In fact, the Court argues that "the general economic development of the interior of British Columbia" could be a justification for infringement. [188] Essentially, the Canadian state still retained its ability to economically benefit from Indigenous land.

Although the Court has viewed Aboriginal title as a unique *sui generis* concept, Indigenous ways of life have also been moulded to fit into common law principles. For example, Aboriginal title, supposedly different from fee simple, is ultimately restricted by the principles of fee simple: (i) alienation (transfer or sale) is limited to the Crown and (ii) it cannot be used in a way that would prevent future generations from enjoying the substantial benefit of the land.[189] In addition, the Supreme Court also takes the assertion of European sovereignty as the "starting point in characterizing the legal nature of Aboriginal title."[190]

Other scholars such as Elizabeth Povinelli have also outlined the colonial features of the politics of recognition of settler states. For example, Australian liberal multiculturalism, in its attempt to recognize Indigenous peoples, has actually forced them into essentialized identity moulds based on 'authentic' traditional ways of life that are both removed from and impossible to realize in the present political-economy.[191]

Coulthard claims that although settler states have turned away from overt policies

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[188] *Delgamuukw* quoted in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para. 83.
[189] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 74.
[190] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para. 69.
[191] Povinelli, Elizabeth A. *The cunning of recognition: Indigenous alterities and the making of Australian multiculturalism*. Duke University Press, 2002, 6.

of assimilation, like the Indian Residential School System, Canada's strategies of recognition through self-government agreements, economic development, and land claims continue to reproduce the very same structures of domination and colonialism that Indigenous peoples have sought to transcend.[192] Particularly, Indigenous peoples have often had to 'give up' their claims to sovereignty and self-determination for a 'bundle' of specified rights, thereby establishing an inferior complex in the fiduciary relationship, while assimilating Indigenous rights into the common law's conception of rights. In *Tsilhqot'in* the Supreme Court unilaterally finds that in order for Aboriginal title to effectively exist, it has to take into consideration the jurisdictions of both the provincial and federal governments. The court argues that the inter-jurisdictional immunity doctrine does not apply because governance cannot be divided into isolated jurisdictions when discussing interest over land; land stewardship in Canada is an overlapping principle, a co-management of governments. The "effective regulation" over titled land requires the cooperation between "interlocking federal and provincial schemes" as the "two level of governments possess differing tools, capacities, and expertise."[193] However, it is significant to note that the expertise of the Tsilhqot'in people is not mentioned. Moreover, there is no mention of a Tsilhqot'in government, or something similar to this idea, in the discussion involving governments and "effective regulation" over Indigenous land. Finally, if land stewardship in Canada is a co-management of interests and jurisdictions, why are Indigenous interests about land and the environment often ignored?

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[192] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* Minneapolis: University of Minnesota Press, 2014, 28.
[193] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 148.

According to Coulthard, the politics of recognition are more than just theories, discourses, and a means to legitimize liberal democratic thought. The reason the politics of recognition is flawed in today's political structure that dictates Indigenous subjectivities is that recognition assumes reciprocity without problematizing the "legitimacy of the settler state's claim to sovereignty over Indigenous peoples and their territories on the one hand, and the normative status of the state-form as an appropriate mode of governance on the other."[194] If scholars of the politics of recognition do the former, they miss the latter and thus undermine the laws continued colonial characteristics, which are directly linked to, and now stabilize, a settler state's claim to sovereignty.

The critique of the politics of recognition can be summed up as follows: when placed in a settler colonial apparatus, the politics of recognition avoids questioning the underlying elements of colonialism, and thus creates an illusion that claims legal and political recognition as the best means towards decolonization and liberation.[195] The struggle for political and legal recognition certainly "calls into question the ways in which the subject comes to be formed and recognized, and the terms and conditions under which this recognition takes place."[196] Yet, posing the struggle as one of recognition assumes the benevolent reciprocity of each other's being as equals.[197] But as Markell explains, some groups are enjoying sovereign agency at the expense of others. In fact, even successful

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[194] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* Minneapolis: University of Minnesota Press, 2014, 109.
[195] Bhandar, Brenna. "Re-Covering the Limits of Recognition: The Politics of Difference and Decolonisation in John Borrows Recovering Canada: The Resurgence of Indigenous Law." *Austl. Feminist LJ* 27 (2007), 4.
[196] Bhandar, Brenna. "Re-Covering the Limits of Recognition: The Politics of Difference and Decolonisation in John Borrows Recovering Canada: The Resurgence of Indigenous Law." *Austl. Feminist LJ* 27 (2007), 6.
[197] Bhandar, Brenna. "Re-Covering the Limits of Recognition: The Politics of Difference and Decolonisation in John Borrows Recovering Canada: The Resurgence of Indigenous Law." *Austl. Feminist LJ* 27 (2007), 6.

exchanges of recognition can create new injustices.[198] It will be interesting to see if *Tsilhqot'in* can protect titled Indigenous communities from exploitative resource projects with the increased threshold of consent, or if the decision legitimizes more government intervention onto titled lands via the new co-management relationship that includes provincial influence/intervention/infringement.

In recent Canadian-Indigenous scholarship it is perhaps Coulthard's *Red Skin, White Masks* that has been one of the most provocative books as it challenges the liberal approach to the politics of recognition from an Indigenous perspective. Coulthard uses Frantz Fanon's foundation to critique reciprocity; however, he also mentions the 'psycho-affective' attachments inherent to the master-slave forms of recognition. In fact, 'psycho-affective' attachments result not only in dependence of the colonized on the colonizer, they also create a complacency that is essential in maintaining the economic and political structures stemming from master/slave relations.[199] Essentially, liberal recognition is a form of this complacency as it does not challenge the foundations of the colonial apparatus but rather works within them.

Without the public and state institutions acknowledging the colonial relations within Canada, recognition will only be symbolic. Settler colonialism is ongoing and indefinite until the Canadian population recognizes the extent of settler colonialism's reach from law and politics into the everyday engagements on Turtle Island. As mentioned above, this is why I often use the word Turtle Island throughout my thesis. By referring to North America as Turtle Island I am simultaneously using and recognizing both Indigenous and

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[198] Markell, Patchen. *Bound by recognition*. Princeton University Press, 2009, 5.
[199] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition.* University of Minnesota Press, 2014, 64.

non-Indigenous identities. Turtle Island, as a concept, finds its roots in the creation stories of various Indigenous communities such as those that form the larger Nishnaabeg peoples; however, by translating the Indigenous concept into non-Indigenous language, not only do I recognize and (re)discover that another way of life exists beyond the 'Canadian history' taught in settler institutions, these small acknowledgements bring new meaning to the ways in which I conceptualizes North America all together.[200]

2.5 Turning Away From Colonial Power, Not The Politics of Recognition

Taiaiake Alfred has argued for Indigenous peoples to "self consciously recreate our cultural practices and reform our political identities by drawing on tradition in a thoughtful process of reconstruction and a committed reorganization of our lives in a personal and collective sense."[201] In order to motivate the rebuilding of Indigenous communities from within, this type of Indigenous resurgence requires a reconnection with traditions and a turning away from externally imposed frameworks. However, scholars like Dale Turner argue that these strategies mimic isolationism and fail to propose a means of effectively changing the legal and political structures that currently hold a monopoly on the power to determine the scope and content of our rights. In other words, even if individuals find restoration within their communities, the larger colonial apparatus still remains outside their walls. Turner suggests that it is through activism and discussion that Indigenous

[200]For a more elaborate discussion on creation stories see, Simpson, Leanne. *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence*. Arbeiter Ring Publishing, 2011.
[201] Alfred, Taiaiake. *Wasáse: Indigenous Pathways of Action and Freedom*. Broadview Press: Peterborough. 2005, 34.

peoples can influence and "shape the legal and political relationship so that it respects Indigenous world views."[202]

Alfred, borrowing from Fanon, is also aware of the internalized self-hatred/self-loathing and fear that the 'Indian' experiences due to the disempowering relations that the Canadian-state has produced. The settler colonial state co-opts and distorts the Indigenous mind, creating a well-calculated reality in which Indigenous peoples are unable to recognize their value as human beings within Canada and amongst their own peoples.[203] Thus embracing one's cultural tradition is in one aspect a sense of liberation because as Fanon states it transcends the:

> absurd drama that others have staged around me, to reject the…terms that are equally unacceptable, and, through one human being, to reach out for the universal.[204]

Furthermore, Alfred argues that without being rooted in the traditions of specific nations, self-determination efforts risk absorption into dominant economic and political structures, and constitute the extension of colonial relations, not its reversal. But how exactly do communities embrace tradition? Can Indigenous resurgence, self-governance, and self-

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[202] Turner, Dale. *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy*. University of Toronto Press, 2006, 5.

[203] Many scholars have also noted the psychological issues that have lingered from the abuse and trauma experienced by survivors of the Indian Residential School system. See, Sochting, I., et al. "Traumatic pasts in Canadian Aboriginal people: Further support for a complex trauma conceptualization?." *British Columbia Medical Journal* 49.6 (2007): 320-326. Though Western medical research may bring insight into understanding these psychological issues their solutions cannot be equitable to clinical remedies. Whereas post-traumatic stress disorder has often been affiliated with soldiers of war, Indigenous peoples to have been at war with the states in which they reside in. Indeed, both have experienced complex and unimaginable trauma, in this they are similar. Their difference however, is that soldiers of the state often volunteer, whereas Indigenous peoples would not have knowingly volunteered for the conditions that would be met within the walls of the Indian Residential School System. Furthermore, Indigenous peoples lost their culture and were punished for *performing* their traditions like having sewing needs pushed through their tongue for speaking their language. Western Medicine cannot retrieve those intimate ways of life or traumatic abuse. See also, Bull, Simone, and Valerie Alia. "Unequaled Acts of Injustice: Pan-Indigenous Encounters with Colonial School Systems." *Contemporary Justice Review* 7.2 (2004): 171-182.

[204] Fanon, Frantz. *Black Skin, White Masks*. Grove press, 2008, 174.

determination really be autonomous from the state? And what does autonomy mean or look like? Where does *Tsilhqot'in* fit in this discussion?

Indigenous resurgence models focused on community action have the potential to transform colonial relations by creating a reconnection with political and cultural traditions of specific Indigenous nations. I argue that *Tsilhqot'in* has created some form of liberation as proposed by Fanon's discussion on the embracement of culture. This will be explored in the fourth chapter with regard to the assertion of sovereignty strategies employed by Indigenous communities following *Tsilhqot'in*.

2.6 Conclusion: In Search for a New Politics of Recognition Discourse

Evidently, we cannot completely disregard the ideas behind a politics of recognition, that is, a sense of acknowledging the other. As *Tsilhqot'in* affirms, a vital criterion for the test of sufficient occupation is whether the group in question could make visible their interest in the land to neighbouring communities.[205] The various communities in the Chilcotin region of British Columbia unanimously agree that the claim area belongs to the Tsilhqot'in Nation. Therefore, even in Indigenous self-resurgence strategies recognition plays a significant role. But who belongs to the community? What constitutes traditional territory? Do the surrounding Indigenous communities agree? I have illuminated but a small glimpse into the vast lexicon of the politics of recognition. But what links these critical voices together, and what is most important, is their fundamental goal to find justice in an unjust society. Whether it is in the context of Indigenous or non-Indigenous relations, the common ground of the politics of recognition scholarship is a deep commitment to

[205] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 38.

discourse and participation amongst peoples, whether or not the state is included.

