

**The Political Entanglements of Recognition: Aboriginal Title, Crown Sovereignty, and
Indigenous Self Determination.**

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Abstract:

Since the Supreme Court of Canada's *Calder* (1973) decision, Canada has been forced to recognize that Aboriginal title exists. As a result, Canada has indirectly recognized that Indigenous peoples were self-governing prior to British occupation, however, there has yet to be a comprehensive and adequate articulation of the ongoing sovereignty of Indigenous peoples in Canada. Indigenous Nations across Turtle Island have questioned to what degree Canada "owns" their lands, and have done so in a myriad of ways. Primarily, I centre my critical analysis on Canada's land claims policy regime and its relationship to the Supreme Court of Canada's jurisprudence regarding Aboriginal title. I ask: a) what does it mean for Canada to "give" land back to Indigenous Nations that it does not hold title to in the first place, and b) by what strategies has Canada come to claim sovereignty and radical title over Indigenous lands? These questions may only be answered by uncovering the political rationalities and objectives that Canada has enacted and sought since the establishment of the colony under British colonialism. I argue that the project of settler-colonialism, as a form of governmentality, is an unfinished project that constantly seeks the erasure of Indigenous peoples and polities in favour of white-settler society.

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INTRODUCTION

In April of 2021, I found myself sitting on the couch in my apartment in Ottawa on the phone for a relationship-building preliminary discussion with a future interlocutor. Despite my own expectations of a short introductory conversation, my potential interlocutor's gripping story had others. Three hours into the conversation with Kanien'kehá:ka¹ (Mohawk) Chief Jason Arbour, who was keen on telling me his life's story, I was still frantically taking notes. All the important details, all the historical weight. I was not prepared for the sheer breadth of it, but I was happy to make this relation. Jason is a man who speaks with confidence for what he wants for his community and what needs to be done to get there. Our conversation began with me telling him that I had read some of his personal research on his community's lack of access and rights to their land, and Jason candidly shared that the "number one problem is how do I return to sky world? We [no longer] have a land base, but we are still the rightful owners, but how do I convince Canada and the business community to acknowledge our law?" Jason grew up in the Greater Ottawa Area and through oral history passed down by his father and grandfather, learned of the existence of his community Kanat:so. "As I got older and got educated, I realized we have a law that protects us and that these rights were never extinguished. I decided I would continue our culture." When Jason's son turned 16, they went on a hunt. Jason would later be charged with hunting moose out of season north of Gatineau, Quebec.

I was following our traditional legal order; I was following my great law. We hunt when the leaves on the sumac turn red. I did not know anything of [Quebec's] hunting regulations. Then I found myself in court in Hull, I told the judge I was Indigenous in the

¹ I write this as I have personally spoken with Chief Jason Arbour of the Mohawks of Kana:tso who has accomplished extensive research regarding his community and the lack of treaty within the Township of Hull, Gatineau. I urge readers to find his research and community history compiled here: <https://www.unpublishedottawa.com/letter/330320/how-east-was-stolen-research-mohawk-indigenous-history-canadas-capital>.

region, and I was exercising my right. 2012 I had to prove my rights, but I was unsure how to convince the courts of our rights, I decided I would go and do my own research.

After being granted time to prepare, in 2012 on his own behalf, Jason presented his case to the Court of Quebec. Jason argued that his section 35 Aboriginal rights, under the Constitution Act of 1982², had not been considered. As Jason and his community no longer had a land base and are not recognized under the Indian Act, he would have to prove that there was indeed a historic Mohawk community within the Ottawa-Gatineau region³. After Jason provided an extensive amount of evidence to prove his claim, Justice Christine Auger's judgement was given, with paragraph 51 reading: "The extremely detailed and compelling documentary evidence presented by Mr. Arbour as well as his testimony concerning his ancestors living in the Township of Hull convinces the Court of the existence of the historic rights-bearing community of Kanienghaga (People of the Place of the Flint) from Tsit-Kanaja as well as Mr. Arbour's link to that band" (as reproduced in Arbour 2019: 229). There was no doubt that Jason's community existed. However, the Court did not agree that the community and therefore Jason maintained their rights despite their recognition of his community's existence.

The Court invoked *R. V. Powley* (2003) to test if Arbour and his community maintained their section 35 rights. *Powley* (2003) is a precedent setting case that concerned non-status Indians, in this case Métis in Sault St. Marie. The Court had to determine if Indigenous peoples held section 35 rights even if they were unrecognized as status Indians. As Jason is not a "status-Indian", the Court felt this was the closest jurisprudence to the case, as the Métis involved in *Powley* demonstrated they maintained their Aboriginal rights as they had maintained their occupancy of

² Section 35 refers to the area in the Canadian Constitution that "recognizes and affirms Aboriginal rights".

³ I deliberately decided to include Jason and his identifying information as this is a story that he has been open with sharing in public media and within his own work. As a result, I do not feel it is a breach of Jason's privacy or my own ethics.

their land. The issues for Jason's case, as stated by the Court, is that "there is no contemporary community. That being said, there can be no connection to a specific Aboriginal community" (as reproduced in Arbour 2019: 231). The weight of this continuity clause is found later in the judgement when the Court explains "this community was disbanded and never relocated as a group. This last criterion, there is no *prima facie* evidence before the Court, that there is an existing contemporary community" (Ibid). To make this, statement the Court relied on *R. v. Van der Peet* (1996) and *R. v. Sparrow* (1990), which set out how to test if Aboriginal rights and title continue to exist. One of those criteria that are laid out within the two cases is the need for a continued and contemporary community. If this does not exist, as with Jason's case, it is accepted until proven otherwise (i.e., *prima facie*) that those rights are not maintained.

Jason demonstrated that both the ancestral connection existed, and a historic rights-bearing community existed, but as Jason mentioned to me in our conversation, how could he convince the Courts that he continues to have his Aboriginal rights if his community was "disbanded and never relocated as a whole", which "is why we could not maintain occupation"? As Jason further explained to me, this was an error in Canadian law when "[Canada is] relying on your past misconduct [for] your current misconduct". Through years of expropriation and lack of recognition, Jason's community has been forcibly relocated. To Jason's point, how are you supposed to contend with Canada's case law if this requirement to maintain occupation is often flawed and does not transpose onto many Indigenous nation's experiences? For that matter, how do you contend with a Court system that uses a harmful action they made in the past (i.e., forced relocation) to justify current harmful actions (charging Jason and not recognizing section 35 rights)?

What Jason articulates in his own work, our conversations, and his court case, is the desire to enact his own laws and sovereignty, the reclamation of his lands, and finally the right to determine how this is done. It is about having the authority to have authority, to decide on what is right for his community. As I write from a position of privilege as a white, settler, master's student, I cannot write about the most intimate details of what I have heard from various Indigenous actors. However, I wanted to reproduce this time in Jason's life as it had a profound impact on me and this thesis. It has anchored how I wanted to structure this thesis and the arguments I make. Jason and I have maintained contact and hope to work together in the future. However, I was not able to receive approval from Jason's community and clan mothers to accomplish a community-based project (see Chapter 1). The impeded access and my ethical stance have resulted in this project being focused on settler legalities, rather than Indigenous perspectives of colonization and Indigenous law due to my lack of engagement with Indigenous communities. Although, this thesis does pull from Indigenous voices in the form of authors, land defenders, and in one case a policy analyst that I have had the privilege of speaking with, but I do not follow a strictly traditional ethnographic approach with a singular community focus.

I begin this thesis at this juncture to explicitly recognize that for much of Canada's colonial past and present, the lands that settlers have come to possess were stolen and are a result of over 150 years of occupation. Though for the majority of Canada's past and present, the way in which Indigenous lands are taken is not always viscerally violent. The dispossession can occur through years of mundane bureaucratic work that comes to the forefront when someone like Jason advocates that their Aboriginal rights have not adequately been addressed. To adequately address how these forms of dispossession continue to operate and upon what justifications, as a settler

master's student, I choose to focus on my own institutions and my own laws, namely academia, Canadian Courts, and Canada's bureaucracy.

By uncovering the foundations and objectives of the settler-colonial political order, I demonstrate the relative fragility of the Canadian political order as it relates to the supposed Crown title, the acquisition of sovereignty, and the resulting justifications. This requires documenting the particular political rationality that enables Canada to claim sovereignty over Turtle Island and the Indigenous peoples that have come before and continue to practice on this land as a way to interrupt the Canadian mythos (Scott 1995: 204). I am not concerned with what "Canada" as a nation-state is, rather what "Canada" as a particular colonial liberal formation sought and continues seeking to do to Indigenous peoples. This is not to overdetermine the role "Canada" plays in the lives of Indigenous peoples. In fact, where I can, due to my ethnographic limitations, I center the importance of privileging Indigenous self-determined and localized ethico-political projects that seek to enact their own form of politics such as the Land Back movement.

At the heart of this thesis is the question: what does it mean to give land back? Or on the flipside, what does it mean to not give land back? There are two aspects of concern when discussing land restitution in Canada. First, is how can a political entity such as the Canadian state *give* land that was not owned by them in the first place. This requires an inquiry into how Canada came to have jurisdictional control over these lands and by what means and justifications this occurred (see Chapter 2). The second aspect concerns how Canadian recognition policies conceptualize identity in relation to land. This requires documenting the epistemological violence⁴ inflicted when identity is tied to a social and political order to justify settler-states' material and

⁴ Spivak (1988) defines epistemic violence as the projections of the West's "universal" values, naturalized in the myth of Western supremacy while on the other hand defining the colonial subject as Other by devaluing their knowledge systems. In my usage of the term, I am referring to the specific settler-colonial project within the borders of Canada that sought to erase Indigenous ways of knowing.

immaterial dispossession of Indigenous peoples (see Chapter 1). However, I recognize that I write from a position of settler privilege, one which I cannot take for granted when discussing Indigenous interactions with the state. As a result, I do not comment on the tactics, strategies, or supposed successes or lack thereof, of Indigenous Nations' struggles.

Specifically, these are questions of how an entity, in this case Canada and the Crown, comes to claim the authority to have authority, by what justifications and means this occurs and then how these become normalized and taken for granted. As such, my analysis is directed towards the institutions of settler-colonialism and how they have responded to Indigenous identity, land claims, and movements. I argue that in its responses, Canada represents Indigenous claims for sovereignty and self-determination as a risk to Canadian sovereignty, which involves managing said claims into channels of "certainty" that unilaterally privileges the so-called Canadian rule of law.

AN ANTHROPOLOGY OF RESTITUTION

On Aboriginal Peoples Television Network (APTN), Secwepemc activist Kanahus Manuel—daughter of late activist Arthur Manuel—joined Cheryl McKenzie on her show *InFocus* to discuss the "celebration" of Canada 150. Framed under the idea of "Unsettling Canada"⁵, Manuel explains that "we were here to address what the 150 years mean for native peoples. This includes child apprehension, Kinder Morgan pipeline, Murder and Missing Indigenous Women, fentanyl crisis, homelessness. We are using this platform of 150 years of Canada to address these" (InFocus 2017). She goes on to explain that when it comes to understanding Indigenous peoples' interactions with the Canadian state, the provinces, and the RCMP, it is the idea that Indigenous

⁵ "Unsettling Canada" is the title of late Arthur Manuel and Chief Ronald M. Derrickson's 2017 book which attempts to interrupt the short colonial memory that seeks the erasure of Indigenous peoples in Canada while being attentive to Canadian treaties, policies, and doctrines used throughout the state's relatively brief history (Manuel and Derrickson 2017).

title (or Aboriginal title) “is the underlying issue we all need to address. Native people across this country hold this radical title, which means the complete ownership and control over our lands and resources. This continues to be ignored” (Ibid). In Ottawa during these “celebrations” and at the time I write in 2021, the very lands that the national capital region sits upon is unceded Algonquin territory and is home to a Kanien’kehá:ka community that has not been afforded Indian status under the *Indian Act*⁶—the omnibus legislation where Canada consolidated its efforts to regulate, manage, and assimilate Indigenous peoples to solve the “Indian Problem”.

On September 30, 2021, the Yellowhead Institute⁷ published a blog containing a series of articles to comment on what the new September 30th holiday called Truth and Reconciliation Day represented. The page was entitled “Resources for Truth and Restitution” (Yellowhead Institute 2021). The blog provokes a sense that reconciliation may not be what is occurring, at least not in the true intent of the TRC recommendations⁸. In the same vein as Manuel’s discussion about unsettling Canada in the year of the 150th, “Truth and Restitution” questions the value of such celebrations with a lack of concrete implementation of the TRC’s calls to action. I take this as a

⁶ I also want to emphasize that the Indian Act was a double-edged sword. It was a tool of erasure and assimilation aimed at solving Canada’s so-called “Indian Problem”, however it also provided contradictory protective qualities to “Indian” land rights. It barred squatting on Indigenous land and the sale of Indigenous property that came to be known as reservations, and though it held this protective quality to ensure further erosion of Indigenous territory, it was premised upon a stereotype that Indigenous peoples were indolent and therefore subject to unscrupulous land speculation (Harring 1998). This issue would arise to the forefront of the Liberal 1969 White Paper which sought to abolish any special purpose rights set under the Indian Act. Pierre Trudeau’s Liberals argued that in order to raise the status of Aboriginal peoples, one must reduce the barriers for Indigenous peoples’ participation. This was a veiled attempt at off-loading all responsibilities that the Canadian state held to Indigenous peoples. Even though Indigenous peoples understand the Indian Act to be a tool of assimilation, Indigenous peoples argued at the time that it was still a necessity to maintain the Act until Canada would seriously consider Indigenous title and the original intent of the treaty relationships (see Cardinal 1999; Cairns 2000).