By putting contrasting voices in conversation with each other, it becomes evident that although some scholars, more than others, are sceptical of settler institutions, individual and group agency remain the answer to finding justice when a settler state like Canada is reluctant to directly make transformative changes. What I have provided thus far is a conversation or "critical multilogue"[206] that includes the ideas of theorists situated in the politics of recognition. While this multilogue exposes certain weaknesses, it also reveals important questions that need to be asked, and highlights the strengths that remain in the politics of recognition. These strengths include, but are not limited to, embracing and protecting culture, diversity, and social justice, strategies that both Taylor and Alfred, though having different approaches, resort to.

However, as it stands, the judiciary in *Tsilhqot'in* has the final say in interpreting, producing, and affirming Aboriginal title. I argue that in the end, Aboriginal title as *sui generis* law was recognized because it does not challenge the underlying colonial structures of the Canadian state. Aboriginal title is reduced to a cultural accommodation, rather than a political or legal system that predates common law. The next chapter examines the colonial structures of the Canadian state more explicitly, and how colonialism's legacies influence the courtroom and the *Tsilhqot'in* decision.

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[206] My emphasis on a critical multilogue also stems from the work of Alizera Asgharzadeh who suggests that in order to understand whether the field of politics in a given environment is well equipped and educated enough to deal with complex issues of subalternity we must examine the narratives of various intellectual, cultural, and linguistic traditions and how these ideas, voices, identities and resistance strategies intersect. See. Asgharzadeh, Alireza. "The Return of the Subaltern: International Education and Politics of Voice." *Journal of Studies in International Education.* Winter 2008 vol. 12 no. 4 334-363 (2008). 334-363.

Chapter 3: Tsilhqot'in and Settler Colonialism

3.1 Introduction: Exclusion through Inclusion

In this chapter, I use Achille Mbembe's and Giorgio Agamben's concepts of necro-politics, bio-politics, and sovereignty to provide an additional framework to problematize *Tsilhqot'in* as an apparatus geared toward the subversion of Indigenous subjectivities. Specifically in Canada, legal Indigenous recognition through the common law is based on a structure of exclusion through inclusion.[207] Indigenous identities are recognized by the settler state only to be transformed and thereby excluded from what the state considers to be political.[208] Although Aboriginal title is affirmed in the *Tsilhqot'in* decision, it is limited by the common law. Furthermore, Aboriginal title is not its own distinct Indigenous political system parallel to the Crown's underlying title; rather, it is a burden on the Crown's title. Only when Indigenous ways of life have been transformed to fit into the common law's parameters are they considered legitimate political constructs; or rather, Indigenous cultural rights. In *Tsilhqot'in*, Aboriginal title is juxtaposed with fee simple and then reformulated to include justified limits/infringements through various common law tests.

Moreover, I argue that *Tsilhqot'in* supports Mbembe's claim that the colonial state derives its claim of sovereignty from its own cultural mythology; the narrative of its own divine right to exist, while failing to explain how it gained sovereignty/underlying title

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[207]Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen. Stanford University Press, 1998. See pages 9-12 and 89.

[208] See Agamben's analysis on the distinction between biological (*bios*)/political life (*zoe*) and *homo sacer*/bare life. Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen. Stanford University Press, 1998, 9-14.

across Canada.[209] Consequently, the exclusion of Indigenous subjectivities reveals insights into the source of Canada's political composition. Specifically, the exclusion of the Indian/Other ensures the political order of the settler Canadian population, and this is achieved by actively pursuing the death of the Indian through sovereign power.[210] Death, in this sense, is not only physical. It is the elimination of Indigenous identities by means including, but not limited to, dispossession of lands, severance of kinship bonds, erasure of languages, and rendition of Indigenous laws as obsolete. By placing *Tsilhqot'in* in this framework, I will show that the logic of elimination is masked by terms such as co-management, reconciliation, and protection of the environment. Nonetheless, colonial expansion and influence on Indigenous lands are visible in the legislative will of the state, as exemplified by the infringement test in *Tsilhqot'in*.

Finally, I suggest that the (re)construction of Aboriginal title to fit the settler colonial politics of recognition is most detrimental to Indigenous communities because it promotes the erosion of Indigenous traditions grounded on an "ontology of care."[211] By an Indigenous 'ontology of care', I mean the essence of being and belonging on Turtle Island based on structures of respect and responsibility forged *with* the land,[212] or on the "original

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[209] Mbembe, J-A. "Necropolitics." Trans. Libby Meintjes. *Public culture* 15.1 (2003), 27.
[210] Mbembe suggests that death through sovereign constitutive power (necro-politics) is also a social construct – a false imagery. "the existence of the Other as an attempt on my life, as a mortal threat or absolute danger whose biophysical elimination would strengthen my potential to life and security—this, I suggest, is one of the many *imaginaries* of sovereignty characteristic of both early and late modernity itself." Essentially, "sovereignty consists of the will and the capacity to kill in order to live." Mbembe, J-A. "Necropolitics." Trans. Libby Meintjes. *Public culture* 15.1 (2003), 18.
[211] Pasternak, Shiri. "Jurisdiction and Settler Colonialism: The Algonquins of Barriere Lake Against the Federal Land Claims Policy". PhD Dissertation for the Department of Geography. University of Toronto Press, 2014.
[212] Pasternak, Shiri. "Jurisdiction and Settler Colonialism: The Algonquins of Barriere Lake Against the Federal Land Claims Policy". PhD Dissertation for the Department of Geography. University of Toronto Press, 2014, 6.

instruction[s]" of the Creator.[213] Indigenous rights, including title, are therefore not a form of *cultural difference* that can simply be *accommodated* alongside a settler political order forged *on* the land. In fact, the settler political order in *Tsilhqot'in* involves the *effective regulation* of titled land by the provincial and federal government, but it makes no mention of Tsilhqot'in law. I argue that Indigenous identities, which include Indigenous law, are inherently political and are rooted in systems of order connecting individuals to the community, neighbours, and the land. The court is not built on philosophical foundations that can understand these Indigenous ideas.

Evidently, the most clear-cut assertions of the Canadian Crown's rhetorical, mythical, and exclusionary sovereignty in *Tsilhqot'in* are apparent in the Supreme Court's failure to explain how the Crown obtained underlying title despite denying *terra nullius*. In fact, constructing Aboriginal title as a *burden* to underlying title also implies a temporal and hierarchical relationship between the Supreme Crown and the original inhabitants of the New World. Moreover, the basis behind justifying an infringement as per reconciling Aboriginal interests with the *broader interest of society as a whole*[214] legitimizes unilateral decision making. This tips the balance in favour of the Crown in what should be considered Nation-to-Nation agreements. Finally, the Supreme Court's unilateral elimination of the inter-jurisdictional immunity doctrine established by the *Royal Proclamation* not only implies Indigenous precedent is outdated, it also undermines Indigenous legal systems by suggesting that autonomous titled land would create a "legal vacuum."[215]

Despite recognizing Aboriginal title as unique *sui generis* law, these three features

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[213] Simpson, Leanne. *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence*. Arbeiter Ring Publishing, 2011, 66.
[214] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 82.
[215] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 147

of *Tsilhqot'in* are significant in that they fail to engage with concepts of Indigenous self-determination. In the discourse of the politics of recognition, Canadian sovereignty, and governance, *Tsilhqot'in* demonstrates that the judicial system is an extension of sovereign power that has an integral role in eliminating the ontologies of Indigenous care and responsibility, replacing them with more familiar settler colonial mechanisms. Therefore, *Tsilhqot'in* affirms that the sovereign is not only the one who makes law, but also the one who recognizes and decides what law *is* and *ought* to be. Or rather, the sovereign is still "he who decides on the exception."[216] Moreover, *Tsilhqot'in* demonstrates that settler colonialism is a combination of the bio-political, and the necro-political.[217]

3.2 State of Exception, Exclusion, and Settler Colonialism: *Indian Act* as Precursor to *Tsilhqot'in*

In understanding the significance of *Tsilhqot'in*'s inclusion into the common law, I find it important to further deconstruct Agamben's statement that sovereign power and the construction of a bio-political body are intrinsically connected. Agamben discusses the paradox in democratic states whereby political life (*bios)* and natural biological life[218] (*zoe)* are at once separate, yet indistinguishable. However, it is political life (*bios*), or rather the political order (citizenry, *demos*), which becomes the definition of the *just life*. Accordingly, the bio-political body, at least in Canadian nationhood, is (at least) two-fold. On the one hand, there exists the bio-political construction of the *Canadian citizenry*, and

[216] Schmitt, Carl. *Political Theology, Four Chapters on the Concept of Sovereignty*, Trans. George Schwab. University of Chicago Press, 2005, 5.
[217] Mbembe, J-A. "Necropolitics." Trans. Libby Meintjes. *Public culture* 15.1 (2003), 27.
[218] Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen. Stanford University Press, 1998,12.

on the other hand, the bio-politically constructed *Indian* encapsulated in the *Indian Act*.

In the New World, the population under scrutiny was the Indigenous population; thus, bio-politics treated this population as pre-constructed and pre-determined beings with specific "biological and pathological features."[219] In Canada, the concept of *bare life*, and the sovereign's elimination of natural life into political life, are evident in the bio-political force that is the *Indian Act*. The *Indian Act* is federal legislation that decides who is Indigenous, and that governs Indigenous lives from birth to death. Contained within the act are provisions and regulations relating to all aspects of social and economic life, including, but not limited to: Indian registration, revenues, education, health status, elections, estates, and wills. Essentially, the *Indian Act* has regulatory power over all facets of 'Indian' life and provides the federal government with a major concentration of authority and social control over 'Indians'. That is, those that they identify as 'Indians'. To decide Indian status there is a registrar in Ottawa that determines *who is* and *who is not* an Indian based on the Department of Aboriginal Affairs and Northern Development polices and legislations. The registrar adds or takes people off a list called the Indian Register. The issue is not who is actually an Indian, but *who is* entitled to be registered as an Indian according to the *Indian Act*. In Canada, simply being of Indigenous descent does not make one an *Indian*. It is the state and its institutions that decide *who i*s Indian.

The *Indian Act's* intent was to eliminate Indigenous kinships, cultures, and histories. Specifically, the provisions of the *Indian Act* attempted to disrupt matrilineal cultures of many First Nations as lineage was passed down through the mother. Indigenous women and men could lose status in a variety of ways including marrying a man who was

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[219] Foucault, Michel. *Security, Territory, Population: Lectures at the Collège De France, 1977-1978*. Trans. Graham Burchell Basingstoke. Palgrave Macmillan, 2009, 47.

not a status Indian (but this policy did not apply to men who married Canadian women) and enfranchisement ('Indians' could vote in federal elections only by renouncing Indian status).[220]

What I would like to emphasize through my exploration of the *Indian Act* is that the elimination of Indigenous subjectivities did not have to be as physically direct as the strategies employed through the Reserve system or the compulsory enrolment into the Indian Residential School System, which has now been equated to *cultural genocide*.[221] For example, in 1884, under the authority of the *Indian Act*, dances were prohibited and carried a prison sentence ranging from two to six months.[222] Although, in Western culture, a restriction on a dance could be viewed as subtle and microscopic in comparison to the direct killing of a person, for certain Indigenous communities, the dance carried its own significance in terms of being and belonging. Dances were integral to many Indigenous communities as they were inextricably linked with the social, political, and economic life of the community. For example, Dakota ceremonial dances often entailed large gatherings of different Indigenous communities, and provided invaluable opportunities for the elders to pass on histories of the buffalo hunts, the intertribal wars, or the Rebellion of 1885. Dances were also times in which goods were collectively distributed.[223] However, dances were perceived by government officials as "foolish practices," "profligate and spendthrift

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[220] *Indian Act, 1876.* Retrieved from: http://www.tidridge.com/uploads/3/8/4/1/3841927/1876indianact.pdf
[221] Truth and Reconciliation Commission of Canada. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015, 57. Accessed on July 29, 2015. Retrievable from: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf
[222] Constance Blackhouse. *Colour-Coded: A Legal History of Racism In Canada 1900-1950*. University of Toronto, 1998, 63.
[223] Constance Blackhouse. *Colour-Coded: A Legal History of Racism In Canada 1900-1950*. University of Toronto, 1998, 64.

behaviour," and as vestiges of savage life.[224] Essentially, the premise of the *Indian Act* was an elimination of the most intimate of elements that constructed Indigenous identities and sense of belonging, to the land, community, and self-identity. If Canada could exterminate or assimilate the Indians' ways of life, Indian-ness would cease to exist, and so would the Indigenous relations forged with the land. Canada would therefore have complete access to all Indigenous land, reaping its benefits at the cost of the *Indians*.

As Deputy Minister of Indian Affairs Duncan Campbell Scott remarked in 1920, Canada wanted to "get rid of the Indian problem ... [the government's] object is to continue until there is not a single Indian in Canada that has not been absorbed into the *body politic* and there is no Indian question, and no Indian Department."[225] The *Indian Act*, therefore, illustrates that the fundamental bio-political structure of sovereignty and modernity is also "the decision on the value (or nonvalue) of life."[226] By criminalising elements of Indigenous identities, the Canadian state was able impose its prescription of Western normalcy on Indigenous society, including the imposition of the norms of capitalist social relations. Today, the *Indian Act*, and the construction of Indigenous identities within Canada, have taken a more liberal direction. My point is that the sovereign powers of constructing a bio-political order, deciding the exception, excluding/including what is of value, and recognizing what is law and the norm remain implicit to the *Tsilhqot'in* decision.

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[224] Constance Blackhouse. *Colour-Coded: A Legal History of Racism In Canada 1900-1950*. University of Toronto, 1998, 67.

[225]De Leeuw, Sarah. "'If anything is to be done with the Indian, we must catch him very young': colonial constructions of Aboriginal children and the geographies of Indian residential schooling in British Columbia, Canada." Children's Geographies 7.2 (2009), 130; emphasis added. I emphasize the term body politic in Scott's statement as it notes Agamben's idea that the body politic is distinct from that of biological life. The body politic is civilized, it is modern.

[226] Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen. Stanford University Press, 1998,13.

3.3 *Tsilhqot'in*: Problematizing Underlying Title

The Supreme Court examines the doctrine of *terra nullius* and its relation to Canada's underlying title and sovereignty. McLachlin writes: "[t]he doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada."[227] However, at the same time, and in the same paragraph, the Court affirmatively reproduces one of the most troubling aspects of *terra nullius*. *Tsilhqot'in* reaffirms the idea that "[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province."[228] To elaborate, although the court rejects *terra nullius*, it still asserts unilateral concepts that (re)legitimizes its unjustified and illegitimate control over land. Instead of assuming that no one owned the land, the Court now asks, who effectively controlled the land? But even if an Indigenous group can prove that it effectively controlled a land, the Supreme Court finds that the recognition of Aboriginal title is simultaneously dependent on the existence of Crown sovereignty. In *Delgamuukw* the Court argues that "it does not make sense to speak of a burden on the underlying title before that title existed, [A]boriginal title [therefore] crystallized at the time sovereignty was asserted."[229] To this, I must add that it also does not make sense to speak of underlying title without explaining its manifestation over the New World. How did Canada actually gain 'sovereignty' by ensuring effective control?

Taiaiake Alfred states that in participating in the confines of settler colonial institutions, we are legitimizing the false sovereignty of the state and the continued

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[227] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 69
[228] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 75
[229] *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010 at para 145.

dispossession of Indigenous peoples.[230]

Robert Miller argues that "there could be no crystallization because Crown sovereignty could not replace Indigenous sovereignty just by virtue of non-Indigenous peoples settling in Indigenous territories and homelands."[231] Likewise, he notes that the Supreme Court's construction of a *fiduciary* relationship between the Crown and Indigenous peoples "requires a specific Doctrinal[232] *magic*; you must assume Indigenous inability, absence, and invisibility in order to imagine the crystallization of Crown sovereignty and superior title."[233] These illegitimate constructs allow the Crown to gain underlying title, simply by declaring *superiority* and disregarding the interests of Indigenous peoples.[234] Evidently, I suggest that the ability to give *value* to life (sovereign power) under the logic of elimination underlies the Supreme Court's entire definition and scope of Aboriginal title. In fact, the logic of elimination through the exclusion/inclusion apparatus is also the basis of legal reconciliation, and the enhanced role of s. 35 of the *Constitution Act* (1982). This is most evident in the elimination of inter-jurisdictional immunity in the *Tsilhqot'in* decision.

Tsilhqot'in may modify a system built on colonial hierarchies of rights and access to land, but it does not establish an alternative to the logic of elimination intrinsic to the

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[230]Alfred, T., and E. Tomkins. "The Politics of Recognition: A Colonial Groundhog Day." *Chiefs of Ontario Discussion Paper* (2010), 6.
[231] Miller, Robert J. *Discovering Indigenous Lands: the Doctrine of Discovery in the English Colonies*. Oxford University Press, 2010, 158.
[232] Robert Miller is making reference to the Doctrine of Discovery and the concept of *terra nullius* in this quotation. For a more in-depth genealogy on the Doctrine of Discovery and its relation to Canada's construction as a state, see Jennifer Reid, "The Doctrine of Discovery and Canadian Law," *The Canadian Journal of Native Studies* 2 (2010): 335-359.
[233] Miller, Robert J. *Discovering Indigenous Lands: the Doctrine of Discovery in the English c\Colonies*. Oxford University Press, 2010, 158.
[234] For a more in-depth genealogy on the Doctrine of Discovery and its relation to Canada's construction as a state, see Jennifer Reid, "The Doctrine of Discovery and Canadian Law," *The Canadian Journal of Native Studies* 2 (2010): 335-359.

common law. In fact, as the next section delineates, once Aboriginal title is recognized as *sui generis* law, the Court immediately reverts to using colonial language that justifies and legitimizes infringement, diminishes Indigenous self-governance, and re-establishes the legitimacy of Crown sovereignty by stating that Aboriginal title is a "*product* of the *historic* relationship between the Crown and the Aboriginal group in question."[235] The last point will be shown to be quite paradoxical, as the Supreme Court later eliminates a historical Canadian-Indigenous relationship inherent to the *Royal Proclamation*. In essence, I argue that the judiciary as an extension of sovereign power decides *what is* law and *who is* capable of making a title claim in the name of the Crown (sovereign).

3.4 *Tsilhqot'in's* Concept of Reconciliation

Although *Tsilhqot'in* demonstrates a *culturally sensitive* approach in interpreting Aboriginal title, by the latter half of the decision, the concept of Aboriginal title shifts into a discussion of attempting to reconcile Canadian-Indigenous relations. Yet the discussion is one-sided. The Supreme Court argues that "[w]hat is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader [Canadian] society."[236] In this case, the Court finds that British Columbia's "land use planning and forestry authorizations were inconsistent with its duties owed to the Tsilhqot'in people."[237] However, the concept of Aboriginal title in *Tsilhqot'in* also implies the idea of a legal reconciliation. In fact, the Court argues that the legal parameters defining and limiting the unique characteristics of Aboriginal title are a "necessary part of the

[235] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 72; emphasis added.
[236] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 23.
[237] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 2.

reconciliation of Aboriginal societies with the broader political community of which they are part."[238]

Tsilhqot'in is a landmark case because it affirms Aboriginal title. However, borrowing from *Gladstone*, it reasserts the idea that because "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community" [239] there exists circumstances in which Aboriginal rights can be infringed/limited in order to pursue objectives of compelling and substantial importance to both Indigenous and Canadian societies. I argue that this form of legal recognition or reconciliation, in which infringements of Aboriginal rights are justified, does not abandon the exclusion through inclusion or hierarchical relationships of settler colonialism. In fact, reconciliation, as proposed by *Tsilhqot'in*, is not defined nor engaged with beyond being referenced as justification for infringement. Particularly, it is because Indigenous rights, including title, once recognized as *sui generis* are further displaced from their original relationships with the land *independent of* and *prior to* colonial law. The recognition of a *sui generis* Aboriginal right suggests that Indigenous peoples accept their subordination through a myth of Canadian sovereignty to which Indigenous peoples, especially non-treaty communities like the Tsilhqot'in Nation, have not consented. This demonstrates a continuum of the logic, evident in the *Indian Act*, of authority to unilaterally decide the outcomes of Indigenous issues.

[238] Quoted in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para. 16.
[239] *R v Gladstone*, [1996] 2 SCR 723, at para. 73.

3.5 Deconstructing the Restrictions of Aboriginal Title

The limitations of rights is by no means unique to Indigenous peoples, as the rights of settler-Canadian citizens can also be limited via the *Oakes Test*.[240] It is not the *limitation* of an Aboriginal right that is the problem, so much as it is the reasons justifying and legitimizing the infringement. Furthermore, posing the struggle for Aboriginal title as one of recognition under the common law assumes the benevolent reciprocity of equality.[241] As mentioned earlier, Bhandar argues that the struggle for political and legal recognition calls into question the terms and conditions under which this type of recognition takes place. It is evident that "the politics of recognition is rooted in a deeper misrecognition, or failure of acknowledgment, of its own."[242] In *R v Van der Peet*, the Supreme Court emphasizes that the essence of Aboriginal *sui generis* rights is the bridging of non-Aboriginal and Aboriginal cultures. *Van der Peet* suggests that Aboriginal rights are "neither English nor Aboriginal in origin," they are "a form of intersocietal law that evolved from long-standing practices linking the various communities."[243] However, despite precedent affirming that "what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty,"[244] *Tsilhqot'in* does not demonstrate

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[240] The Supreme Court of Canada established a two-part legal test, known as the *Oakes test*, which is applied each time a Charter violation is found in order to determine if a law that infringes a Charter right can be justified under s. 1 of the Charter, often referred to as the 'reasonable limits clause.' The two part test establishes that: "1) There must a pressing and substantial objective for the law or government action. 2. The means chosen to achieve the objective must be proportional to the burden on the rights of the claimant. i. The objective must be rationally connected to the limit on the Charter right. ii. The limit must minimally impair the Charter right. iii. There should be an overall balance or proportionality between the benefits of the limit and its deleterious effects. More a broader discussion see, *R v Oakes*, [1986] 1 S.C.R. 103.