⁷ The Yellowhead Institute is a First Nation led think tank dedicated to Indigenous self-determination and is embedded in community networks. Notable members include Shiri Pasternak and Hayden King.

⁸ It is worth mentioning that the TRC is not the first report that has dealt with documenting Indigenous issues within Canada. Though the TRC dealt specifically with documenting the lasting and historical impacts of Indian Residential Schools, it also commented on the need for Indigenous self-determination (see calls-to-action 45-52). The Royal Commission on Aboriginal Peoples (RCAP) (1996) is a report that suggested Indigenous Nations had the right to self-government, yet none of its recommendations were implemented at the time, suggesting a common trend of inaction on the part of the Canadian government.

jumping point into a form of inquiry that does not privilege the official narrative of Canada. Instead, I focus on an approach that perhaps can be best referred to as the anthropology of restitution (Fay & James 2008).

As Manuel suggested in the APTN interview, land is the central issue when it comes to Indigenous grievances over colonial dispossession. As an anthropology of restitution holds land and its related aspects as its central focus, it makes it an apt companion in discussing the case of Canadian land claims policy regime and the dispossession it is meant to rectify. I will explain this policy regime in greater detail later in this introduction (see *Politics of Recognition*), but first I feel it pertinent to discuss how restitution intersects with various theoretical and conceptual debates regarding “property, social transition, injustice and redress, citizenship and community, the state and the market” and most importantly, colonialism and indigeneity (Fay & James 2008: 1).

Settler Colonialism: The Past and Present

Restitution is about what has and can be returned, and perhaps what ought to be. An anthropology of restitution focuses on understanding how this operates in terms of the strategies and rationalities employed by the parties involved. Fay & James (2008: 5), in their anthology *Rights and Wrongs of Land Restitution*, see restitution as centering on “those who once suffered the loss of a material, territorial basis of identity and livelihood, demanding that past wrongs are set right”. While I agree with their positioning, I further argue that an anthropology of restitution is also crucially about those who continue to experience ongoing loss. Part of this thesis is about emphasising the importance of foregrounding the understanding that colonialism, particularly settler colonialism, is an unfinished and continuing project (Wolfe 1999; Pasternak 2017). I choose to utilize the terminology of settler colonialism as opposed to colonialism to gesture to the nuances in discussing the North American variant of European imperialism. Anthropologist Patrick Wolfe

(1999: 2) discusses how the North American variant of colonization constitutes a particular form of colonization. This form of colonization is not predicated upon the concept of primitive accumulation—a Marxist concept that seeks to explain how colonizers sought the reformulation of Indigenous peoples into subject labourers for the commercial benefit of quasi-imperial authority as it was in Latin America and parts of Asia (Mora 2017; Li 2010). In contrast, settler-colonialism is more concerned with removing Indigenous peoples from their lands, assimilating them into Euro-American society, and replacing them with a white settler population. Dene author-activist Glen Coulthard notes that Canadian settler-colonialism is a system of domination that requires the “[facilitation of] dispossession of Indigenous peoples of their lands and self-determining authority” (2014: 7). In other words, settler-colonialism “is a structure, not an event” (Wolfe 2006: 388).

Though by no means am I suggesting that settler-colonialism is a temporally coherent totality. In fact, temporality is crucial here. When it comes to speaking about the structure and systematic effects of settler-colonialism, it is relatively easy to fall prey to totality. Colonialism was and is a system, but the way in which colonization was enacted and the goals it sought varied, depending on the time and place of the application of imperialism (Scott 1995: 204). At some point, it was the complete and physical eradication of Indigenous peoples, like with the Beothuk in Newfoundland and Labrador. At other points, it seemed genuine agreements between Indigenous Nations and settlers might prevail as with the Two Row Wampum and Peace and Friendship Agreements (Asch 2014; Manuel & Derrickson 2017: 60). If I were to discuss colonization as a totality, I would risk missing the nuances of settler-Indigenous relations in their evolving social, legal, and political relationship. It also runs the risk of stripping Indigenous peoples of agency in the colonial encounter by representing Indigenous Nations as solely oppressed subjects.

I argue for nuance in understanding the temporal specificities of settler-colonialism, but I also, following Wolfe (1999; 2006), Simpson (2014), Coulthard (2014) and others, hold that all settler-colonial political regimes have a common objective. This aspect of settler colonialism is the requirement of the clearing (whether physically, socially, or politically) of Indigenous peoples and lands to allow for white settlement and therefore “improvements”, according to that rationale. What binds different moments of settler-colonialism together is the persistent “logic of elimination” at play (Wolfe 2006). This logic persists through the language of territoriality—a term originating in geography, meaning the political rendering of space (Sack 1983). Wolfe (2006) contends that “territoriality, is settler-colonialism’s specific, irreducible element”, since this form of colonization seeks to replace the Indigenous populations in an expropriated land base with white settlers favourable to imperial society (388). It is this logic of elimination that “produces a post-colonial society (Canada) through the settlement of land and the displacement of Indigenous peoples,” which in turn justifies “the subsequent management of Indigenous populations [and] the *fortification of legal regimes of sovereignty on top of Indigenous societies*” (Crosby & Monaghan 2018: 8 [emphasis added]). It is worth noting that justifications for settler-colonialism and the dispossession of Indigenous peoples require(d) a range of techniques, and they depend(ed) on the colonial need according to a particular time (Harris 2004). I will expand upon the political techniques later in this introduction (see *Anthropology of Liberalism*) but first let us turn to dispossession in relation to this thesis.

Dispossession

Land dispossession and the resulting forms of dispossession are recognized across disciplinary lines (Alfred 2005; Coulthard 2014; Simpson 2014) as the central issue when discussing Indigenous-settler relations. Unfortunately, one of the most readily available lenses to

view Indigenous-state relations in the Americas is the idea that Indigenous peoples were conquered over 500 years of colonization (Canessa 2017: 69). To what extent this is or was ever true is questionable at best and at worst deliberately untrue⁹. Dispossession occurred through a myriad of techniques, ranging from outright violence to more common nuanced approaches requiring epistemological and legal justifications¹⁰, or as Jean Comaroff (2001) calls it—lawfare. While being predicated upon force, this form of dispossession is also enabled by the creation of new forms of property and disciplinary systems related to specific European hierarchal ordering of social and political systems (Faye & James 2008: 2; Nadasdy 2017). The epistemological underpinnings here cannot simply be glossed over as “Western” or European¹¹. Particularly, I gesture towards the liberal Enlightenment thinking that enabled the civilizing project following Hobbesian, Lockean, and Rousseauian notions of property, government, modernity, and what constitutes the political (Canessa 2017; Graeber & Wengrow 2021: 7; Nadasdy 2017; Shaw 2008). It is important to recognize that this period of European thought that sought to reformulate how to think about property, government and their relationship to individuals was and continues to be embedded in the colonial project that seeks to dispossess Indigenous peoples (Nadasdy 2003: 232).

⁹ Mathew Restall (2003), in his *Seven Myths of the Spanish Conquest*, addresses seven myths related to how the Spanish came to claim supremacy in Latin America. In each chapter, Restall debunks the idea that Spanish colonialism was “successful” due to superior arms, technology, and race, when in fact colonialism did not reach the majority of Latin America until the nineteenth century, if not later. As such, most Indigenous peoples lived relatively independently from Spanish colonialism and were definitely not conquered.

¹⁰ This is not to say that these techniques were any less harmful. Epistemic violence has resulted in very real material dispossession of Indigenous peoples in Canada. It is only to suggest that these forms of what some may call symbolic violence are distinct from more outright violence that often occurs in Canada. John L. Comaroff (2001: 306) defines lawfare as “the effort to conquer and control indigenous peoples by the coercive use of legal means”. Lawfare will center prominently in my second chapter on the origins of Aboriginal title and Crown sovereignty.

¹¹ Political Scientist James Tully (1995: 70) recognizes that in fact the entire canon of European thought regarding the enlightenment cannot all be lumped into together. There are nuances that exist and Tully (Ibid) notes that there were those that did not rank Indigenous peoples’ “cultures relative to a European norm, undermining the prevailing justification of European imperialism”. Though this is not to say that some European thinkers went as far as to suggest providing nationhood to Indigenous peoples and therefore were still implicit in the colonial project. In this thesis, I emphasize Thomas Hobbes and Rousseau as the main influential thinkers, as they both explicitly contrasted their projects of modernity against Indigenous peoples.

To be sure, settler-colonialism is an unfinished project. Settler legalities¹² have rested upon a shifting and often incoherent patchwork of papal bulls, philosophical-legal doctrines, proclamations, and currently politico-legal frameworks outlined in Canada's Courts, parliament, and its constitution (Pasternak 2017: 6; Ford 2010). Though with all the inconsistencies within such policies, what each have in common is the goal to “perfect” colonialism. In other words, the objective is to repeatedly suggest “that the sovereign possessed all underlying title to the land” (Pasternak 2017: 6).

One of the original methods—and as I argue throughout this thesis, an enduring method—that Europeans used to justify their “ownership” of the so-called new world was the Doctrine of Discovery and its relationship to *terra nullius* (territory without a master or nobodies land). The Doctrine of Discovery refers to the series of practices, policies, treaties, and decrees that “justify” the dispossession of Indigenous peoples’ political authority and territory, all within a framework of sovereignty (Archer 2012: 13; Bonilla 2017: 332; Nadasdy 2017). The Doctrine of Discovery, under false pretenses, allowed Christian monarchs to claim complete ownership of lands they had “discovered”. These lands needed to be unoccupied from Christian subjects and any recognizable political entity to enable European monarchs to lay claim—i.e., *terra nullius*. The Doctrine arose from colonizers needing to “codify and regulate the practices of conquest and the settlement of lands with peoples deemed uncivilized—and hence unsovereign” (Bonilla 2017: 332). It is this connection between how Europeans claimed that Indigenous peoples were “uncivilized” (i.e., their perceived lack of political and property systems) and the Doctrine

¹² Settler Legalities is a term I borrow from Shiri Pasternak (2017) and Lisa Ford (2010). I use it within this thesis to describe the legal apparatuses and the resulting justifications that underpin all Indigenous and settler-state relations. For Ford (2010), settler legalities refer to the whole body of law that initially began as a practice of legal pluralities in initial colonial interactions with Indigenous Nations but would eventually become the sole recognizable and enforceable body of law. Settler legalities, as a concept, allows one to speak of the changing jurisdictional abilities of the settler-state and for Ford, to demonstrate how these legalities seek to “perfect settler sovereignty.”

of Discovery, that is important in understanding how Canada today is able to claim radical title and sovereignty over Indigenous lands. By firmly cementing Indigenous peoples in a pre-political pre-modern past, colonizers sought to claim all the lands as rightful owners (Fabian 1983). It is precisely these claims that need interrogation to understand Canada's ongoing colonization of Indigenous peoples (Borrows 2019).

The Context of Restitution

Often the story told about Indigenous land claims begins with the Numbered Treaties in the 1800s and skips to the Supreme Court of Canada's (herein Court) *Calder* decision (1973) which recognizes the existence of Aboriginal title. It is not a well-known fact that Indigenous peoples were explicitly barred from seeking restitution, likely due to their strong chance of winning in the Courts and interrupting the relatively new confederation. From 1927¹³ to 1951, Canada barred Indigenous Nations from hiring counsel for the purposes of pursuing land claims. In fact, it was an imprisonable offence under the Indian Act (1876) "for an Indian or Indian nation to retain a lawyer to advance their claims, or even to raise money with the intention of retaining a lawyer" (Mathias & Yabsley 1991: 35). That is not to say that Indigenous Nations ceased politically organizing, rather that this organization faded from public purview (Manuel & Derrickson 2015). In 1951, the provisions regarding political organizing and seeking counsel were repealed. Unfortunately, documenting each case of Indigenous resistance and organizing during those periods is beyond the purview of this thesis (see Capatano 2007; Elbourne 2012; Harring 1998).