[241] Bhandar, Brenna. "Re-Covering the Limits of Recognition: The Politics of Difference and Decolonisation in John Borrows Recovering Canada: The Resurgence of Indigenous Law." *Austl. Feminist LJ* 27 (2007), 6.

[242] Markell, Patchen. *Bound by Recognition*. Princeton University Press, 2009, 14-15.

[243] *R v Van der Peet*, [1996] 2 S.C.R. 507 at para 42.

[244] *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010 at para 114.

a horizontal bridging of intersocietal law. Rather, I argue that the fiduciary relationship inherent to Aboriginal title establishes a hierarchical apparatus in which the common law enjoys paramount supremacy

The government of Canada notes that, by definition, a fiduciary duty is "one in which someone in a position of trust has rights and powers which he is bound to exercise for the benefit of another."[245] Evidently, in the 1950s, the Supreme Court observed that the *Indian Act* "embodie[d] the accepted view that these aborigines are … wards of the state, whose care and welfare are a political trust of the highest obligation."[246] Since the Crown remains paramount to Indigenous perspectives, I argue that a legal fiduciary relationship entails a hierarchical and patriarchal relationship that continues the superseding racist logic of the *Indian Act*. The ordering principles of underlying title are also consistent with Coulthard's claim that Indigenous peoples have often had to 'give up' their claims to sovereignty and self-determination for very specified rights.[247] For instance, although Aboriginal title is unique and supposedly different than fee simple, the Court ultimately reaffirms the claim that title is restricted in two ways: (i) alienation (transfer or sale) is limited to the Crown and (ii) it cannot be used in a way that would prevent future generations from enjoying the substantial benefit of the land.[248] The restrictions imply that if anyone is to make a profit off the land, it is the Crown. Safeguarding land for future generations does seem like a reasonable and responsible restriction. However, why is it that only Indigenous communities with 'title' have to be extra careful with land, while non-

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[245] Hurley, Mary. The Crown's Fiduciary Relationship with Aboriginal Peoples. *Law and Government Division.* Parliament of Canada. Aug 10 200. Accessed on July 14 2015. Retrieved from: http://www.parl.gc.ca/content/lop/researchpublications/prb0009-e.htm.
[246] *St. Ann's Island Shooting & Fishing Club Ltd v R*, [1950] SCR 211 at page 219.
[247] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition.* University of Minnesota Press, 2014, 28.
[248] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 74.

Indigenous land operations are not held to the same standards? Companies that clear-cut forests and overfish bodies of water are not constrained by these restrictions. As I discuss in the next section, the infringement on Aboriginal title can be justified with reference to the same landscape-altering and revenue-producing activities that Indigenous communities are restricted from pursuing.

3.6 Inter-jurisdictional Immunity Doctrine and Reconciliation

Assuming from the nature of precedent that reconciliation stems from the *Van der Peet* case, then reconciliation must take "into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each."[249] However, as I have argued, reciprocity here does not mean recognizing or balancing two distinct legal systems as equals. The laws of Indigenous communities do not construe Aboriginal title; rather title is confined to the common laws ideas of sovereignty and underlying title. In fact, I suggest that the Court only recognizes Aboriginal title within the common law as *sui generis* because, by advancing a *culturally sensitive approach* to Aboriginal title, it implies that title is simply *cultural* and not a legal concern. Thus the Court avoids challenging the overall structure of the common law. The idea that Indigenous law is not part of the Canadian political order (exclusion) despite title being affirmed (inclusion) is evident in the elimination of the inter-jurisdictional immunity doctrine. It is also reminiscent of the *Indian Act's* idea that certain Indigenous elements are incompatible with the *body politic* simply because Canadian government officials find them to be primitive in nature.

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[249] *R v Van der Peet*, [1996] 2 SCR 507 at para 50.

The Supreme Court's decision to eliminate inter-jurisdictional immunity stems from a legal norm that ends a two hundred and fifty-year-old constitutional principle first outlined in the *Royal Proclamation of 1763*, and accepted by many First Nations in central Canada in the *Treaty of Niagara* (1764).[250] This principle is moreover affirmed in section 91(24) of the *Constitution Act* (1867). As noted earlier, the *Royal Proclamation* notes that British interests prior to 1763 were responsible for "great fraud and abuses"[251] in obtaining land from Aboriginals, and had caused the latter "great dissatisfaction."[252] The *Royal Proclamation* is not without criticism; it can be argued that it was another means to acquire land from Indigenous peoples. However, John Borrows argues that the *Proclamation*'s confirmation of the exclusion of the provinces from dealing with Canada's Indigenous peoples and their land use was, at the very least, one of the few checks and balances Indigenous peoples enjoyed under Canadian law throughout history.[253]

The Supreme Court argues that Aboriginal title stems from *historical* relationships between Indigenous peoples and the Crown, implying that history is a significant factor in establishing the parameters of Aboriginal title. In addition, *Tsilhqot'in* makes reference to the *Royal Proclamation* as being the document that affirms that *terra nullius* does not exist. Thus in my view, the *Royal Proclamation* is a very significant legal document. Yet, the Court argues that the inter-jurisdictional immunity doctrine outlined in the *Royal*

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[250] Borrows, John. *Aboriginal Title in Tsilhqot'in v. British Columbia [2014] SCC 44.* August 19, 2014. http://maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqotin-v-british-columbia-2014-scc-44/

[251] *The Royal Proclamation, 1763*. Accessed on Apr 20 2015. Retrieved from: http://archiveca.com/ca/c/canadiana.ca/2014-02-05_3637863_47/Canada_in_the_Making_Aboriginals_Treaties_amp_Relations/.

[252] *The Royal Proclamation, 1763*. Accessed on Apr 20 2015. Retrieved from: http://archiveca.com/ca/c/canadiana.ca/2014-02-05_3637863_47/Canada_in_the_Making_Aboriginals_Treaties_amp_Relations/.

[253] Borrows, John. *Aboriginal Title in Tsilhqot'in v. British Columbia [2014] SCC 44.* August 19, 2014. http://maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqotin-v-british-columbia-2014-scc-44/.

Proclamation, and thus entrenched in the constitution, was outdated in relation to modern forms of governance and managerial relationships over Crown land. To this I must add that if certain traits of the *Royal Proclamation* are outdated and can be unilaterally eliminated for the reconciliation of Canadian-Indigenous relations, despite being Constitutionally protected, then, the principles explaining how *terra nullius* does not apply to Canada must also be revisited. Furthermore, the claims that justify and legitimize Crown sovereignty must also face the same scrutiny by the Supreme Court that Aboriginal rights claims endure.

The Court argues that the inter-jurisdictional immunity doctrine would produce "uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests — some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all."[254] This statement can be interpreted as the Court suggestion that Indigenous stewardship and caretaking of the land is not actual law due to its inferiority to modern forms of governance. Thus, the Tsilhqot'in's own political systems are not fully recognized through the recognition of Aboriginal Title.

In the *Tsilhqot'in* decision, the Court finds that the tension over Aboriginal title is not between competing government jurisdiction, but rather between the jurisdiction of governments and the actual Aboriginal title-holder.[255] Clearly, the Court demonstrates that there are two distinct political issues at stake, the rights of the Indigenous community and the jurisdictions, or rather the sole interests, of the settler colonial state. This is evident when the Supreme Court states that "the doctrine of inter-jurisdictional immunity is

[254] *Tsilhqot'in Nation v British Columbia*, 2014 at 147.
[255] *Tsilhqot'in Nation v British Columbia*, 2014 at para 144.

directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction."[256] However, Indigenous peoples are not offered this exclusivity despite having to vigorously prove that they have an interest in their rightful and traditional lands.

The Court has also noted in previous litigation that the doctrine of inter-jurisdictional immunity was originally developed "in a very special context, namely to protect federally incorporated companies from provincial legislation affecting the essence of the powers conferred on them as a result of their incorporation."[257] But as the Supreme Court notes in *Tsilhqot'in*, when it comes to Aboriginal title, the provinces and the federal government will set aside their exclusive powers in order to concurrently access and influence the land of the title-holder. It seems Canada is once again exerting its 'sovereignty' through its various institutions, particularly through its ability to craft the tests and parameters of Aboriginal title.

Furthermore, the Crown also secures future land space, and thus the life of its settler population, by imposing certain boundaries and obligations on Indigenous peoples. On the one hand, Canada has burdened Indigenous communities with making sure that titled land is usable for future generations. On the other hand, Canada retains its ability to create and stabilize norms and exceptions. Even if an Indigenous community refuses to provide consent, Canada can pursue economic development projects that inevitably degrade protected titled land space. Taiaiake Alfred notes that "[i]t is hard to imagine what kinds

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[256] *Tsilhqot'in Nation v British Columbia*, 2014 at para 114.
[257] *Canadian Western Bank v* Alberta, [2007] 2 SCR 3, 2007 SCC 22 at para 39.

of developments do not fit into any of the categories of justifiable infringement!"[258] But again, since *Tsilhqot'in* is a recent case, only time can tell if the tests that counter-balance government despotism will actually hold up.

3.7 Conclusion: Aboriginal Title and the Need to Exit the Court

In this chapter I argued that despite Aboriginal title being affirmed, Indigenous stewardship, law, and responsibility over traditional 'titled land' is never mentioned and is thereby undermined and replaced by a European system of entitlement and top-down ruling procedures. The (*mis)recognition* of Aboriginal title as *culture* rather than law is evident in the Court application of a culturally sensitive approach in the establishment of title, and its failure to recognize Indigenous legal jurisdiction. In fact, the words governance, determination, and autonomy are never mentioned in *Tsilhqot'in*. The term 'government' is used to refer to the provincial or federal governments, not Indigenous legal systems. I suggest that the Court only recognizes Aboriginal title as *sui generis* because the cultural aspects it examined, such as semi-nomadic lifestyles, did not challenge the overall structure of common law. Accordingly, Aboriginal title is moulded to fit inside common law's fiduciary duty, thereby eliminating any sense of reconciliation or Indigenous resurgence.

I argued that the Supreme Court's failure to explain how the Crown obtained radical title, the inclusion of the infringement test for resource development, and the elimination of the inter-jurisdictional immunity doctrine, demonstrates that the judicial system has an integral role in eliminating the ontologies of Indigenous care and responsibility through the

[258] Alfred, T., and E. Tomkins. "The Politics of Recognition: A Colonial Groundhog Day." *Chiefs of Ontario Discussion Paper* (2010). Accessed on July 5 2015. Retrieved from: http://web.uvic.ca/igov/uploads/pdf/GTA.PoliticsRecognition_AlfredPaperFinal.pdf.

legitimization of Crown's sovereignty. By extending sovereign power to its settler colonial institutions the nation state (Crown) reaffirms its sovereignty and retains the ability to give value and non-value to life (*zoe/*Indigenous subjectivities) for its exclusion/inclusion into the bio-political order (*bios*, common law, Canadian nationhood). The next chapter investigates why the need to operate within these frameworks of political participation and recognition continues even though Indigenous groups have their rights dictated by colonial constructs inside the courtroom, not to mention the "increasing lip service paid to the incorporation of Indigenous knowledges" into the Canadian Constitution, legal jurisprudence, and policy decisions.[259] Chapter four examines the strategic ways in which the Tsilhqot'in Nation and other Indigenous communities have taken advantage of the small but significant changes that the *Tsilhqot'in* decision has made to legal procedures over Aboriginal title claims.