¹³ Three years prior, Canada, on the advice of Deputy Superintendent of Indian Affairs Duncan Campbell Scott, deposed the Haudenosaunee Confederacy at Six Nations of the Grand River and an elected band council was enacted under part II of the Indian Act regarding Indian Advancement (McCarthy 2016; Capatano 2007: 24; Morden 2015). Directly resulting from what has become known as the Six Nations status case, according to Capatano (2007), Indian Affairs became concerned with First Nations' abilities to hire lawyers and litigate against the government. Following the advice of top bureaucrats such as the infamous Duncan Campbell Scott, the federal government decided to revise the Indian Act in 1927 to bar Indigenous peoples from hiring lawyers for the purpose of litigating grievances against Canada. This was not repealed until 1951 (Mathias & Yabsley 1991: 34).

Suffice to say that Indigenous peoples never stopped claiming self-determination or control over their territories, it was Canada who refused to listen. What I focus on here is not the efficacy of Indigenous claims or always the results of them. Instead, I examine what *officially* enabled Indigenous claims to be made in Canada's Courts and the ways in which Canada has sought to manage favourable outcomes in said land claims. Therefore, even though I begin discussing the Canadian land claims context at *Calder* (1973), I am not suggesting this is where Indigenous land claims began.

It is difficult to imagine the context of Aboriginal law prior to the *Calder* decision, as the ever-growing body of Aboriginal law now has nearly fifty years of precedent-setting decisions. The nuances have grown considerably. Just four years prior to the *Calder* decision, then Prime Minister of Canada Pierre Trudeau and Indian Affairs Minister Jean Chrétien attempted to eliminate any special status afforded to Indigenous peoples (Raven et al 2007: 3; Weaver 1981). Without any consultation from Indigenous right holders, the 1969 White Paper proposed the complete and immediate elimination of the Indian Act (1876). The justification of its elimination was not one based upon current critiques—that it is paternalistic, racist, and genocidal. Instead, the Liberal Party justified the erasure of special purpose rights on the basis that these “rights” held Indigenous peoples back from joining the rest of the “progressive” nation known as Canada. The idea was that the Indian Act created barriers to participating in “modern” society. According to that logic, what Indigenous peoples needed was to become individual right holders (i.e., citizens) under the Canadian social contract, no longer collective entities. The Department of Indian Affairs expressed that “the goal of equality was to be achieved by terminating the special legislation and bureaucracy that had developed over the past century to deal with Indians, and by transferring to the provinces the responsibility for administering services to Indians” (as quoted in Weaver 1981:

4). Evidently, this form of “equality” was one steeped in liberal enlightenment philosophy that is informed by a universalizing tendency towards what is considered equal under a Western philosophy of human rights (see Chapter 1).

Due to a large outpour of Indigenous dissent over the new policy of termination, Canada withdrew the White Paper. When I spoke with Russ Diabo—a leading Indigenous Kanien’kehá:ka policy analyst—he told me that even though the White Paper was officially taken off the books, the main goals of minoritization, extinguishment of rights and title, and offloading responsibility of Indigenous services to the provinces still finds itself existing alive and well in departmental policies. Interestingly, the same year the White Paper was proposed, Chief Frank Calder, on behalf of the Nisga’a nation, sued Canada and British Columbia stating that their Aboriginal title had never been lawfully extinguished (Raven et al. 2007: 4). For the Nisga’a, this was not a new tactic, rather it is part of a long history of asserting their rights through many avenues since the very establishment of British Columbia (see Raven et al. 2007 for extensive discussion). The decision was rendered in *Calder v. Attorney General of British Columbia* (1973). Six out of the seven Court justices decided that indeed Aboriginal title existed (Raven et al. 5) within common law and importantly, that it existed regardless that prior governments had not recognized this title. For the first time, the SCC was willing to accept that a concept of collective Indigenous property existed, however the Courts decided that the Nisga’a Nation did not follow procedure correctly (Ibid). There would be no resolution for the Nisga’a Nation through the Courts, however the *Calder* decision opened an immense set of possibilities and questions for the future of Indigenous Nations residing in Canada.

The SCC did not explain the content of Aboriginal title, how it could be recognized, or how it may be extinguished. All that was clear at the time was that Aboriginal title existed. It was

the next nearly fifty years that would come to define what Aboriginal title is and, perhaps on a cynical note, how Canada would deal with its “Indian Problem” (see Chapter two). In 1984 in the *Guerin* decision, the Court began to define Aboriginal title as “sui generis”, meaning a unique form of legal standing requiring creative formulations. In 1998, the *Delgamuukw* decision regarding Gitksan and Wet’suwet’en peoples’ inherent rights to Aboriginal title set forth “features of Aboriginal title, its content, and the criteria for proving its existence, the latter including occupation prior to the assertion of British sovereignty and continuity and exclusivity in the possession of the lands” (Dickson 2018: 20)¹⁴. It was not until the *Tsilhqot’in* (2014) decision that Aboriginal title would finally be “granted” to a First Nation asserting their unceded Aboriginal title to a large swathe of territory in west-central British Columbia.

It is within this context that Aboriginal rights and title have come to be framed as a claim for land, a grant of land, or in some contexts, a claim for recognition. However, as stated in the opening of this section on the anthropology of restitution, the concept of restitution is much more than the returning of what was once taken. It is equally about uncovering how that expropriation was facilitated, by what tactics and justifications, and how this informs the subjective experience including the governance of the land. As criminologist Shiri Pasternak notes, “demands for land restitution go hand in hand with Indigenous jurisdiction because without land, there is no meaningful governance to speak of” (2017: 52). Therefore, to explore what restitution is and does,

¹⁴ Unfortunately, due to case proceedings and the trial judge’s treatment of the evidence submitted by the First Nations, the decision made by the SCC is mostly *obiter dicta*, roughly translated to other things said. The principle of *obiter dicta* stands for the majority of the case, as the justices could not reasonably grant title due to the amalgamation of the Gitksan and Wet’suwet’en claims, which according to the *Sparrow* (1990) decision, did not meet the test of single occupancy required for granting Aboriginal title. The justices commented on the case, even though for either First Nations to be granted title another case would need to be tried on a different basis, which allowed for their discussions of title and claims to be included in official proceedings.

it is also necessary to comment on the relationship it holds with what I refer to as political subjectivity (see Chapter one).

ANTHROPOLOGY OF LIBERALISM

Recall in the section *Dispossession*, I mention how settler-colonialism and its civilizing project is intimately tied up with a mixture of Hobbesian and Rousseauian notions of property, government, modernity and what we think of as the political realm. These thinkers essentially form the main schools of thought that came to be understood as liberal enlightenment thought. They are the epistemological basis to the governing orders of settler-colonialism and the Canadian settler-state and how the colonial project operationalized these liberal beliefs to dispossess Indigenous peoples (Nadasdy 2003: 232). It is well documented that liberalism required the fictive existence, and active creation, of a “primitive” Other (Fabian 1983; Tuori 2015). Liberalism, with its colonial and imperial genealogy, simultaneously defines *its* individuals as citizen subjects that enjoy equal constitutional freedoms, protection, and recognition, and rests upon the assumption that not every individual within the polity’s territory is a citizen (Agamben 1998; Chandra 2013: 136). To justify colonial expansion in connection to international legal perspectives, colonial administrators, justices, and the Crown needed to construct “specific ideas...to legitimate unjust and unnecessary forms of political domination” (Eagleton 1991:167). The colonial apparatuses justified its expansion by temporally and spatially ordering “pre-modern subjects” as outside of their “modern” and “civilized” period, concurrently enabling colonial authorities to present themselves as “civilizers” there to help and protect the “primitive” Other (Fabian 1983; Latour 1993).

Governmentality

When one encounters liberalism, often it is through the discussion of a political scientist who might define it as a philosophy or a type of government, but what if we consider liberalism

from a Foucauldian point of view as Nikolas Rose (2006: 145) suggests? That is, instead of treating liberalism as an ideal type, I consider it in its practices and rationalities as a form of governmentality.

The usage of governmentality in this thesis is meant to denote the practices of political conduct—the art of government—as it relates to various political communities and individuals. As stated in the beginning of this introduction I am more concerned in understanding how Canada came to claim legitimacy. This is not meant as a project in determining the efficacy of such a claim (i.e., the nature of sovereignty), but understanding, in the vein of a governmentality approach, how Canada’s practices of government came to supposedly possess political authority over Indigenous Nations of Turtle Island. This follows in the tradition set forth by Foucauldian theorist Nicholas Rose (1999: 20), who promotes avoiding an approach bent on asking “what happened and why?” and opts in favour of “asking what authorities of various sorts wanted to happen, in relation to problems defined how, in pursuit of what objectives, [requiring which] strategies and techniques”? I seek to disrupt the image of the state as omnipotent in favour of the understanding that political power is relational, contingent, and most importantly incoherent and fragile (Foucault 2003: 280; see Gupta 2012). Governmentality allows us to look at the processes of governance not located within the monolithic state, but rather located in the intersection of assemblages of governing bodies and subjects like activists, Indigenous governments, the Courts, parliament, and the Canadian bureaucracy. It is about documenting “how different locales are constituted as authoritative and powerful, how different agents are assembled with specific powers, and how different domains are constituted as governable” (Dean 1999: 29).

I locate this form of governmentality within the bureaucratic apparatus of Canadian recognition policies, namely Crown-Indigenous Relations and Northern Affairs (CIRNA). Since

power must manifest itself in new forms to maintain some semblance of control, resulting in the proliferations of power relations, new areas of administration are required. To maintain control as these relations proliferate requires expert knowledge holders—such as Public Service of Canada employees centred in this thesis—to intervene in the process of governing to adjust said relations to ensure they are manageable and legible for governability (Li 2007: 276). As Gupta (2012) reminds us, it is important to acknowledge that bureaucratic work should not be read as the by-product of a nation-state’s instrumental function, but that bureaucrats and bureaucracies both create and maintain populations to create a specific ordering of people (165). Another way to understand Gupta’s use of “specific ordering of people” in relation to governmentality is Foucault’s meaning that governmentality was not just about the power to do an act, or that it was diffuse, but that it was about the conduct of conduct. By the conduct of conduct, Foucault meant those who conduct seek to produce readable and amenable forms of subjectivity. When read in relation to liberal subject formation, subjectivity materializes as citizenship thereby limiting alternative political relationships (Martin 2018: 137). Similar to the ways in which Indigenous demands are reduced “to a singular relationship – the relationship between citizens and a sovereign authority, or constitutional state”, a form of governmentality can delimit the ability to be politically otherwise (Shaw 2008: 144). It is the approach of governmentality that allows one to understand what forms of conduct in relation to the subject are enabled and produced by those who conduct.

The Politics of Recognition

Following the nearly 50 common law jurisprudence, Canada now has a series of land restitution policies enacted through the Specific Claims Branch (SCB) and Comprehensive Claims Branch (CCB), under Treaties and Aboriginal Government (TAG)—a sector of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC). The SCB is meant to redress situations where

Canada breached its historic fiduciary responsibility to Indigenous peoples and their lands as outlined in treaties and the Indian Act (Pasternak et al 2013: 68-9). The CCB is meant to address Indigenous claimants who hold that their Aboriginal title is unceded and has been unlawfully expropriated. To what extent these branches address Indigenous concerns are highly questionable, and these systems have also been critiqued for the bottlenecks they cause due to municipalizing Indigenous governments (Nadasdy 2017; Pasternak 2017).

If Indigenous Nations decide to negotiate with Canada, these are the only form of redress aside from litigation. A growing body of literature that inquires into the disconnect between what Canada has come to call reconciliation and recognition, and the continuing colonial dynamics at play, has come to coin this relationship as the politics of recognition. Perhaps one of the first to use such a phrase is Canadian political philosopher Charles Taylor (1994). Following a Hegelian model of subjects, Taylor asserts that human identity is forged through the process of dialectic recognition (66). Yet it is also misrecognition, or the lack of recognition, that causes “real damage, real distortion” (25). Taylor was concerned with how recognition plays out in a multicultural liberal state and concludes that as liberalism is a political expression of Western-centred traditions, recognition cannot be applied neutrally and, therefore, can be harmful (38, 62). These are important observations in terms of the role recognition plays in producing a subject, but they do little to understand the material and normative dynamics involved in unequal terms of said recognition (Fanon 1986). Following Dene political scientist Glen Coulthard as a contemporary starting point is more fruitful.

Stemming from his experiences with Dene Nation negotiations with Canada, Coulthard (2014) recognizes that there are three aspects to how Canadian institutional recognition and the accommodation of “cultural” differences of Indigenous peoples operate (106). The first is

Canada's need to reconcile the vast diversity of Indigenous cultural practices via official recognition (107). The second is the accommodation of Indigenous difference through restoring or mending damaged relationships due to historical violence, requiring apologies, public forums, or truth and reconciliation commissions (Ibid). The final and third aspect Coulthard mentions is the need to render "Indigenous assertions of nationhood [consistent] with the state's unilateral assertion of sovereignty over Native peoples' lands and populations" (107). Herein lies the most important critique of Canada's policies of recognition, namely that it is impossible to actively pursue reconciliation when it is premised upon the state's sole right to sovereignty. Recognition is not simply about "identity" in a Taylorian sense nor is about inclusion into the normative political paradigm. Coulthard explains that recognition must equally be about redistribution in a political, material, and social sense (2014: 19).

When discussing Canada's land claims policies, Russ Diabo told me that "the whole purpose of that Native Claims statement was to continue a process of extinguishing or getting, you know extinguishment of rights and interest in a specific task policy or set of specific claims once and for all and get certainty". Diabo gestured to the idea that it is this "certainty" that the politics of recognition hoped to gain. By exchanging pre-existing sovereignty in favour of an agreement that clearly outlines the powers Indigenous peoples hold under the Canadian constitution, Canada gains certainty. According to anthropologist Paul Nadasdy (2017), these agreements do not simply formalize the forms of governance that Indigenous governments had prior to colonization, rather "they establish new social boundaries through the institution of First Nation citizenship" (2017: 189). In other words, engaging with Canadian politics of recognition can mean creating new forms of relating to land, government, and each other. Doing so could mean closing off the potential for alternative forms of conduct.

Elizabeth Povinelli (2002) describes this aspect of the politics of recognition as promoting certain forms of subjectivity, which in its colonial liberal form means promoting the concept of liberal citizenship. By invoking subjectivity, I am borrowing Foucault's understanding of the subject's relationship to governmentality, or conduct. Foucault understood subjectivity as the position a subject holds in relation to others that is "produced by discursive regimes [that are both] self-making and being-made by power-relations" (Ong 1996: 737). Subjectivity is inherently about "a relationship in which one person tries to control the conduct of the other", it is constitutive of governmentality rather than defined at its limits (Foucault 1997: 292). The politics of recognition then, understood as a form of governmentality, is an apparatus that seeks to produce subjects that are "amenable to political programming" (Rose 2006: 147). Colonial power operates in terms of disciplining, but at the same it enables agreeable types of subjectivity while attempting to disable others (Scott 1995: 205). What then must be attended to is "the politico-ethical project of producing subjects and governing their conduct" that settler-colonialism hopes to achieve (Scott 1995: 214).

The Limits of the Political: Political Subjectivity, Conduct, and Counter-Conduct

If the "politics of recognition" approach hopes to understand how Indigenous demands are distilled into manageable realms of conduct and colonial subjectivity in the name of certainty, then the project of counter-conduct asks, what does it mean to seek to be politically otherwise? In the *Hermeneutics of the Self* (2005) lectures and in interviews such as "The Ethics of the Concern of the Self as a Practice of Freedom" (1997), Foucault sought to develop an ethical approach to a subject's "practices of freedom" (1997: 283). For him, this meant that relations of conduct can manifest between "self and self..., within social institutions and communities, [as well as] relations concerned with the exercise of political sovereignty" (Gordon 1991: 2-3). It is this period of Foucault's intellectual life that I find most promising with his focus on the ethical subject as

opposed to the structural limits placed upon said subjects. For Foucault, the term ethics was meant as an *ethos*: “a way of being and of behaviour” (1997: 286). In this sense, the ethical side of the subject meant questioning what the right way was to conduct oneself in relation to others; it was about “the way in which one should ‘conduct oneself’” (Foucault 2009: xxvi). Of course, the subject is contingent on particular historical and political discourses and their practices, but for Foucault the ability to work upon oneself toward an ethical goal—or as Foucault (2009) called it, the techniques of the self—was the key in understanding how subjectivity operated.

This form of Foucauldian ethics is not simply a project of morality, in fact I hope to stay away from any questions of morality, rather it “involves taking account of how one is conducted and how this could be otherwise” (Demetriou 2016: 225-6). This is where a Foucauldian ethics of the self takes on a political meaning. If governmentality is the conduct of conduct, then what would it mean to, for lack of a better term, resist that conduct? For Foucault, the answer was counter-conduct. Counter-conduct has received little attention in academic literature when concerning any interruptive or disruptive acts (except for Dawney 2013; Davidson 2011; Demetriou 2016; Rahimi 2015; Rosol 2014), and instead governmentality studies have been oversaturated. For Foucault (1997b: 44), alongside questioning how best to govern were questions about “how not to be governed like that, by that, in the name of those principles, with such and such an objective in mind and by means of such procedures, not like that, not for that, not by them”. It is not the complete rejection of all governments, but particular forms of governing¹⁵. Moreover, as the conduct of conduct enables certain subjectivities—as they emerge “out of conditions of being”, it is “counter-conduct [that] stresses that these conditions are far from inert” (Demetriou 2016: 219-220). Nor are conduct and counter-conduct simple dichotomies, in fact Foucault (2009) goes to

¹⁵ I opt to use counter-conduct to explain my interlocutors ethico-political positionings in order avoid the issues with resistance studies (see Mahmood 2001 for a full debate over the concept).

pains to stress the oscillation between conduct and counter-conduct as it relates to subjectivities, it is never a finished project. When considering these two concepts, there is no original state of being, or as anthropologist Demetriou calls it “just being”—a state of unchangeable subjectivity (Ibid).

In *Security, Territory, and Population* (2009), Foucault spoke of friendships in relation to counter-conduct. He believes that these affective relations had the ability to produce new political and ethical possibilities. It was these counter-conducts (made possible by these friendships) that would alter socio-political realities. In another sense this very well relates to the affinity and solidarity felt by Indigenous activists in their responses to Canada’s governmental rationality. I am curious as to how what I am calling counter-conduct movements, such as Land Back, inform such deep affectual relationships in these encounters. And what have been the effects on the ethical positioning of oneself in relation to the political moment they find themselves within? What we need to look out for, more importantly, is an understanding of a new type of politics. Not one defined by who holds power over others, but one that is relation oriented. We may move towards what Graeber and Wengrow (2021) understand as the very essence of politics: it is quintessentially about “the ability to reflect consciously on different directions one’s society could take, and to make explicit arguments why it should take one path rather than another” (Graeber & Wengrow 2021: 86). It is about a flourishing of friendship as opposed to liberal subject formation. This is on the margin of something otherwise. I am not naïve enough to suggest these counter-conducts will halt and dismantle global structures of capitalism and colonialism, but it is worth delineating on the pockets of flourishing that thrive. I propose in my final chapter of this thesis that by following Indigenous counter-conduct movements like that of Land Back, and by privileging Indigenous

politico-legal systems, researchers might yet have a way to engage in a form of counter-conduct by doing so.

METHODS AND CONTINGENCIES

Originally, this project was to take its form in a participatory fieldwork framework in partnership with a Kanien'kehá:ka (Mohawk) community in Ontario. I hoped to employ, in conversation with Indigenous community leaders, a fully community-based approach. Knowing of activist research and public anthropology (Graeber 2009; Mora 2017; Simpson 2014; Speed 2006), I had hoped these teachings could guide my positionality as to what makes an anthropologist, by which I mean an overt commitment of engagement directed towards shared political goals. Little did I know that the COVID-19 pandemic would span over two years beginning around the time I had hoped to begin my fieldwork. I did not achieve my initial goals. This project has morphed into a mixture of textual, interview, and media-based analysis resulting from conversations with academics, activists, and public service employees of Canada. I mainly rely on two subsets of data, the first being my ethnographic work from conversations I have had with three government of Canada employees, two male and one female. When it comes to Indigenous perspectives, I pull from attending conferences on Land Back and discussing various struggles that I have been informed about by three Indigenous land defenders and one Indigenous policy analyst, all of whom are male and are Kanien'kehá:ka. For all the government of Canada employees, the ethnographic material was recorded and transcribed automatically on Zoom, however, with all of my Indigenous participants except for one, they were not recorded and only notes were taken so as to respect privacy. The second subset of sources that I utilize includes Supreme Court judgements, news articles, and government publications which help supplement the conversations and experiences I have had throughout this two-year period. In this way I use

text-based analysis with more grounded ethnographic research of governmental practices to document Canada's ongoing colonization (Pasternak 2017: 74)

Due to the nature of the work Indigenous land defenders that I spoke with were doing, I was not able to include many of the details of our conversations. As mentioned in the introduction, I also had a chance to speak with Jason Arbour, Chief of Kana:tso Kanien'kehá:ka First Nation. We had hoped to develop a project in a similar fashion to my original project, however I was unable to gain the approval of the clan mothers due to the University's required consent approval process. This will feature in my first chapter, and I will mention Jason where I feel we have adequately discussed what I can and cannot include. I will not be able to comment on any specifics of Jason's journey except for the story I told in the very beginning of this thesis, as Jason has reproduced this story in the public eye prior to our conversations. However, I want to gesture towards Jason's own research on his community's struggle to gain recognition which can be read here: <https://tsit-kanajakaniengehaga.webs.com/>.

Methodology and Decolonization

I want to comment on a commitment I hold throughout my thesis as it centers as my main methodology—that is how I think of methods after fieldwork. In an article, Brooke Hansen and Jack Rossen (2017) suggest that anthropology and related disciplines that hope to continue working with Indigenous peoples in research must forgo the type of “truth-seeking” that Vine Deloria Jr. (1998: 100) decries. Hansen and Rossen (2017: 36), via their Haudenosaunee partners, suggest four recommendations to follow when conducting research in the United States, when engaging in critical work: “(1) respect and support indigenous sovereignty; (2) remember that treaties are the supreme law of the United States; (3) care for the earth and work to end global warming; and (4) do not co-opt Native cultures or ceremonies”. What I find particularly of

importance in terms of what I write about in this thesis is the first and second recommendations. When I think of my methodology, I suggest that methodology does not start and end during your fieldwork. When you are writing there is an important aspect to remember. Language is power. The way people and their actions are represented has extreme importance in public discourse and how that research will be used and understood in the future. The way in which we as anthropologists write about our interlocutors is a crucial part of our methodology. I suggest that perhaps this is the most important methodological factor within this thesis.

Let us return for a moment to the first two points. If I were to seriously respect and consider the sovereignty of Indigenous peoples, in particular the Anishinaabe Algonquins and the Haudenosaunee where I am situated as I write, then I must be attentive to how I privilege legal and political histories in the context of Canadian politics of recognition. We must treat treaties like the Two Row Wampum, Covenant Chain, and the Niagara Treaty (1763) as the legitimating basis of the Canadian polity, not the British North America Act, not the Numbered Treaties, and especially not the 1982 Constitution. By recognizing the power of those treaties to serve as the foundation of a Canadian state, one is forced to consider that for Canada to exist it has obligations to be in partnership with Indigenous Nations. In this way, while we write we can both recognize Indigenous sovereignty while diminishing Canada's ability to claim sole authority over the legal and political realm.

Conclusion

Since the Supreme Court of Canada's *Calder* (1973) decision, Canada has been forced to recognize that Aboriginal title exists. As a result, Canada has indirectly recognized that Indigenous peoples were self-governing prior to British occupation, however, there has yet to be a comprehensive and adequate articulation of the ongoing sovereignty of Indigenous peoples in

Canada. Indigenous Nations across Turtle Island have questioned to what degree Canada “owns” their lands and have done so in a myriad of ways. My thesis focuses on Canada’s responses to Indigenous peoples’ claims of sovereignty and self-determination over their lands. Primarily, I centre my critical analysis on Canada’s land claims policy regimes and their relationship to the Supreme Court of Canada’s jurisprudence regarding Aboriginal title. I ask a) what does it mean for Canada to “give” land back to Indigenous Nations that it does not hold title to in the first place, and b) by what strategies has Canada come to claim sovereignty and radical title over Indigenous lands? These questions may only be answered by uncovering the political rationalities and objectives that Canada has enacted and sought since the establishment of the colony under British colonialism. I argue that the project of settler-colonialism, as a form of governmentality, is an unfinished project that constantly seeks the erasure of Indigenous peoples and polities in favour of white-settler society.

Proceeding through three chapters entitled “The Culture Concept: Towards an Anthropology of Political Subjects”, “Claims or Treaties: Aboriginal Title, Sovereignty and Jurisdiction”, and “Land Back: Thoughts on Canadian-Aboriginal Affairs, Indigenous Law and Direct Action”, I document the relationship that the anthropological project has with enabling the epistemic violence asserted through the unique iteration of Canadian settler-colonialism. Chapter one traces the anthropological discourse regarding the “culture” concept through the nineteenth and twentieth century, to delineate on the discipline’s harmful relationship with liberal enlightenment thought and evolutionary models as they pertain to Indigenous peoples. I hold that it is this relationship that formed a body of knowledge that continues to contribute to the othering of Indigenous peoples. This form of settler-colonial othering sets Indigenous peoples firmly in the past, carrying with it harmful identity constructs that enable the epistemic violence required for

eroding Indigenous title and rights. In chapter 2, I demonstrate how this form of producing knowledge of Indigenous peoples has led to a type of a “politics of recognition” that is unwilling to attend to Indigenous Nations’ rights to be self-determining. Following the Court’s jurisprudence of Aboriginal title and Crown title (1888-2014), I look at the changing doctrinal justifications for Canadian colonial authority and settlement. In the final chapter, I present a discussion on what it can mean for Indigenous Nations to enact their own laws without appealing to colonial authorities for recognition, and how the settler-state then responds. This centers around the burgeoning Land Back movement to understand what it means for Indigenous peoples to engage in a form of counter-conduct that favours ethico-political self-formation and resurgence.