[259] Alfred, T., and E. Tomkins. "The Politics of Recognition: A Colonial Groundhog Day." *Chiefs of Ontario Discussion Paper* (2010) at p. 9

Chapter 4: Tsilhqot'in Aftermath: Ghosts and Finding Justice

4.1 Introduction: Unjust Institutions

The Supreme Court found that "British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations."[260] Yet, the Court ultimately re-establishes a way for the province to justifiably infringe Aboriginal title. *Tsilhqot'in* demonstrates that to engage with the Crown, Indigenous groups must deal with the languages of development and private property. The fact that the Supreme Court of Canada has kept the burden of proof on the Aboriginal title holding groups to prove their Aboriginal title means that many First Nations will not meet the legal tests, not because they do not have a legitimate claim, but because it costs millions of dollars to collect and analyze data in order to prove their claim, let alone sustain the prolonged legal fees and court costs.[261]

If the Supreme Court ever were to recognize *absolute* Aboriginal title, the Court would have to question Canada's sovereignty, which would reveal its own illegitimacy. Essentially, Canadian sovereignty depends on the continued masquerade between the judiciary, parliament, and provinces. Thus, the *true reconciliation*[262] that the Court preaches cannot be found in the courtroom.

This chapter thus examines the strategies that the Tsilhqot'in Nation and other Indigenous communities have pursued both inside and outside the courtroom post-*Tsilhqot'in*. In doing so, I hope to interrogate whether *Tsilhqot'in* has made any significant

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[260] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 153.
[261] Diabo, Russell. "The Tsilhqot'in Decision and Canada's First Nations Termination Policies." *New Socialist: Ideas for Radical Change*. Jan 13 2015. Accessed on: May 12, 2015. Retrieved from: http://www.newsocialist.org/782-the-tsilhqot-in-decision-and-canada-s-first-nations-termination-policies
[262] *R v Van der Peet*, [1996] 2 SCR 507 at para 50.

changes within common law. I argue that although *Tsilhqot'in* has not destroyed the colonial-legal apparatus *in toto*, it has partially challenged and disrupted the colonial processes in recovering/constructing Indigenous identities. At the very least, Indigenous communities can use *Tsilhqot'in* to strengthen their bargaining positions, even when their rights to land remain unresolved. Consequently, Indigenous communities can avoid litigation and re-open negotiations with governments by declaring their own 'sovereignty' or forms of self-recognition. This could change the top-down patriarchal model of Indigenous-Canadian legal relations, as the Crown will have a more difficult time assuming its sovereignty or depicting Indigenous peoples as wards of the state.

Most importantly, *Tsilhqot'in* can still be viewed as enabling an Indigenous resurgence that *turns away* from the State and rejects its destructive colonial assertions. Furthermore, I argue that *Tsilhqot'in* has awoken a sense of confidence, pride, and belonging within Indigenous communities. This is most evident in the political action that Indigenous communities have been engaging in following the decision, such as giving eviction notices to corporations that have failed to meet their fiduciary obligations. The pressure that *Tsilhqot'in* creates, with the aid of on-the-ground politics, proves that Indigenous communities will continue to protect their traditional territories regardless of recognition of title. Moreover, Indigenous communities will push to develop stronger strategies of self-governance over traditional land. This has been the case with the Tsilhqot'in Nations efforts to open Dasiqox Tribal Park as an assertion of physical space in the Chilcotin area. Outside British Columbia, other Indigenous communities declared their own sovereignty as a reaction to the Crown's assumed authority.[263] Finally, this

[263] Dasiqox Tribal Park: Nexwagwez?an – There for us. *Friends of Nemaiah* Valley. Accessed on Jul 30 2015. Retrieved from: http://www.dasiqox.org/.

chapter also begins with a discussion on how Indigenous activism can be viewed as a politics of acknowledgement that does not fall under the ideals of the liberal politics of recognition.

4.2 Markell and the Politics of Acknowledgment

To return to the discourse of the politics of recognition, I argue that Patchen Markell's unique approach around recognition exposes the fluidity, activity, and at times vulnerability, of an authentic, natural participatory recognition process. Indeed, the process of cultivating knowledge and producing identity through the liberal politics of recognition was evident in the *Tsilhqot'in* decision when the court created a legal test, a set of checkboxes that need to be crossed-off before Aboriginal title could be claimed, proven, and affirmed. Another issue with the liberal politics of recognition is that it demands that others recognize identities under the political constructs of the state. Throughout this thesis, I have articulated the various ways in which s.35 of the Canadian Constitution and other Canadian-Indigenous policies and documents have constructed and limited Indigenous identities. However, I argue that the activism following post-*Tsilhqot'in* fosters a sense of recognition that parallels Markell's concepts of a more authentic recognition process.

For Markell the politics of acknowledgment can be summarized in four points:

> 1) acknowledgement is in the first instance self- rather than other directed; 2) its object is not one's own identity but one's own basic ontological condition or circumstances, particularly one's own finitude; 3) this finitude is to be understood as a matter of one's practical limits in the face of an unpredictable and contingent future, not as a matter of the impossibility or injustice of knowing others; 4)

> acknowledgment involves coming to terms with, rather than vainly attempting to overcome, the risk of conflict...[264]

If the politics of recognition are to be viewed through this framework, then recognition is not necessarily something people give directly to others. Rather, recognition is "something people perform in relation to themselves and their condition"[265] I believe this also ties into Corntassel's ideas about land and space, acceptance, and the politics of 'welcoming'. Markell seems to be in line with Indigenous scholars that reject the liberal politics of recognition; he suggests that we should abandon the presumption that justice always consists in granting more recognition to members of marginalized groups.[266] This falls in line with Coulthard and Alfred's rejection or scepticism over inclusionary political rights. Yet, Markell argues that despite that politics of acknowledgment have the capability to refuse recognition, the refusal should not be misrecognized as isolationism. Again, the premise of a politics of acknowledgement is the creation of new relationships of recognition that are malleable and that are based on authentic self-expressions. So what does a politics of acknowledgement, that acts outside the liberal politics of recognition or settler colonialism's bio-politics, look like?

I find that Markell's politics of acknowledgment fit within the discourse of Indigenous resurgence ideologies that demand that we begin to "*collectively* redirect our struggles away from a politics that seeks to attain a *conciliatory* form of settler-state recognition for Indigenous nations toward a resurgent politics of recognition premised on

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[264] Markell, Patchen. *Bound by Recognition*. Princeton University Press, 2009. at p. 55.
[265] Markell, Patchen. *Bound by Recognition*. Princeton University Press, 2009. at p. 180.
[266] Markell, Patchen. *Bound by Recognition*. Princeton University Press, 2009. at p. 180-1.

self-actualization, direct action and the resurgence of cultural practices."[267] Furthermore, this self-actualization must be grounded in practices that are antagonistic to the organizing bio-political production of settler colonial power, and that act outside its exclusionary ideology. Vivienne Jabriar argues that in making a claim, one that interrupts and interjects the legacy of colonialism, the subject constitutes self as subject of politics; therefore, the subaltern subject is no longer in the subordinate position.[268] This interruption of colonial structures is what the Court was missing and therefore it could not find justice for Indigenous peoples without performing injustice by being bound by its colonial constructs.[269] Yet, as I will make evident in the following section, the Indigenous activism that followed the *Tsilhqot'in* decision demonstrates a politics of acknowledgement and a disruption of colonialism by challenging the assumptions that law and recognition are absolutes. Therefore, these concepts are concepts in progress that require direct political action.

4.3 Justice Outside the Courtroom

With the exception of clarifying what is required to establish occupation and infringement, and the elimination of inter-jurisdictional immunity, *Tsilhqot'in* keeps intact the hierarchical and colonial construct of Indigenous-Crown relations as they have come to exist over the last several decades within the court system. However, if colonialism is a

[267] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. University of Minnesota Press, 2014, 99; emphasis added.
[268] See, Vivianne Jabri's concept of bottom-up interruption and resistance in: Jabri, Vivienne. *The postcolonial subject: claiming politics/governing others in late modernity*. Routledge, 2012, 130-134.
[269] Derrida, Jacques. "Force of Law: The 'Mystical Foundation of Authority'." in Deconstruction and the Possibility of Justice. Ed. Drucilla Cornell et al. New York: Routledge, 1992, 19-23.

structure, and not an event,[270] colonialism's deconstruction cannot be encapsulated simply in momentary events within spaces that are by nature extensions of sovereign power. In fact, the Supreme Court of Canada could technically be abolished by Parliament, as the power to create a "Court of General Appeal for Canada"[271] was granted to Parliament by s. 101 of the *British North America Act* (1867).[272]

The paradox of finding justice through an institution built on injustice is best described in the work of Christiane Wilke who argues that:

> Attempts to address state atrocities are bound to encounter ghosts: past injustices make their presence felt in a time that is not properly theirs, courts are unsettled in their authority by the inheritances they have made, and the asserted line between past and present appears elusive. In these instances, the language of linear time so common among theorists and practitioners of transitional justice, the imagery of 'looking back, reaching forward' does not do justice to the complex temporalities and modalities of the claims that are made. The past is too alive to be sealed off as past. When the time is out of joint, there is a desire for a reckoning that is more rich and complex than the justice we can normally expect to see in courts—especially in courts that are themselves haunted [273]

Moreover, Wilke argues that "[i]f there is any justice to be had through an engagement with ghosts, it requires the departure from the linear temporality that arranges past, present and future in linear progression."[274] It is precisely this linear progression that plagues legal

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[270] Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* Vol.8, no. 4 (2006). 388-90

[271] VII. Judicature. s. 101, *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3. Retrieved from: https://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html

[272] Morton, Frederick Lee. *Law, politics and the judicial process in Canada*. University of Calgary Press, 2002, 98.

[273] Wilke, Christiane. "Enter Ghost: Haunted Courts and Haunting Judgments in Transitional Justice." *Law and Critique* 21.1 (2010), 88-89.

[274] Wilke, Christiane. "Enter Ghost: Haunted Courts and Haunting Judgments in Transitional Justice." *Law and Critique* 21.1 (2010), 78.

concepts such as Aboriginal title. In *Tsilhqot'in*, the Supreme Court relies upon the linear progress of legal precedent in order to make its arguments; it does not break from its colonial heritage. In fact, it relies upon its heritage in order to claim its sovereignty. The Court views colonialism as an event in the past. However, the Tsilhqot'in people have made it evident that the memories of the hangings of their six Chiefs during the Chilcotin War run rampant throughout the community. One RCMP officer tells Tsilhqot'in Chief Alphonse that "every single last Tsilhqot'in person we pull over will look at us and tell us, you bastards hung our chiefs."[275] The ghosts of the Chilcotin War are very much alive and, until they have been healed, they will continue to influence the actions taken by the current Tsilhqot'in Nation. But the courtroom does not reconcile with these ghosts.