CHAPTER ONE

THE CULTURE CONCEPT: TOWARDS AN ANTHROPOLOGY OF POLITICAL SUBJECTS

[Culture] can be understood only as an *historical growth* determined by the social and *geographical environment* in which each people is placed and by the way in which it develops the *cultural material* that comes into its possession from the outside or through its own creativeness (Boas 2010 [1927]: 4 [emphasis added] [sic]).

Those which, having a *historical continuity* with pre-invasion and pre-colonial societies that developed on their *territories*, consider themselves as distinct from other sectors of societies now prevailing in those territories...and are determined to preserve and transmit to future generations their ancestral territories, and their *ethnic* identity, as the basis of their continued existence as peoples (Cobo 1986: 21-22 [emphasis added]).

The above two definitions, coming from separate temporal positionings, each sought to identify what it means to have “culture”, and what it means to be Indigenous, or to embody an Indigenous identity (i.e., Indigeneity). On the one hand, German anthropologist Franz Boas’s definition sought to establish the “culture” concept to explain historically particular differences between societies on the basis of their geographical location and “cultural material”. Boas hoped to disrupt the structural functionalist rendering of society and culture as universal, with its baggage of biological racism (Boggs 2004: 195). He presents the importance of recognizing the dense entanglements of cultural systems and resisted the mistake his predecessors to disregard the embodiment of systems (Boggs 190; Rodseth 2015: 870). However, the “social” and “geographical” locations that Boas championed as vectors of relativity became some of the most harmful positionings as they relate to the temporal spatialization of “ethnic” and “cultural” identities, known as the process of Othering (Fabian 1983; Simpson 2018). The second definition is the United Nation’s definition of Indigenous peoples. José Martínez Cobo’s (1986)¹⁶ definition

¹⁶ This is from the United Nations (UN) working definition in the “Study of the Problem of Discrimination Against Indigenous Populations”. It is worth noting that the UN’s definition of Indigenous peoples has not changed since the 1986 definition. In fact, the only difference is the addition of an important aspect of self-identification, which is due to direct influence by Indigenous peoples.

of Indigenous peoples is starkly similar to Boas's definition of culture. This is not a coincidence. The UN, and the nation-states that compose it, rely on anthropological knowledge to formulate a definition of what constitutes Indigenous society. Without being careful in seeking to define what Indigenous peoples "are", each fall into a harmful tradition of ongoing epistemic violence against Indigenous peoples. I want to touch on how this legacy has impacted my own research due to its relationship to Canadian history and anthropological analysis.

Canadian Essentialism and the Policy of Gradual Enfranchisement

Culture is often used to determine localized difference that inform the process of territorializing identity (Malkki 1997). This framing especially gained traction in the post-WWII years (1945-) with the rise of independent nationalist ethno-states, but it is also the epistemological underpinning that influenced generations of Canadian bureaucrats on how to solve the "Indian Problem" in the 19th and 20th centuries (Titley 1986). It is at this juncture that culture (and ethnicity) was used broadly as a general ordering of difference to advocate for liberal multicultural or assimilatory projects, or both simultaneously. The cultural relativism, as well as salvage ethnography advocated by Boasian anthropology (Simpson 2018), and operationalized in liberal forms of rule, enacted difference and diversity as a managing technique, or technology (Rose 1999), to produce a multicultural polity. Within these polities, certain cultures deemed unruly required exclusion, and others deemed civilized were granted inclusion (Bennett 2015: 560; Agamben 1998). Therefore, even if a discourse surrounding a "politics of difference" exists, as liberalism is a political expression of Western-centred traditions regarding culture, it cannot be neutrally multicultural in recognition policies and can be harmful for its tendencies to essentialize and reify culture (Taylor 1994: 38, 62). It is this position that is implicated in Canada's taxonomic practices of recognition as it lends itself to techniques of statecraft (Coulthard 2014).

This obsession that colonial states have with cultural improvement and civilizing missions is a direct result of Enlightenment philosophy and anthropological representations of Indigenous people that I will describe within this chapter. These attitudes are painfully present in the Gradual Enfranchisement Act (1869), which would eventually be part of the omnibus legislation, the Indian Act (1876). The Gradual Enfranchisement Act, and its successors, explicitly sought to assimilate Indigenous peoples into the Canadian body politic. The idea was that once an Indigenous man reached a certain level of education and property requirements, they would become enfranchised, meaning gaining citizenship and losing Indian status. For Indigenous women, the policy meant that if they were to marry a white male, they would gain Canadian citizenship and lose status. Read alongside the Indian Act, these policies controlled who was an “Indian”, what constituted an “Indian” band, how reserves could be surrendered, and what spiritual practices were deemed unruly. All had the explicit purpose of ensuring the erasure of Indigenous peoples (Leslie 2002: 25), which has been recognized as constituting genocide by the Truth and Reconciliation Commission (2015) and the Nation Inquiry into Missing and Murder Indigenous Women and Girls (2019).

What is crucial here is upon what justifications these acts of genocide rested. Duncan Campbell Scott exemplifies the typical Canadian bureaucratic justification of those actions. Scott was Deputy Superintendent General of Indian Affairs from 1913 to 1932. He oversaw the intensification and implementation of many of the Indian Act policies from increasing residential school attendance and disposing of self-determining governing structures in favour of imposed band councils, to the expropriation of Indigenous lands (Titley 1986). Scott had a particular aversion to Indigenous political organizations that sought to maintain their self-determination such as the Haudenosaunee confederacy at Six Nations of the Grand River (Capatano 2007). He was

bent on seeing Indigenous peoples acquiring Canadian sensibilities. In fact, he was convinced that “as a class and race Natives would move forward only by being inexorably absorbed within the Canadian body politic” (Capatano 2007: 107). And the way to “move forward” and progress in line with the positivist school of thought was “to undergo a cultural reconstruction through submitting to education, enfranchisement and capitalism, leavened with Christian philanthropy” (Ibid). Speaking on the enfranchisement policy in 1920, Scott clearly demonstrated his feelings toward Indigenous peoples:

With reference to enfranchisement I may say that the policy of the government is to carefully protect and educate the Indians and to thus contribute towards their civilization in order that they may eventually be merged in the general body of citizenship. If this in any way conflicts with the aspirations of Indians whose faces are set against ultimate destiny, it can only be regretted (as quoted in Titley 1986: 116).

There is no doubt that Scott’s own personal goal was to acculturate Indigenous peoples and believed it was their “ultimate destiny”, demonstrating his adherence to an evolutionary model of thinking. He sought to ensure that “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”¹⁷.

Evident in Scott’s thinking about these Canadian colonial policies is the need to rid Indigenous peoples of the shackles of tradition in favour of modernity. This directly mirrors the way the sub-discipline of anthropology and ethnology called “Iroquois Studies” represented the Haudenosaunee Nations—Mohawk, Cayuga, Oneida, Seneca, Onondaga, and Tuscarora (Fenton 1998; Morgan 1877; Parker 1916; Shimony 1961; Weaver 1994). The sub-discipline was engaged in a sustained practice of salvage ethnography¹⁸—a form of anthropology that believed it was

¹⁷ National Archives of Canada, Record Group 10, volume 6810, file 470-2-3, volume 7, pp. 55 (L-3) and 63 (N-3)

¹⁸ This form of salvage work that Morgan (1877), Fenton (1995), and others did, created a cultural artifact that is then rendered readable by colonial law and tradition, requiring a “people” and a “nation” to be subjugated, managed, and disciplined to form more amenable subjects that they can provide for. By reviewing what was “Iroquois”, these authors cast Iroquois peoples as essentially stable in their cultural continuity. However, if we critically examine Fenton’s claims that the Iroquois are the most commendable for maintaining cultural continuity, what he is saying is

inevitable that Indigenous peoples would disappear—that documented the Iroquois “culture” and “tradition”. Treating it as an enclosed system, those who deviated from the “traditional” were quickly labelled, in both positive and negative senses, as modern “Indians” and progress (Elbourne 2012). Those who held on to “tradition” needed civilizing and education. The anthropologists cited above essentially invented the colonial dichotomy between tradition and modernity. Based on those attributes, this charge of “factionalism”—as it is known in the sub-discipline— “tends to blame the victims of colonialism for not solving problems and ‘getting along,’ rather than owning up to a complicated legacy of exploitation and racism that sets marginalized groups’ members against one another” (Capitano 2007: 5). These so-called “permanent factions as described in the anthropological literature” do not exist in reality (Ibid). Though I cannot go into detail here, suffice to say Haudenosaunee authors critique these “cultural” formations as a colonial paradigm (see Elbourne 2012; Hill 2017; Simpson 2014). Anthropology’s reification of these “cultural” forms has enabled these forms of truth-claiming to seep into the political realm. It is this very form of knowledge with the baggage of the Enlightenment that is operationalized in colonial policy making as seen with the case of Duncan Campbell Scott.

The legacy of this form of truth-seeking and its relationship to colonial policy making has affected my own research. On June 13th, 2021, I received an email from Jason Arbour. As we have seen in the introduction, Jason is the Chief and Legal Representative of the Kanien’kehá:ka of Kana:tso. The Kanien’kehá:ka of Kana:tso are a First Nation community who are currently advocating that their sovereignty has never been extinguished and that they have been unlawfully removed from their territory—areas of Ottawa and Gatineau. Jason and I have been in contact

that anyone outside of the cultural object created by these ethnologists would no longer be “Indian” enough. And if one is assumed to not be “Indian”, they are then a subject of the Crown, of Canada, just like any other citizen. This is one of the many ways that authenticity is operationalized as a form of erasure.

since April 2021. We had hoped to formulate a project that would help in Jason's pursuit of recognition by the Canadian government which has been an ongoing fight since 2017. However, due to the nature of requiring written consent, the relationship I held with the University of Ottawa, and the wording used as per the guidelines of the Ethics Review Board, I was unable to gain approval from his community and the clan mothers. I am unable to produce the conversation in full due to my ethical positioning, but there is one attribute I wish to discuss as it relates to anthropology's role in settler-colonialism. With permission from Jason, I share below a small part of the rejection letter I received:

I have shared your email and consent form with some community members. Unfortunately, certain community members are very concerned about the signing of any papers and the impact the University may have on our oral history and perception of certain documented records. The concerns and confusion regarding signing any consent form derives from experiencing historical and present-day systemic racism, as well as historical and present-day misrepresentations. Eurocentric perceptions regarding our burial ground and Indigenous title has disconnected our society from fact and our community from justice.

The idea of signing papers for many Indigenous communities often brings with it memories of trauma due to experiences with colonial officials and harmful research (see Lyons 2010). Jason and his community were concerned about what how their knowledge would be represented if authorized in an academic context. He identifies that this concern is tied directly to their experiences of historical and contemporary racism, and the misrepresentations and misuse of their knowledge. Even though my project was not about uncovering their "culture" as those anthropologists I mentioned before, the weight of the historical and contemporary harm that has come out of academic projects was too great.

When I first began this research, one of my main concerns was not reinscribing liberal settler multiculturalism styles of colonialism. In relation to my ethical and academic positioning and how this has developed through my personal relationships with Indigenous friends, I was

taught to be cautious around how I approach who has the authority to sanction research within Indigenous communities. Professor of Queer Studies at Queens University, Scott Lauria Morgensen (2012), discusses the subtleties involved in defining Indigenous authority for ethic review boards. Morgensen (2012) warns that establishing band councils (imposed governing bodies) as the gatekeepers of Indigenous knowledge within ethics reviews “mediates knowledge about Indigenous people using two apparatuses of liberal settler multiculturalism: ‘self-governance,’ devolved within colonial law; and ‘protection’ as a means of entering the academy and its funder, the state” (807). The Kanien’kehá:ka of Kana:tso are not “status Indians” and therefore have no band council under the Indian Act, but I think Jason and his community’s concerns speak to the issues involved in the way we as settler researchers conduct research. We must recognize that there is an imperative on the part of settler states and universities to increase the knowledge production on Indigenous peoples so that they can be accommodated “under governmental logics of inclusion or reconciliation” (Ibid). This has been a long-standing issue, recognized in anthropological work stemming from Elizabeth Povinelli’s work (2002) when she diagnosed this rationality as “liberal settler multiculturalism”. These issues continue to persist, and Jason and his community made it explicit that the wedding of anthropology and state policies bars his community from gaining justice.