French philosopher Jacques Derrida argues that justice is fundamentally aporetic.[276] It is implicated with the violent foundation of law since it is not and cannot be justified by any pre-existing law.[277] As an analysis of Canada's construction suggests, common law was a violent construct. The pre-existing law was that of Indigenous peoples. The Court's attempt to reject *terra nullius* actually *reaffirms and recognizes* the Crown's racialized bio-political order and rights abuse over Aboriginal lands by virtue of the assertion of sovereignty. Borrows notes that there is "no explicit justification in the decision for why

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[275] Meissner, Dirk. First Nation Chief Gives Mountie Grim History Lesson 150 Years Later. *The Canadian Press*. Oct 23 2014. Accessed on July 9 2015. Retrieved from: http://metronews.ca/news/canada/1192622/chief-gives-lesson-of-hangings-150-later/

[276] Derrida argues that: "[I]t turns out that droit [law] claims to exercise itself in the name of justice and that justice is required to establish itself in the name of a law that must be enforced."See, Derrida, Jacques. "Force of Law: The 'Mystical Foundation of Authority'." Deconstruction and the Possibility of Justice. Ed. Drucilla Cornell et al. New York: Routledge, 1992, 22.

[277] Derrida, Jacques. "Force of Law: The 'Mystical Foundation of Authority'." Deconstruction and the Possibility of Justice. Ed. Drucilla Cornell et al. New York: Routledge, 1992, 33.

the Crown and not the Tsilhqot'in have underlying title to the land."[278] As a result, "the court may as well speak of magic crystals being sprinkled on the land as a justification for the diminution of Aboriginal occupation and possession." [279] Therefore, Canada's sovereignty and legal system is an unjust, and self-legitimizing act, a "mystical foundation of authority."[280]

Nevertheless, *Tsilhqot'in* is important because it points to the "impossibility of justice within the constraints of the law or a courtroom."[281] Indigenous activism must therefore continuously engage with the law in forms that challenge and transcend the dominance of settler colonial relations.

Stephen Brickey and Elizabeth Comack argue that placing the role of marginalized actors in the constitution and reproduction of legal order alters the legal sphere from bourgeois dominance to an arena of struggle, which engages with individuals and collectives of different subaltern positions.[282] Thus, the question remains: how significant is recognizing Aboriginal title to the process of decolonizing Canada, if it is at all? In order to effectively answer this question, *Tsilhqot'in* must be analyzed through a critical approach that investigates practices outside the courtroom that uncover the relationships underlying Indigenous resurgence, law, culture, and society.

Arguably, to abandon the law completely as an agent for social transformation "is

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[278] See, John Borrows' discussion on the *Tsilhqot'in* decision in: Borrows, John. *Aboriginal Title in Tsilhqot'in v. British Columbia [2014] SCC 44.* August 19, 2014. Retrievable at: http://maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqotin-v-british-columbia-2014-scc-44/

[279] Borrows, John. *Recovering Canada: The resurgence of Indigenous Law*. University of Toronto Press, 2002, 96.

[280] Derrida, Jacques. "Force of Law: The 'Mystical Foundation of Authority'." Deconstruction and the Possibility of Justice. Ed. Drucilla Cornell et al. New York: Routledge, 1992, 33.

[281] Wilke, Christiane. "Enter Ghost: Haunted Courts and Haunting Judgments in Transitional Justice." *Law and Critique* 21.1 (2010) 77.

[282] Brickey, Stephen, and Elizabeth Comack. "The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?'(1987)." *Canadian Journal of Law and Society* 2, 102.

to negate one method that can be used to challenge the present system. The insurgent role of law is to identify the existing contradictions within legal ideology and to use those contradictions to pit that ideology against itself."[283] However, as previously mentioned, application to the common law is only one political strategy that supplements resistance. Accordingly, different strategies must be pursued that can deconstruct and penetrate colonialism from different angles in order for decolonization to take place. Assertions of sovereignty, and declarations of Indigenous law over traditional territory, not only construct a more balanced approach to negotiation, they also counter the Supreme Court's narrative that titled land would exist in a vacuum if government influence was excluded. Indigenous lifestyles are their own political, legal, and social systems.

Strengthening Bargaining and Negotiation

The *Tsilhqot'in* decision does not automatically establish Aboriginal title on any other Indigenous community's land in Canada. However, it does create some space for political manoeuvre. Former B.C. Attorney General and Treaty Minister Geoff Plant has noted that Indigenous communities across Canada could potentially use the *Tsilhqot'in* case as political leverage by acting as if Aboriginal title has already been proven in order to "make demands based on that and to use the leverage of uncertainty to extract better arrangements."[284] Evidently, this has already begun to take shape. For example, the Kaska

[283] Brickey, Stephen, and Elizabeth Comack. "The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?'(1987)." *Canadian Journal of Law and Society* 2, 113.
[284] Business Vancouver. Tsilhqot'in case is not a template for resolving all First Nations land dispute: Pursuing a solution through the courts costs as much time and money as staying in the treaty process, experts say. *Law and Politics.* Jul 7 2014. Accessed on July 30 2015. Retrieved from: https://www.biv.com/article/2014/7/tsilhqotin-case-is-not-a-template-for-resolving-al/.

Nations of Yukon referenced *Tsilhqot'in* when they brought the federal government back to the negotiation table and called for policies consistent with Kaska law to be applied on traditional territory. Some resource companies are accepting the Kaska's plan to pass resource laws to govern how and where industry operates in northern B.C., southeast Yukon, and in the southwest corner of the Northwest Territories. This may well transform tense relationships between corporations and Indigenous communities. Though negotiations are still in process between the Kaska Nations and the Yukon government over what consultation and accommodation processes will look like, and where land claims can be made, re-negotiation is crucial for the well-being of the land as Kaska traditional territory is claimed as an area the size of the United Kingdom.[285]

The political leverage that *Tsilhqot'in* has created is not unique to Indigenous communities located in the west of Canada. The Mi'kmaq in Nova Scotia argue that *Tsilhqot'in* strengthens their legal challenge over fracking. In Quebec, the situation is similar to that in British Columbia, in which only a portion of the province was surrendered through the treaty process. Prior to the *Tsilhqot'in* decision, it was anticipated that non-treaty nomadic groups might establish the old postage stamp requirements of Aboriginal rights, but would most likely not meet the stringent test for Aboriginal title. However, thanks to *Tsilhqot'in*, the test for establishing Aboriginal title now rests on sufficient use of land rather than its intensive, site-specific use. This makes it possible for semi and nomadic groups to gain Aboriginal title if they can meet the three-part test of Aboriginal

[285] Hume, Mark. Kaska writing resource law to bring 'certainty' on First Nation consent. *The Globe and Mail*. Jan 29 2015. Accessed on July 31 2015. Retrieved from: http://www.theglobeandmail.com/news/british-columbia/kaska-writing-resource-law-to-bring-certainty-on-first-nation-consent/article22695263/.

title (sufficiency, continuity, and exclusivity of occupation).[286] Consequently, the Atikamekw of Quebec have declared no development without their consent in more than 80,000 square kilometres of land near Montreal.[287] The ripples of *Tshilqot'in* are also being felt in Alberta, where Lubicon Cree are using the decision to sue a local oil company.[288]

Thus, *Tsilhqot'in* brings new strategies to Canadian-Indigenous relations. First, an Indigenous community can assume Aboriginal title if it has not surrendered its title, second, even where title is unclear, it is best to declare a claim to Aboriginal title. At the very least, Indigenous communities have leverage in the negotiation process, as a claim to title avoids relinquishing a significant portion of land inherent to the treaty process. At the same time, perhaps Indigenous communities are at an advantage as litigation is a long process that neither Indigenous Nations nor the government would resort to first. It seems Minister Plant's statement can be used as practical guidance, take Aboriginal title as given and negotiate from there, much the same way the court system assumes its mystical underlying title as the starting point of the litigation process.

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[286] Morin, Rene and Marc-Alexandre Hudon. Tsilhqot'in Nation v. British Columbia, Supreme Court of Canada decision – Highlights and impact in Quebec. *Canadian Energy Perspectives: Developments in Energy and Power Law*. Dec 2 2014. Retrieved on: July 30 2015. Retrieved from: *http*://www.canadianenergylawblog.com/2014/12/02/tsilhqotin-nation-v-british-columbia-decision-supreme-court-of-canada-highlights-and-impact-in-quebec/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.

[287] Prustupa, Mychaylo. First Nations 'pulling a Chilcotin' in resource development battles across Canada. *National Observer*. Jun 20 2015. Accessed on July 31 2015. Retrieved from: http://www.nationalobserver.com/2015/06/20/news/first-nations-pulling-chilcotin-resource-development-battles-across-canada.

[288] Prustupa, Mychaylo. First Nations 'pulling a Chilcotin' in resource development battles across Canada. *National Observer*. Jun 20 2015. Accessed on July 31 2015. Retrieved from: http://www.nationalobserver.com/2015/06/20/news/first-nations-pulling-chilcotin-resource-development-battles-across-canada.

Evictions Notices as Assertions of Sovereignty

Bill Gallagher, a lawyer and Canadian-Indigenous writer, states that Canada is witnessing "the rise of native empowerment."[289] I argue that this empowerment is a direct extension of *Tsilhqot'in*. The decision has given communities confidence to take action, knowing that not only are Indigenous Nations across Canada in solidarity in the fight against exploitation, but now there is a legal precedent giving more legitimacy to Aboriginal title claims. For example, evidence of direct action can be found in the surge of eviction notices that are being advanced by Indigenous groups in British Columbia.

British Columbia Indigenous communities wasted no time in enforcing alleged Aboriginal title. In a dispute with the federal and provincial governments over treaty talks, the hereditary chiefs of the Gitxsan First Nations served what they called 'eviction notices' to the national railway and logging companies, and sport fishing operators, notifying them to leave Indigenous territory along the Skeena River.[290] In addition, the Gitxaala First Nation announced plans to file a lawsuit in the Federal Court of Appeal to challenge Ottawa's approval of the Northern Gateway pipeline from Alberta. They have since successfully been granted leave to appeal.[291]

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[289] Yaffe, Barbara. Resource sector about to witness new era of native empowerment. *The Vancouver Sun*. Jan 22 2014. Accessed on July 31. Retrieved from: http://www.vancouversun.com/business/Barbara+Yaffe+Resource+sector+about+witness+native+empowerment/9418598/story.html#ixzz3hm8nFiW2.

[290] The Canadian Press. Gitxsan First Nation evicting rail, logging, sport fishing interests: Other B.C. bands also making claims following Supreme Court of Canada ruling. *CBC News*. Jul 11 2014. Accessed on July 31 2015. Retrieved from: http://www.cbc.ca/news/canada/british-columbia/gitxsan-first-nation-evicting-rail-logging-sport-fishing-interests-1.2703664.

[291] CBC News. Gitxaala First Nation granted leave to appeal Northern Gateway pipeline: First Nation granted permission to apply for judicial review of Enbridge project. *CBC News British Columbia*. Sep 26 2015. Accessed on July 31 2015. Retrieved from: http://www.cbc.ca/news/canada/british-columbia/gitxaala-first-nation-granted-leave-to-appeal-northern-gateway-pipeline-1.2779604.