This politics of difference that has become so powerful in Canada and other liberal multicultural settler states predominantly works off the operationalization of the anthropological concept of culture. If we are to properly acknowledge this issue, it requires asking what anthropology is without starting from culture. Anthropologist Paul Rabinow asks us (2007: 109), “what if we did not assume that our task is to write culture? And what if the search for another form of anthropological inquiry proceeded from a different set of distinctions”? I believe that when

anthropologists work with communities that are not part of the settler-state's dominant politics, we must also commit to interrupting the state's production of normative claims. In this chapter, I seek to interrupt the colonial standards of acceptable difference, while in the proceeding chapters I relate this discourse to Canada's treatment of specific Aboriginal rights.

Setting the Stage

An important and critical discussion needs to center on the anthropological encounter with colonialism and the identity constructs embedded within. This conversation needs to begin with understanding how anthropology's academic currency, namely the culture concept, has become operationalized in both its liberalism and settler-colonialism forms. I contend that for anthropology, the culture concept (herein culture) has come to represent the main theoretical approach in understanding human communities and in describing social processes, particularly their differences. Since the twentieth century, cultural theory was elevated to a quasi-scientific level of analysis, while also being widely accepted as that which orders human communities in the popular imagination. As it has become so salient when discussing human communities, it is worth being attentive to the epistemological underpinnings of such a theoretical orientation.

At first glance, the idea that these two traditions of cultural theory and liberal theory are so intimately connected may seem incongruent. In part, this is due to the understanding that liberal theory holds at its core a sense of universality whereas cultural theory is meant to explain alterity across time and space, and therefore relativity (Boggs 2004). I argue that placing liberal theory as the epistemological foundation of settler-colonialism helps to illuminate how culture, in relation to Indigeneity, is connected. This requires demonstrating how liberalism operationalizes a particular form of culture to justify colonial domination (Canessa 2017). By taking a historical genealogical approach to the development of each concept, I identify that an image of Indigenous

peoples is foregrounded in settler-colonialism's universalizing liberal project and all the entailments that follow it—individualism, property, and statism, to list a few. As is evident with the definitions of Indigeneity and culture at the beginning of the chapter, identifying the quality and substance of Indigenous identity (and the “Other”) has always been intrinsic to European epistemological work (Said 1989).

Taking up culture as an important element of the liberal-colonizing project, I trace historical articulations of the culture concept through the ethnographic record (Tylor 1871; Morgan 1877; Boas 1911; 2010) and demonstrate the relationship it has to liberalism's epistemic justification for the colonization of Indigenous peoples. I then turn to a selected review of anthropology's “crisis of representation”, as it relates to problematizing “culture” in the attempt to critique the discipline's reliance on the liberal-culture paradigm (Asad 1973; Clifford & Marcus 1986; Said 1989). And finally, I present ways to avoid the objectifying tendencies of the culture concept (which will also include identity writ large). I follow how practice theory (Ortner 1996; 2006) investigates this problem and turn to the critiques that social theory is the science of “unfreedom” (Laidlaw 2014). Finally, I will discuss how the concept of political subjectivity in a Foucauldian ethical analytic (Foucault 2005; Krause & Schramm 2011) may provide a stronger conceptual pathway to position against “culture” and identity as they relate to Indigenous peoples.

THE COLONIAL ENLIGHTENMENT

Liberalism's so-called rule of law allows the state to lay claim to an efficient technocratic administration that encompasses all its subjects. These “subjects” are a particular rendering of citizenship that is awarded to the politically qualified European (typically white) masses. Liberalism's (and perhaps neoliberalism's) reliance on the continuity of an ahistorical, self-

actualized citizen-subject with its focus on individualism and a condition of *homo economus* (Ong 2006: 10) has resulted in the displacement of other subjectivities.

In early liberal thought (Hobbes 1651), those who were represented as having culture were seen to be in an early stage of ignorance—a state of nature. It was “they” who were unable to comprehend the rationalism zealously lauded by the liberal order and therefore, were considered to be temporally asynchronous to settlers (Fabian 1983). The rational self-evident subject in European liberal philosophy was the “‘final man’ who has ascended through the dark stages of ignorance to enlightenment by shedding the illusions of ‘culture’, custom, and superstition” (Boggs 2004: 190). It was those who had culture that were “primitive” Others without the capacity to govern¹⁹. On the flip side, other liberal thinkers from Rousseau (1712-1778) to Kant (1724-1804) saw culture as a form of liberation from nature; that culture was a prerequisite to becoming civilized (Gregor 1974: XXI). Depending on the period of the Enlightenment one analyzes, either the absence of reason meant you have culture and are therefore bound in a state of nature (as with earlier thought), or the ability to have reason meant you have culture and were liberated from nature (as in later thought). Each are dubious and detrimental.

The idea of that the figure of the “primitive” Other came as a result of liberalism and its effects are well established in anthropological and political literature (Asad 1973; Fabian 1983; Gupta et al 1997; Nadasdy 2017; Simpson 2014; Smith 1999; Vine Deloria Jr. 1987), however I want to add that it is not just the fact that liberalism and the colonial project relied on an anthropological account of culture to make such claims. I suggest that liberalism actually *required* the creation of

¹⁹ Boggs (2004) mentions that cultural theory did in fact displace liberal theory. He is careful to note that with cultural relativism, liberal theory had a difficult time maintaining the simple universality it had prior. Though crucial to the argument I am making above, liberal theory still underpins most of the powerful Western institutions, and so liberalism merely thrives as being yet another form of “culture” regarding ideas about humankind, property, governance and so forth. It is the ability of Western powers to make it so widespread that makes it seem universal, even though it can also be understood in a cultural relativist view as just one way of being (Boggs 189-190).

a “primitive” Other to even begin imagining what forms of liberal authority their nation-states could achieve. Anthropologist Andrew Canessa (2017: 71) argues that “Indigenous peoples were necessary to how Europeans imagined the nation state and, especially in the Americas, played a major role in its development right up to the present day” (see also Graeber & Wengrow 2021; Shaw 2008). Why was it so crucial to European thought to have the Other to imagine themselves and their politics?

Liberalism and the Enlightenment

Thomas Hobbes (1558-1679) was one of the first to locate a fictive pre-political, pre-subject natural state of being with the Indigenous peoples of America. And even though he advocated for an absolutist monarchy as the ideal state, he is largely credited for outlining liberal concepts. Many argue that our conceptions of sovereignty, to this day, continue to rely on a Hobbesian model (Nadasdy 2017: 69; Shaw 2008). Hobbes (1651) believed that all human events and histories were the result of a great chain of causality, by way of God. It makes sense then that Hobbes saw that the only way to end human suffering (the natural state of being) was to produce an ultimate being—the absolute sovereign—to quell dissent and enforce a social contract (Graeber and Wengrow 2021: 6). This of course allows for little alternative political organization. According to Canadian political scientist, James Tully (1995:64), this reference to pre-modern subjects (i.e., Indigenous peoples) is meant as way to demonstrate a sort of progress towards a scientific and rational form of government, as opposed to primordial chaos. As Tully notes, this form of government is meant to be rid of all custom as new forms of “rational” government were held to be on a higher stage of development, far away from the “customs of non-European societies at ‘earlier’ and ‘lower’ stages of historical development” (Ibid). According to Hobbes, those “savages”—who lived in a brutish manner and in a constant state of warfare—, held no concept of property, and therefore had no

need to be recognized in the same manner as their European counterparts. Hobbes required the construction of the Indigenous other to be able to craft his version of the sovereign nation-state and then to justify it (Canessa 2017). By placing Indigenous peoples on a lower form of subjectivity, Europeans would continue to use these epistemological means to commit very real violence on those they considered to be less-than-human subjects.

In her work with the Algonquins of Barriere Lake, Shiri Pasternak (2017) recognizes that because of these epistemological underpinnings, Canadian sovereignty is presumed to develop naturally from a Hobbesian condition that requires political authority to maintain control. Setting the conditions of authority becomes a “necessary and natural” development “rather than [a] contingent and violent” one (11; see Chapter two). Tully (1994: 156) suggests that “one of the leading problems [for] political theory from Hugo Grotius and Thomas Hobbes to Adam Smith and Immanuel Kant was to justify the establishment of European systems of property in North America in the face of the presence of ‘Indian Nations’”. Within that problematique, I argue that the qualification of European subjectivities and the disqualification of Indigenous subjectivities is one such justification used to solve this problem²⁰. Framed under the fictive identity of pre-modern and pre-subject, Indigenous peoples became an object which “enable[ed] and privilege[ed] a certain form of reason” to be utilized as the main factor in social evolutionary ordering (Shaw 2008: 23).

The Cultured Enlightenment

²⁰ By qualification and disqualification, I am also referring to Foucault’s (1980: 82, 84) idea that certain assemblages of power act to “subjugate” or “disqualify” knowledge in order to represent them as inadequate and lacking in relation to higher levels of knowledge. I am modifying this a bit to envelop the idea of qualification and disqualification as it relates to “subjectivities” in the Foucauldian sense of the term, that I outlined in my introduction.

As stated above, Hobbes is not traditionally understood to be an Enlightenment thinker, in fact much of Hobbesian thought was against the forms of liberalist forms of freedom that Enlightenment embodied. Even though he did not explicitly speak of “culture”, Hobbes and his thought are nonetheless important to the colonial encounter because he began to layout what can be considered an evolutionary historical approach to political theory by using Indigenous peoples as representations of a pre-political past. What Hobbes did was set the conditions for recognizing a distinction between who is human and who is not (Nadasdy 2017: 70). Indeed, sovereignty itself is a privileged form of politics and rationality which serves as an “anthropological machine, [a] device for producing the recognition of the human” (Agamben 2004: 26). In the qualification of what is and is not a human, modern political theory began to advocate for a certain form of government while justifying this project through the erasure of Indigenous subjectivities, which is an all-too-common theme.

Understanding what constituted the political had, in the Enlightenment, always been concerned with questioning what it meant to be human. And, discussing what it meant to be human often involved Indigenous peoples (for the most part as objects) due to the “series of encounters between European colonists and Native American intellectuals in the seventeenth century” (Graeber and Wengrow 2021: 25). It is worth noting that these encounters were “both more subtle and profound than we usually care to admit”²¹(Ibid). Before I delineate on the more well-known

²¹ Historians usually tell the story of the Enlightenment as the result of individual great thinkers changing the course of European intellectual trajectory, affecting everything from statehood to the economy. Yet, as Graeber & Wengrow rightfully point out, these thinkers and their intellectual contributions did not exist in a vacuum. In many cases, like Graeber & Wengrow’s example of Leibniz, many Enlightenment thinkers openly suggested that what they wrote about was not their own work, but actual Indigenous thought. The existing debate is whether these thinkers were exoticizing and otherizing those “Chinese, Persian, or indigenous American ideas,” or whether their writings were a result of their own “thought work” in a vacuum (Graeber & Wengrow 29)? I do not mean to take these questions seriously, because evidently, there is no potential vacuum at a time when Europe was encountering many different societies across the world with their own intellectual tradition, and of course, to some extent Enlightenment thinkers—for instance, Hobbes—created stories of these exotic Others as a backdrop to their own

theories of culture from anthropology, I want to consider an earlier genealogy of culture stemming from Kantian philosophy and his construction of history.

To understand what it meant to achieve enlightenment, or how the subject becomes enlightened, Kant turned to the individual to explain the relationship between freedom and education (Kant [1784] 2006). He outlined that the way to reach freedom (equated with enlightenment) was through self-oriented education (Scupin 2018: 243). Importantly, as Laidlaw (2014) mentions, Kant did not see freedom as merely the absence of external influence—culture—but was necessarily contingent on the self’s consistency with cultural formations (144). Kant ([1798]1974) held a series of regular lectures (1772-1796) on the topic of anthropology, published as *Anthropology from a Pragmatic Point of View*. In these lectures, he hoped to outline “man’s” ability to “rise above his ‘crude’ nature by becoming both cultured and civilized” (Gregory XXIV). In doing so, one would become enlightened. Therefore, it was thanks to “cultural progress” through reason that humankind’s education would reach different stages (Kant 1798: 3). It was reason above all else that could improve one’s own lot by removing the intellectual barriers towards becoming “a free-acting being [that] makes of himself, or can and should make of himself” (1798: 119). Yet, Kant was too comfortable in “confirming” to his students that it was the white man who had the natural pre-disposition for this type of enlightenment and that in fact, Indigenous Americans were lazy, indolent, and without culture (Flikschuh and Ypi 2014)²². Kant assumed that

intellectual projects. I am only suggesting that even if all European thinkers were exoticizing Indigenous thought, or if their thought came from an enclosed monolithic intellectual tradition, in either situation, no external “body of ideas...could possibly have any influence on [European thought]” (29). Unfortunately, I could not include this line of argument from Graeber & Wengrow due to space constraints, but I think it is crucial to mention here due to the interruption it provides in how we think of European history.

²² I want to identify that there is another attribute of Kant’s interpretation that is more positive than the one I am providing here. The German term that Kant (1798) uses is *Kultur*, and it can be understood to be about cultivating oneself. Kant may not have meant an enclosed system of culture that later anthropologists would take as their object of analysis, but instead he might have shared more affinity with the Foucauldian concept of subjectivity. I choose to take the line of analysis in the body of this section because of how detrimental the idea of progress has been for Indigenous peoples.

to overcome a stage of immaturity, one must obtain culture in a civilized mode of pure reason (Scupin 244). This form of understanding would lend itself to the unilineal evolutionary developmental framework touted by Edward B. Taylor (1871) and Lewis Henry Morgan (1877) in their stages of socio-political organizations from savagery, to barbarism, to civilization²³. Evidently, there was always an intimate connection between culture and historical “progress”.

This is not to forget anthropology’s debt to social theory’s lineage and the relationship each had with Enlightenment philosophers. From Auguste Comte to Emile Durkheim, social theory sought to determine what constituted social life, and therefore “society” as an object. Those who prescribed to the Cartesian divide and early nineteenth century positivism believed social life was subject to a series of transcendental knowable laws, and the individual became a separate entity albeit influenced by these “laws” (Laidlaw 2014: 10, 18). This lineage is important for how it differed from Kant’s philosophical stages of reason and yet was still indebted to it. According to Durkheim, the ability to have reason became a fact of what stage of social life a group was in (Laidlaw 9). For a positivist like Durkheim, knowable laws regarding social life were “amenable to expertly guided improvement and reform” (Laidlaw 19). As a result, many of the anthropologists coming out of these traditions were ingrained in an evolutionary framework and applied it to human formations such as race, society, and culture (Scupin 2018: 245; see Morgan 1877).

Culture: Anthropology’s Toxic Companion

Turning to anthropology, Edward B. Tylor’s²⁴ publication of *Primitive Cultures* (1871) set the stage for a systematic, yet in some ways holistic, definition of the culture concept through his

²³Interestingly, one of Kant’s students, Johann Gottfried Herder’s (1744-1803) work, is sometimes recognized as a forerunner to what became cultural relativism (see Denby 2005; Rodseth 2018).

²⁴ E.B. Tylor is considered a founder of cultural anthropology, though of a structural-functionalist nature.

utilization of material culture (Scupin 245; Watson 1995: 683). Often cited, Tylor insisted that “Culture...is that complex whole which includes knowledge, belief, art, morals, law, customs, and any other capabilities and habits acquired...as a member of society” (1871:1). What is of importance to this discussion is not the already condemned connection Tylor’s definition had with “cultural hierarchies, evolutionary conceptions of racial difference and genocidal colonial projects”, but rather how it differed from what was to come with Boasian and structuralist anthropology (Bennet 2015: 547). Tylor, and for that matter Malinowski (1922), understood culture (like the type of “society” constructed by the positivists) as a series of traits and practices that were a closed, internally bound system that served a pragmatic function (Bennet 2015; Ortner 1984: 131). This type of anthropology is similar to Kantian musings on the young discipline, except for the fact that Tylor, alongside Morgan (1877), were further entrenching culture within stages of social evolution. Ethnological evidence and philosophical reasoning were used to present a “unified science...aimed to extend its principles to represent and properly govern society” (Boggs 2004: 188)²⁵. The project of the social sciences was about forming a universal scientific theory to explain human action and reasoning, but Franz Boas hoped to formulate a cultural theory that asserted the historical particularism and cultural relativism of each society (Scupin 246).

At this juncture, approximately the 1880s, the American anthropology school began to form around Franz Boas and his future students (Mead, Benedict, Kroeber, etc.). Arguing against those who rendered society and culture as something universal that can be separated from the particular (Boggs 2004: 195), Boas sought to present the dense entanglements of cultural systems and resisted the mistake of the previous authors to disregard the embodiment of the systems (Boggs

²⁵ However, this form of social-scientific theory did not spontaneously erupt and is highly contingent on the Cartesian moment (see *Alternatives to Culture*; Foucault 2005: 14; Latour 1993).

190; Rodseth 2015: 870). Based on Boas's fieldwork with the Kwakiutl and the Inuit, cultural theory came to be framed as "dynamic systems of symbols that become manifest in distinctive cosmologies, social orderings, (cultural) behaviors, and material forms" (Boggs 195). Culture, then, used in this fashion, was meant as a renunciation of both liberal theory and evolutionary schemas with their entailments of universalism, race, and progress. However, this only spawned a new school of thought known as American cultural anthropology and as Ortner (1984) reminds us, the evolutionary schema of Tylor and Lewis Henry Morgan rested comfortably in the American cultural ecology school well into the 1960s (132). Therefore, even with Boas's cultural theory challenging the universality of social orderings in favour of the particular, he presented alterity as the central quality of culture over continuity across humanity. Boas himself clearly recognized that culture can only be understood "as an historical growth determined by the social and geographical environment in which each people are placed and by the way in which it develops the cultural material" (as quoted in Bennet 551). Culture could only materialize for the voyeur if placed within a specific historical context situated within the social and geographical environments. Culture's essential qualities were its contingencies and the difference between human communities. From this moment on, culture became the anthropologist's way of using alterity (predominately in Indigenous contexts) as an avenue to make claims on the dominant cultural context (think about the commonly taught quote in undergraduate courses, "make the strange familiar, and the familiar strange"). Arguably, Boas made positive contributions by critiquing scientific racism, but his approach merely allowed for the opening of culture to a new pairing, that of geographic location and a determined sociality.

The Crisis of Representation

The Boasian approach that treats culture as a relativist complex system of meaning that is a “something” that is accessibly knowable as an object remained largely intact as did the evolutionary model (see Chagnon 1968). By the 1980’s, via a symbolic anthropology reading, culture came to be seen as a “serious fiction” (Clifford 1988: 10). With the publication of *Writing Culture* (Clifford and Marcus 1986) and its companion text *Anthropology as Cultural Critique* (Marcus and Michael 1986), James Clifford & George Marcus were reckoning with the tradition of ethnography being unidirectional, representationally fixed, and tending to fetishize interlocutors as objects. This period, roughly from the late 1970s to the early 1990s, has become known as the crisis of representation.

Symbolic anthropology, along with critical anthropology (Diamond, Scholte, and Wolf 2012) and feminist anthropology (Haraway 1991), sought to challenge what it meant to speak of culture and what it meant to have ethnographic authority to describe such cultures. This literary turn best articulated how presenting culture through the ethnographer’s writing meant privileging representative description over recognizing the constitutive nature of this encounter (Scholte 2012: 62). Clifford & Marcus (1986) identified that in the literal sense, ethnographers write culture. That is, culture is not an entity, or a complex series of practices located in spatial-temporal frames, rather it is inherently a literary representation that cannot be disguised as merely a description of an external reality (culture). Additionally, Talal Asad (1973) and Edward Said (1989) critiqued anthropologists for depicting “their” subjects as objects, informing the construction of ahistorical “Others”. Each posited that this resulted in a reductionist approach that assumed these groups were pre-political and without Western civilities. Anthropology was in crisis. It was clear that the ethnographer needed to address their positionality when it came to reifying culture. Clifford

thought that if, traditionally, anthropology has been centered in a Western gaze and has been understood as a “totalizing project”, it did not mean that it will be so for eternity (Clifford 1983: 119-120). By recognizing partiality and our interpretive power in all things we do, it was possible to have an engaged anthropology and continue using the culture concept as a way into the relative world of cultural meaning²⁶. What the symbolic anthropologists neglected to articulate (though feminist and critical anthropology²⁷ had) was how power relations affected our representations.

What followed was a “politics of position”, which meant locating ourselves in concrete social structures to better understand what power and position we as researchers bring to people with different structures and different privileges (Hartsock 1987: 188). This was an important articulation that pushed anthropology past the mere recognition that “their” subjects had subjectivity and unique histories. Attending to structures of privilege allowed anthropologists to recognize that certain voices were more powerful, and that if they did not attend to this they were “sanctioning some points of view while silencing others (black, female, working-class, [Indigenous])” (Jackson 1991: 133). Therefore, by following a “politics of position”, anthropologists could move beyond collecting stories for their own use, and colonizers’ usage for that matter, and categorizing their subjects as authentic Blacks or “Indians” in relation to sanctioned cultural formations; instead, they were turning their gaze upon the institutions of oppression (Hooks 1990; Gupta & Ferguson 1997; Nader 1997). These turns in anthropological focus recognized the importance of questioning how culture is problematically spatialized, and the

²⁶ To be sure, *Writing Culture* was not a monolith. It should be understood as a debate surrounding what has come to be called post-modernism, and the role of the anthropologist in what ways we represent “reality”. The debates and entrenched positions that this started are so vast that I cannot fully comment productively, but suffice to say that the position between the relativist and anti-relativist is an ongoing issue in anthropology (James, Jenny & Dawson 1997; Strathern 2004). I think it is worth mentioning that as long as these debates exist between what is objective reality, what is relativity, and what is anthropology’s object, the anthropologist will follow a middle ground (Hirst 1985).

²⁷ It must be mentioned that the political economy approach that critical anthropology uses has been heavily critiqued for its equation of culture with ideology (Ortner 1984). It is perhaps in feminist anthropology that we find a stronger approach to identity for its fluid, practice oriented, and symbiotic aspects (see *Alternatives to Culture*).

interplay between the construction of culture and its operationalization through power (Gupta & Ferguson 3). Importantly, culture was still part of the anthropological lexicon which as I show in chapter two, is utilized to diminish Indigenous claims to self-determination and ownership of lands. I suggest that these cultural approaches, and other forms of reduced subjectivity read through Canadian colonial logics, limit Indigenous identity in such a way that Indigenous peoples and their affiliated Nations are reduced to a form of taxonomic cultural practices that imbues them with a core sense of “Indigenusness”, thereby enabling Canada to “give” modified cultural rights. In the following two chapters, I argue that colonial recognition needs to pivot from cultural models towards a more complex understanding that formal political structures are unique to all Indigenous Nations. not derivate of their cultural rights. By doing so, we, as Métis scholar Chris Andersen (2014) suggests, may yet alter the course of colonial recognition towards politically focused recognition with real governing powers over cultural ones derived from Canada.

TOWARDS AN ANTHROPOLOGY OF ETHICS

Political Subjectivity

At this juncture, this is where I think Rabinow’s (2007: 109) question about what it means for anthropologists to start from a different set of distinctions, gains its relevancy. Rabinow suggests that abstract formations isolated from context and practice do little analytic work. In questioning where to start an anthropology without culture, I feel it starts by recognizing human and non-human subjectivities as they manifest in interactions between multiple beings or moments. To do so, is a negation of problematic colonial, liberal, and anthropological epistemologies in favour of decolonizing perspectives (Corntassel & Alfred 2005). This chapter problematized the culture concept, its entailments, and its uses in liberal forms of recognition while also advocating for a pivot away from cultural identity in favour of an anthropology concerned with outlining how

subjects become politically recognizable in their practices of self-making and their interactions with power. That is, I advocate for starting anthropology from the point of view of political subjectivities.

Recall from the introduction that Foucauldian subjectivity is about the position a subject holds in relation to others that is “produced by discursive regimes [that are both] self-making and being-made by power-relations” (Ong 1996: 737). I want to push this further to recognize that subjectivity is not simply the result of social outcomes or structure, which sounds like practice theory, but “provides the ground for subjects to think through their circumstances and to feel through their contradictions.... Subjectivity is the means of shaping sensibility. It is fear and optimism, anger and forgiveness, lamentation and pragmatism, chaos and order.” (Biehl, Good, and Kleinman 2007: 14). If all social theory since Kant, and perhaps before, has been concerned with describing the relation between humans as “nature” and humans as free and rational beings, then subjectivity hopes to capture “the dynamic and unsolved tension between the bodily, self, and social/political processes” (Biehl, Good, and Kleinman 2007: 15; Laidlaw 2014: 20). It resides within these assumed contradictions between structure and agency and opts for an ethical approach rather than structural.

As earlier demonstrated, culture finds its origins in the Enlightenment. While this is where the term culture first arises, there is some debate over what the trajectory could have been if the translations were different. The two terms that culture concept derives from are *Kultura* and *Bildung*. Rabinow notes that we should have opted to translate these terms “not as ‘culture’ but as ‘self-formation’” (2007: 112). If anthropology had begun its conceptual journey not from culture but from self-formation, it may have been possible to avoid the totalizing and self-affirming objects like culture—and by implication, the harmful relationship with the colonial-Indigenous encounter

(Ibid). In the *Hermeneutics of the Subject* (2005) Foucault “reached the point where how people thought they had to make themselves as subjects—their ethics—was a matter not of uncovering hidden desires but of crafting a self fit to exercise freedom” (Laidlaw 2014: 100). There was no hidden structure per se, but Foucauldian subject formation was and is concerned with questioning what is the best way to live life in relation to the self and others (113). If we take the political to mean “the ability to reflect consciously on different directions one’s society could take, and to make explicit arguments why it should take one path rather than another,” then subjectivity is an endeavour of the political (Graeber & Wengrow 2021: 86). The ethical subject, much like political subjectivity, can also be said to be a type of relation. As Faubion (2011: 203) suggests, conscious self-formation is not accomplished in a vacuum and should be understood to be a form of composite created by interaction and reflection.