On August 5, 2014 approximately ten billion litres of wastewater, and five billion litres of solid tailings waste, escaped the impoundment at Imperial Metals' Mount Polley mine in the interior of British Columbia. The creek that received the brunt of the flow was completely contaminated, some of the waste backed up into Polley Lake, and some of the wastes and debris continued downstream into Quesnel Lake.[292] The spill was devastating as it has contaminated local drinking water, but the Tsilhqot'in National Government is also concerned the spill will have long-term impacts on ceremonial and food fish as dead salmon have been washing up along shore.[293] As a result, the Neskonlith Indian Band released a statement that they had issued an eviction notice to Imperial Metals, the company that runs the Mount Polley Mine. In the statement, Chief Judy Wilson alleges that "Imperial Metals failed to properly protect Secwepemc land and waters and…traditional and current uses in [Secwepemculecw] territory."[294] The Secwepemc is made up of seventeen bands representing the Shuswap Nation.

The surge of Indigenous assertions of sovereignty in the form of eviction notices, judicial review, and re-negotiation demonstrates that Indigenous communities are responding to situations in which they believe the state has failed. This "native empowerment," owes itself to the increased threshold of consultation and accommodation that *Tsilhqot'in* created. In fact, both Chief Alphonse (Tsilhqot'in) and Chief Clarence Innis (Gitxaala) refer to *Tsilhqot'in* as having "given us a bit of confidence that things are

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[292] Mining Watch Canada. Catastrophic Tailings Spill at Mount Polley Mine. Aug 8 2014. Accessed on July 31 2015. Retrieved from: http://www.miningwatch.ca/blog/catastrophic-tailings-spill-mount-polley-mine.

[293] Canadian Press. Mount Polley Tailings Pond Spill Could Affect Fish: First Nations. Oct 15 2014. Accessed on July 31 2015. Retrieved from: http://www.huffingtonpost.ca/2014/08/15/mount-polley-tailings-pond-spill-affect-fish-first-nations_n_5682748.html.

[294] Judd, Amy. "Neskonlith Indian Band issues eviction notice to Imperial Metals." *Global News*. Aug 13 2014. Accessed on July 31 2015. Retrieved from: http://globalnews.ca/news/1505507/neskonlith-indian-band-issues-eviction-notice-to-imperial-metals/.

going to be going our way."[295] Arguably, the eviction notices are performances of sovereignty and ownership. The Indigenous community is making it evident to third parties that they have an interest in the land. This is the test for sufficient occupation prior to Crown sovereignty that the Supreme Court emphasized in *Tsilhqot'in.* The activism with the tailing pond spill also indicates that Indigenous communities are not going to passively wait for the government to respond to a disaster. I argue that this demonstrates that Indigenous groups are confidently moving away from state dependencies.

Tribal Park as Sustainability and Self-Governance

In response to the Supreme court decision, the Tsilhqot'in National Government announced the creation of the Dasiqox Tribal Park on the traditional land that was under dispute in the case. The new park covers an area larger than half of Prince Edward Island. It is perhaps the Tsilhqot'in Nation's plans to create a Tribal Park that has penetrated and disrupted the colonial processes in constructing Indigenous identities and senses of belonging. Because the Tribal Park is not bound by the common law system, the Tsilhqot'in argue that that it is an "expression of self-determination."[296] There are three main features of the park: ecosystem protection, economy for sustainable livelihoods, and cultural revitalization. These features are designed as an alternative to the constant threat of industrial logging and mining activities that not only disrupt the physical composition of the land, but threaten the political and biological life of the community.[297] This was the

[295] Moore, Dene. B.C. First Nations take action on top court's land-title ruling. *The Globe and Mail*. Jul 10 2014. Accessed on July 31 2015. Retrieved from: http://www.theglobeandmail.com/news/british-columbia/bc-first-nations-take-action-on-top-courts-land-title-ruling/article19560069/.
[296] Dasiqox Tribal Park: Nexwagwez?an – There for us. *Friends of Nemaiah* Valley. Accessed on Jul 30 2015. Retrieved from: http://www.dasiqox.org/.
[297] Dasiqox Tribal Park: Nexwagwez?an – There for us. *Friends of Nemaiah* Valley. Accessed on Jul 30 2015. Retrieved from: http://www.dasiqox.org/.

case in the Mount Polley spill, in which salmon used for both sustenance and ceremonial gatherings were polluted. But a park on traditional titled land governed by Indigenous law with policies on how to manage, use, and interact with the land also counters the idea that Indigenous land is lawless or that it exists in a "legal vacuum."[298]

Arguably, the concept of the Tribal Park engages with the ghosts inside and outside the courtroom and brings us closer to a sense of justice, one that is organic and not constructed by false assertions of superiority. The Tsilhqot'in Nation recognizes that the concept of the tribal park:

> has evolved from a place of conflict, however the intention is to express through our hearts the most thoughtful aspirations of this area as a space of healing, cultural education, economic sustenance and an intact ecosystem that supports all of our activities.[299]

Though these plans may be met with hostility and criticisms from Canada's settler institutions, technically speaking, since *Tsilhqot'in* acknowledges that Indigenous communities have title over all claimed land, and can control and enjoy the land in which ever way they choose, so long as it does not deprive future generations from its benefits, these plans are legitimate. In fact, the park could be understood as falling under the scope of making sure that land is kept intact for future generations. But most importantly, it is a space for healing. As the Tsilhqot'in point out, the park finds its roots in conflict. The Tsilhqot'in community thought litigation was the last effort to reconcile with the ghosts of the six Tsilhqot'in Chiefs that were hung during the Chilcotin War, a crisis that plagued the community with anger and distrust to authorities. Clearly, the yearning for justice,

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[298] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 147

[299] Dasiqox Tribal Park: Nexwagwez?an – There for us. *Friends of Nemaiah* Valley. Accessed on Jul 30 2015. Retrieved from: http://www.dasiqox.org/.

through a process of acknowledging at least some part of a history bound to Indigenous identity, is a vital characteristic of the politics of Indigenous resurgence, at least for the Tsilhqot'in. This yearning for justice is embodied in the tribal park.

4.4 Politics of Welcoming and Refusal

As noted, the memory of betrayal and dispossession is alive within the Tsilhqot'in community. Yet this Indigenous resurgence is not simply based on the desire to settle old accounts; it is premised on finding sustainable self-determination strategies for social healing. David Macey argues that "[a]nger does not in itself produce political programs for change, but it is perhaps the most basic political emotion. Without it, there is no hope."[300] Macey is correct, without anger, inspiration and strength can often be diminished. If were it not for the spectre of anger and the incompleteness of recognition and justice haunting the Tsilhqot'in Nation, perhaps litigation for Aboriginal title even as a last resort mechanism would not have been sought. Additionally, the surge of evictions, and the confidence displayed by fellow Indigenous communities across Canada, would not have happened either.

As Nishnaabeg scholar Leanne Simpson addresses, "[r]esurgence cannot occur in isolation. A collective conversation and mobilization is critical to avoid reproducing the individualism and colonial isolation that settler colonialism fosters"[301] Likewise, I argue that *autonomy from* the Canadian-state does not necessarily mean a complete refusal to acknowledge others, isolationism, or the creation of exclusive space. As noted in the

[300] Macey, David. *Frantz Fanon: A Life*. Granta Books, 2000, 503.
[301] Simpson, Leanne. *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence*. Arbeiter Ring Publishing, 2011, 69.

introduction, a politics solely based on *refusal*, *isolation* and *anger* can do more harm than just. In order to begin a process of decolonization on Turtle Island, one must actively refuse the bio-political constructs that perpetuate the logic of elimination or exclusion and accept/welcome the differences that at once make us unique, but that also have the ability to strengthen relationships. As I have argued, the surge of declarations of sovereignty from Indigenous communities across Canada, such as through the renegotiations of claims, the distribution of eviction notices, and the creation of a tribal park, all demonstrate a sense of autonomy that refuses the logic of eliminating/excluding Indigenous subjectivities from the larger Canadian body politic.

Although these examples display the politics of refusal, it must also be noted that these Indigenous communities also welcome renegotiation; they are not refusing to acknowledge the Crown or third party corporations, but rather refuse to accept the current policies that harm traditional lands. James Tully argues that if we are to construct a truly inclusionary political culture based on welcoming relations across differences, there must be a willingness to overcome contestations. Moreover, "cultures ... are continually contested, imagined, transformed and negotiated both by their members and through their interaction with others."[302]

Cherokee scholar Jeff Corntassel suggests that the politics of resurgence must revolve around a discussion of community and spatial-surrounding. For example, "how do we carry our community consciousness and responsibilities with us even when we're not

[302] Tully, James. *Strange Multiplicity. Constitutionalism in an Age of Diversity*. Cambridge University Press, 1995, 11.

on our own territory?"[303] Corntassel notes that while specific communities may not recognize certain individuals, the goal of Indigenous-settler recognition is to be known not as strangers, but as welcomed visitors with accountability to the Indigenous nations and peoples of Turtle Island.[304] This form of recognition also entails that social relations are fragile and can be broken at any time. To welcome does not mean to surrender one's identity or be locked into a contract, rather the new social relations created must continuously be worked at, between all individuals in the given space. The politics of acknowledgement/welcoming along with the capability to refuse can be attributed to the events taking place post-*Tsilhqot'in* with Indigenous communities evicting companies that they had perhaps been in agreements with before. The ability for an Indigenous community to refuse is also potentially justified and legitimized by *Tsilhqot'in* increasing the threshold of the duty to consult to the extent that development projects could be ceased for failing to accommodate new realities (Aboriginal title).

The foundation of recognition as a continuous dialogue is also captured in the Letter of Understanding signed by the province of British Columbia and the Tsilhqot'in Nation following the *Tsilhqot'in* decision. The Letter of Understanding sets out how the Tsilhqot'in and Province will work together together to: 1) redress issues of the past, including the wrongful trial and hanging of the Tsilhqot'in Chiefs in 1864-65; 2) begin the immediate work of the present, by establishing tables that will work together to implement the court's decision; and 3) move into the future with longer-term reconciliation initiatives

[303] Snelgrove, Corey, Rita Dhamoon, and Jeff Corntassel. "Unsettling settler colonialism: The discourse and politics of settlers, and solidarity with Indigenous nations." *Decolonization: Indigeneity, Education & Society* 3.2 (2014), 4.
[304] Snelgrove, Corey, Rita Dhamoon, and Jeff Corntassel. "Unsettling settler colonialism: The discourse and politics of settlers, and solidarity with Indigenous nations." *Decolonization: Indigeneity, Education & Society* 3.2 (2014), 5.

that explore economic opportunities, and improve the health, education and socio-economic well-being of the Tsilhqot'in people.[305] The Letter of Understanding is also supplemented with the *Affirmation of the Nemiah Declaration*, which sets out Indigenous Tsilqot'in law governing the titled area. In the *Declaration*, the Tsilhqoti'in state that they "are prepared to SHARE our Nemiah Aboriginal Wilderness Preserve with non-natives,"[306] but are also "prepared to enforce and defend our Aboriginal rights in any way we are able."[307] The Tsilhqot'in Nation's emphasis on sharing land or defending it when necessary demonstrates the notion that a more authentic politics of recognition is one that is fragile, reciprocal, and always in progress.

4.5 Conclusion: Justice In Action

As mentioned in the opening chapter of this thesis, the dispute over Tsilhqot'in territory is not recent, it dates back centuries to the Chilcotin War in which Tsilhqot'in Chiefs were tricked into meeting with the government for what were to be peace agreements only to meet their death. The hangings of six Chiefs has haunted the community, which is evident in interactions between Tsilhqot'in members and the RCMP. It was essential for the the Tsilhqot'in Nation to seek justice. After many the courtroom is problematic, at the very least the Tsilhqot'in gained a small tactical advantage. The

[305] *Letter of Understanding*, Schtsiledule A, s. 7. Accessible at: http://www2.gov.bc.ca/assets/gov/business/natural-resource-industries/consulting-with-first-nations/agreements/lou_tsilhqotin_xenigwetin.pdf.
[306] *Letter of Understanding*, Schedule A, s. 7. Accessible at: http://www2.gov.bc.ca/assets/gov/business/natural-resource-industries/consulting-with-first-nations/agreements/lou_tsilhqotin_xenigwetin.pdf.
[307] *Letter of Understanding*, Schedule A, s. 8. Accessible at: http://www2.gov.bc.ca/assets/gov/business/natural-resource-industries/consulting-with-first-nations/agreements/lou_tsilhqotin_xenigwetin.pdf.

affirmation and recognition of Aboriginal title strengthens the Tsilhqot'in Nation's claim to their traditional space, and forces governments and its institutions to re-evaluate past, present, and future development projects that do not respect the community's way of life.[308] In addition, this small victory could aid in not only putting the Tsilhqot'in Chiefs' ghosts to rest, it also assists other Indigenous communities across Canada who are seeking justice for projects that have taken advantage of traditional territory. As the Supreme Court argued "if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing."[309]

Though the arguments surrounding Aboriginal title in *Tsilhqot'in* did not completely separate themselves from the hierarchies of colonialism, or break from the problematic linear timeframe of legal precedent, I have argued that justice perhaps finds itself outside the courtroom. The courtroom cannot speak of Indigenous sovereignty, self-governance, or self-determination without calling into question its own legitimacy. Pursuing these traits that are inherent to Indigenous communities, rather than European legal constructs, therefore calls for direct action. *Tsilhqot'in* changes the procedures for making Aboriginal title claims somewhat by providing Indigenous Nations with new political leverage to defend and negotiate much larger land claims. Perhaps than, the discourse behind *Tsilhqot'in* should be viewed as one trajectory that can further teach non-Indigenous and Indigenous peoples ways in working together in order to construct the roads towards decolonizing the law and the institutions it protects. Decolonization is an ongoing

[308] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 92.
[309] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 92.

process that requires direct political action, as the common law alone cannot provide justice through the ideals of recognition.

Chapter 5: Closing Remarks

5.1 Caretakers and Stewards of the Land

As this thesis articulates, the accordance of Aboriginal title to the Tsilhqot'in Nation, is a limited victory. The path to decolonization is an ongoing process that exists both inside and outside the courtroom. Homelessness, drug abuse, inconsistent land claim rulings, and the continued abuse and violence towards Indigenous women remain issues yet to be solved. Essentially, if colonialism is a structure, and not an event, colonialism's deconstruction cannot be encapsulated simply in momentary events either, like landmark decisions based on the liberal politics of recognition.[310] The reforms to Aboriginal title claims created by *Tsilhqot'in*, such as the strengthening of consultation and accommodation should be viewed as political tools that can assist in decolonization, but are not themselves the answer to eliminating colonialism. Essentially, certain Canadian laws can strategically be used to benefit Indigenous peoples and their interests.

Tsilhqot'in demonstrates the need to search for strategies that exist outside the walls of settler colonialism's institutions. This is the point, as explored in the opening chapter, being advanced by critics of the liberal politics of recognition. I argue that critics of the liberal politics of recognition are not rejecting the concept of acknowledging and embracing one another; rather, one must reject the exclusionary nature of the politics of recognition premised on the false promises of liberalism.

Decolonization is premised on the continuous engagement with the law in forms that challenge and transcend the dominance of settler colonial relations. We must expect

[310] Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* Vol.8, no. 4 (2006), 388-90.

the unexpected, otherwise recognition becomes static and pre-determined, incapable of fully capturing the fluidity and progression of identity and authentic social exchanges between peoples. This is also the core of Markell's emphasis on the fluidity, rather than the absolutism, of a politics of acknowledgment. The politics that led to the *Tsilhqot'in* case, particularly the quest to put the ghosts of the Tsilhqot'in Chiefs to rest, did not end with the affirmation of Aboriginal title. The concept of Aboriginal title sparked new debates and political activism over concerns about Indigenous sovereignty and self-determination.

By exploring the various discussions surrounding the politics of recognition and its relation to settler colonialism, I have sought to answer the questions posed at the beginning of this thesis: "how significant is recognizing Aboriginal title to the process of decolonizing Canada, if it is at all?" and "has it changed the legal topography of settler colonialism?" In order to effectively answer these questions, *Tsilhqot'in* had to be analyzed through a critical approach that uncovers the relationships underlying law, culture, and society. I found that the social relationships established by the judiciary promoted the erosion of an Indigenous ontology of care.[311] Indigenous stewardship and responsibility over traditional 'titled land' was undermined and replaced by a European system of entitlement and ownership. The judiciary followed a logic of political and economic order on the land rather than a connection with the land.

Arguably, the Supreme Court only recognizes Aboriginal title as *sui generis* because the cultural aspects it examines (semi-nomadic lifestyles) do not challenge the

[311] Pasternak, Shiri. "Jurisdiction and Settler Colonialism: The Algonquins of Barriere Lake Against the Federal Land Claims Policy". PhD Dissertation for the Department of Geography. University of Toronto Press, 2014.

overall structure of common law. Aboriginal title is (re)constructed to fit inside the common law's fiduciary duty, thereby eliminating any sense of recognition as equal. In fact, the words self-governance, determination, and autonomy are never mentioned in the decision. The Supreme Court also fails to explain how the Crown obtained radical title, it includes an infringement test for resource development, eliminates the two hundred and fifty-year-old principle of inter-jurisdictional immunity proposed by the *Royal Proclamation* and the *Treaty of Niagara*, all in the name of the political integrity and reconciliation with the larger Canadian community. Arguably, *Tsilhqot'in* is not so much a case about protecting Aboriginal land and finding reconciliation with Tsilhqot'in ghosts as it is justifying Aboriginal title's infringement through its inclusion into common law's language. Indigenous communities are not included in the decision to eliminate the inter-jurisdictional immunity doctrine, nor did they agree to the Crown's underlying title for that matter.

In my opening case study of the *Tsilhqot'in* decision, I introduced the ways in which the Supreme Court engages with the law. I made evident that the decision strengthens section 35 of the *Canadian Constitution* by recognizing broader title claims if a community can meet the test of sufficient occupation, increasing the threshold of the duty to consult and accommodate, and clarifying how governments may infringe and regulate lands that are declared to have Aboriginal title through a discussion on the doctrine of inter-jurisdictional immunity.

My second chapter placed *Tsilhqot'in* in the lexicon of the liberal politics of recognition to demonstrate how Aboriginal title was undermined to mean cultural accommodation rather than its own political ordering system. In doing so, Aboriginal title

fell under the same discourse that has plagued the liberal politics of recognition. Fundamentally, *Tsilhqot'in* does not challenge the underlying foundations of settler colonialism. The liberal politics of recognition does not engage with the fact that law is often lopsided, in favour of the State. Ultimately, the purpose of this chapter was to also strengthen the politics of recognition, first by locating problematic liberal strategies about Indigenous peoples and social justice, and then by attempting to transform these strategies by prioritizing substantive rights to Indigenous autonomy and self-determination.

The third chapter provided an additional framework to problematize *Tsilhqot'in* as an apparatus geared toward the subversion of Indigenous subjectivities. Specifically, in Canada legal Indigenous recognition, through the common law, is based on a structure of exclusion through inclusion. This is a construct that the liberal politics of recognition does not discuss. In this chapter I argued that settler colonialism is not accidental; it has logic and a false legitimacy it must continuously attempt to reaffirm. This led to the question as to how one could resist settler colonialism's bio-political governance if the common law and the courtroom are based on false and violent assertions of authority?

It was chapter four that provided a discussion on how Indigenous peoples could foster an Indigenous resurgence that resists the sovereign nature of the Canadian settler colonial state. Arguably, there is a (re)balancing of powers when Indigenous communities declare their own sovereignty/self-determination and give eviction notices to corporations that they believed have failed to respect the land. This surge of Indigenous action stems from the strength and confidence in knowing that, at the very least, *Tsilhqot'in* creates some legal protections against government despotism that has often harmed Indigenous communities and their environments. Though I suggest that *Tsilhqot'in* provides new

insight into the discussion of the failures of liberalism, the common law as political leverage must also be supplemented with different strategies that can deconstruct and penetrate the state from different angles. Thus, in this chapter I also suggested that law can work alongside political agency. Interestingly, Indigenous action with the help of the common law can also exert similar inside/outside or exclusion/inclusion strategies that the state employs. Indigenous assertions of sovereignty/self-determination can refuse to accept state policies or evict development projects (exclusion) while referencing the common law and Aboriginal title to strengthen their claim (inclusion). The Tsilhqot'in 'Dasiqox Tribal Park' can be seen as a space that is inside the state, as the Nation cites the common law as its justification for the park's construction, but outside the state's colonial construct, as the park is built on the Indigenous legal orders of respect, stewardship, and sustainability.

How significant is Aboriginal title? Perhaps that question cannot be answered in the absolute. Who is to say what the recognition of Aboriginal title means for different Indigenous communities and their members? But has *Tsilhqot'in* changed the nature of settler-Indigenous relations? Undoubtedly, although perhaps not inside the courtroom, as Aboriginal title is deemed a burden of the Crown. However, the small dialogue that the Supreme Court has opened up surrounding Aboriginal title has given Indigenous communities the confidence to take action and assert their self-determination. Indigenous activists are aware that the courts are not as tightly bound by conventional common law ideas about Indigenous rights and title. Even if there is a *potential* to make an Aboriginal title claim the "Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right."[312] In other words, why wouldn't an

[312] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 78.

Indigenous community assert its sovereignty? At the very least, *Tsilhqot'in* re-opens the possibility for communities that once thought Aboriginal title to be impossible to discuss and re-negotiate agreements with settler colonial institutions. I stated earlier that in order to decolonize Canada, a massive transformation of political, legal, cultural, social, and economic orders must be pursued in order to extend the concerns of Indigenous peoples beyond their own communities. The Indigenous activism across Canada demonstrates that the efforts of the Tsilhqot'in Nation have moved beyond British Columbia. Indigenous communities across Canada are speaking about *Tsilhqot'in* and its possibilities, perhaps the decision has provided the first steps for a social transformation based on direct action that brings balance to Indigenous-settler relations in Canada.

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