At first glance these musings might sound like “culture”, but what the political subject and political subjectivity offers in cultures stead is the fluidity of the terms very nature. Anthropologist Sadeq Rahimi (2015) suggests humans enter into political subjectivity “through acts of interpretation and being interpreted” (8). This means that within “the apparatus of meaning making,” political subjectivity is located in “the process through which one makes sense and is made sense of by the other” (9). As meaning is always political due to its properties of representing an interest, then it must also be considered as a collective subjectivity and not solely in the field of the individual. Political subjectivity speaks to both properties of the individual and the community while holding interaction and meaning making to be the central locus of humanity, not some structural order of the mind or universe as with older anthropological and sociological concepts that culture derives from.

Here I must confess, I use only part of Rahimi's argument to my benefit. For Rahimi, political subjectivity is one of many ways by which to understand "culture" or as Rahimi puts it, the "collective memories, narratives, and fantasies such as histories, myths, folk beliefs, and other collective products" (9). Rahimi further states "that the interaction between power and meaning is embedded within the work of culture", thereby wedding political subjectivity to be embedded within "cultural systems" (10). Rahimi is one of the only anthropologists that adequately defines political subjectivity as Foucauldian scholars would, but as I have documented throughout this chapter, culture can be a dangerous concept at worst, and at best seems to be a concept thought of to explain and cope with the vast amount of difference that was unimaginable to the Euro-centric world prior to European colonization and imperialism. With this lineage in mind, I find it difficult to use this culture with such a lack of imagination to what it may be missing. If not culture, then what? Many will inevitably ask this very question. I do not assume that political subjectivity, or other options I have discussed, provide the sole answer. Nor do I suggest that one must be critical of those regularly use the term culture from a popular understanding to discuss their community's heritage as a source of pride and knowledge. I merely suggest that in academic circles and in the realm of political policy, we must be wary of so easily reducing the differences between humans and their forms of political being to be a result of "culture", and with it, accepting the baggage of unconscious action, universalisms, and cultural hegemony. If we center the "self" as the result of political subjectivity (Foucault 2009; 2005; 1997), we may begin to move away from oppositional concepts like that of culture in favour of recognizing the processes of "self-making and being-made by power-relations" (Krause & Schramm 2011: 127).

Final Thoughts

There are those within the discipline that cannot imagine an anthropology that does not begin with culture. Take anthropologist Seth Rodseth for example: “Indeed, what “culture” in the traditional sense had so effectively highlighted—various “ways of life,” especially as products of social creativity—has been overshadowed by the thoroughly politicized notion that has come to the fore” (Rodseth 2018: 400). Rodseth yearns for a return to the usage of culture in a “productive way”, much like how the concept was reformulated after the crisis of representation. This yearning is accompanied by a critique of anthropology for becoming overly political. I would argue that here, Rodseth’s claim of anthropology’s over-politicization is a misleading over-compensation on his behalf. His usage of politicization refers very particularly to the idea that anthropological analysis has come to overdetermine power and see hegemony everywhere. He asks, what happened to culture with its conceptual ability to explain holistic ways of life? I contend that culture never really achieved what it was meant to. I have traced what I argue to be one lineage of culture from Hobbesian political theory and Kantian cosmopolitan philosophy to early romantic sociologists and anthropologists, and finally to the attempt to reformulate culture by symbolic anthropologists. What is clear to is that there is no saving culture. The discipline cannot continue with culture’s colonial baggage

“Dark Anthropology”, Sherry Ortner (2016) mentioned that since the turn of the century, anthropology has been so heavily influenced by post-Marxists like Foucault that we now “see the world almost entirely in terms of power, exploitation, and chronic pervasive inequality” (50). I would disagree. These things exist, but there also exists an ethico-political approach to anthropology that does not begin our conversations with “culture” and “identity” constructs, nor does it focus purely on power and exploitation to explain the plethora of human difference and

interaction, but begins with centering human experience as contingent, always changing, and relating to an ethical responsibility to live in the best way in relation to others (Laidlaw 2014: 99). This approach looks for relations and their meanings, rather than the original substance of human interaction. By doing so, I suggest that we can resist the tendencies of anthropological knowledge production being operationalized in settler-colonial recognition policies. By resisting tendencies to explain social phenomena and individual subjectivity as resulting from different inherent cultures, one interrupts the liberal settler-colonial attempt to manage difference by reformulating those differences to fit their uneven terrains of recognition (Povinelli 2002: 170).

CHAPTER 2

CLAIMS OR TREATIES: ABORIGINAL TITLE, SOVEREIGNTY, AND JURISDICTION

“The recognition and implementation of Indigenous rights will chart a new way forward for our Government to work with First Nations, Inuit, and Métis Peoples and to undo decades of mistrust, poverty, broken promises, and injustices. We have listened and learned and we will work together to take concrete action to build a better future and a new relationship.”

—*The Rt. Hon. Justin Trudeau, Prime Minister of Canada*

“As we enter the next 150 years of Canada, we will write our future together in partnership with First Nations, Inuit and Métis. The recognition and implementation of Indigenous rights is critical to reconciliation. We invite all Canadians to work to better understand the damage done by our colonial past and join us in the journey of reconciliation.”

—*The Honourable Carolyn Bennett, Minister of Crown-Indigenous Relations and Northern Affairs*

In February 2018, Justin Trudeau, the Prime Minister of Canada (2016-), announced the development of a new policy suite aimed at replacing *the Comprehensive Land Claims and Inherent Right Policies* called *Recognition and Implementation of Indigenous Rights Framework* (RIIRF) (King & Pasternak 2018). In 2015, Trudeau and his Liberal party ran on an election platform promising nation-to-nation relationships with Indigenous partners. The Liberals quickly hailed the RIIRF as enacting those very same promises. In the above quotes, this new policy framed by the Minister of Crown-Indigenous Relations and Northern Affairs (CRINA), Carolyn Bennet, and Trudeau²⁸, is meant to pursue “reconciliation” to right past wrongs, thereby cementing those “wrongs” firmly in the *past*. The RIIRF is meant to implement a particular understanding of Indigenous rights under the Canadian Constitution of 1982, and yet the policy is portrayed as a way to rectify the imposition of the Canadian political order upon Indigenous peoples. This idea of “rectifying” the harmful past neglects the ongoing implementation of settler colonial political

²⁸ Canada, Prime Minister Justin Trudeau, “Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Rights Framework” (February 14, 2018).

orders and expectations on Indigenous peoples, often without consent. To what extent this framework addresses Indigenous self-governance has been questioned and critiqued for its assumption that self-governance solely derives from Canada's Confederation (1867), which relies on a narrow understanding of what Indigenous self-governance is and ought to be (King & Pasternak 2018; Pictou 2020). By December 2018, the Liberal Party withdrew the Framework, largely due to an outpour of Indigenous dissent against the RIIRF that saw the Framework as too "focused on entrenching a largely reserve-based, administrative governance model with improvements in service delivery, transparency and accountability," instead of a broad transformational land-based approach to Indigenous self-governance (King & Pasternak 2018: 5; see Nadasdy 2017).

This chapter is structured around the following questions: what gives Canada the power and authority to decide who Indigenous peoples are and the forms self-governance takes? In other words, how did Canada come to possess and enact sovereignty (de facto or de jure)? I also question to what extent Canada's recognition and land claims policy suite reflects a continuity or a departure from past settler-colonial politics. These questions are largely aimed at understanding the contemporary political-legal relationships Indigenous Nations have with Canada writ large, but this is not to forget the self-determined and localized Indigenous projects that seek to enact their own legal political models (Pasternak 2017; see Chapter 3).

In responding to these questions, the first section of this chapter is centered on how this thesis understands government, and reviews the political technologies at Canada's disposal to understand how Canada came to have jurisdictional control over Indigenous peoples. I then turn to reviewing the origin of the concept of Aboriginal title from its usufruct to *sui generis*

interpretations within common law interpretations of Indigenous self-determination and Crown sovereignty.

WHAT IS A GOVERNMENT: WHO CAN GOVERN; WHAT IS GOVERNING?

Towards a Foucauldian Analytic of Conduct

Before delving into the Canadian apparatuses of governance as they relate to Indigenous peoples, I want to say a few words on the intersections of law and conduct. In turning to the juridical realm of Indigenous self-governance within the settler-state of Canada, I do not mean to overdetermine or naturalize aspects of Aboriginal title or forms that Indigenous self-governance may take. Instead, I follow Elizabeth Povinelli's notion that "law is one of the primary sites through which liberal forms of recognition develop their disciplinary sides as they work the hopes, pride, optimisms, and shame of indigenous and other minority subjects" (2002: 184). Though Povinelli here uses the term disciplinary to describe how the enactment of law becomes the primary site informing subjects' aspirations, the intent is much closer to what Michel Foucault (2003; 2009) means by governmentality and its relation to subjectivity. Whereas discipline in Foucauldian literature refers to the specific sites of surveillance informing an ideal behaviour (Li 2007: 279), governmentality is concerned with the rationalities of Western practices of governance.

In *Security, Territory, and Population* (2009), Foucault embarked on analyzing governments as an "ensemble of practices operating through specific forms of political rationality," thereby departing from monolithic political logics of sovereignty and his own prior research into disciplinary power (Barnett 2016: 8). What is crucial in this line of thinking is how it enables the understanding of what power does, over what power is. As Foucault said in 1976, "we have still not cut off the king's head" (Burchell, Gordon and Miller 1991: xi). When it comes to political analysis, power is often understood to be the restriction of a thing by a sovereign.

Whether that be rights, behaviours, or groups, the typically acknowledged attribute of power was in what it limits. Viewing power from this angle cemented the idea that power disables, often framed in opposition to the idea that resistance enables. Yet, it is well recognized in Foucault's (1980) axiom "where there is power, there is resistance," that it is imperative to conceptualize resistance not in an exterior position to power, but rather recognize that the possibility of resistance is constituted through the structures of power (95-6). In other words, thinking of power as *enablement*²⁹ allows one to comprehend that government in a Foucauldian understanding is not simply the political rationalities of a system, but is also an art (or technique) in the formation of conduct(s) to encourage the right disposition of things (Gordon 1991: 3). This approach allows one to speak of government as a concept that "refuses the reduction of political power to the actions of the state" and opens government to a broader understanding of the conduct of conduct (Miller & Rose 1990: 3). By conduct, Foucault (2009) was distinguishing what it meant to govern from what it meant to rule (116), and to govern meant "the activity of conducting (*conduire*) [others]" (193).

Similar to how Foucault conceptualizes power as structuring the possibilities of the subject (2005), so too does governing guide the possibility of conduct for the purpose of "educating [the] desires and configuring [the] habits, aspirations and beliefs" of the citizenry's subjectivity (Li 2007: 275). However, this was not the only aspect that Foucault meant by conduct. Foucault was careful not to overdetermine the power of conducting a subject's practices. Later in his career in the *Hermeneutics of the Self* (2005) lectures and in interviews such as "The Ethics of the Concern of the Self as a Practice of Freedom" (1997), Foucault sought to develop an ethical approach to a

²⁹ It is important to note that thinking of power as enablement can also be a way to refer to Foucault's basis of subjectivity, as power "acts upon, and through, an open set of practical and ethical possibilities" which presupposes the agency of individuals (Gordon 1991: 5).

subject's "practices of freedom" (1997: 283). For him, this meant that relations of conduct can manifest between "self and self..., within social institutions and communities, [as well as] relations concerned with the exercise of political sovereignty" (Gordon 2-3). I will return to this ethical approach to conduct in the next chapter. The point here is that government does not need to be tied to the nation-state or the formal exercise of sovereignty, "but [is comprised of] activities, including using and relying on expert knowledge...that affect the conduct of other persons – or the self" (Rosol 2014: 72). This recognizes that the conduct of conduct can also be enacted by a subject upon oneself, which emphasises a subject's "practices of freedom" over solely the act of being conducted upon (Foucault 1997: 283).

Biopower, Sovereignty, and Indigenous peoples

Thus far, I have articulated how the art of government informs the conduct of others and their subjectivities (and vice versa), but I have yet to explain the objective that orients these political technologies (Dreyfus & Rabinow 1982; Rose 1999). According to Foucault (2003), the substance of modern political power is biopower. The objective of the state is the maintenance and production of life that constitutes itself as a population under a *polis*. Biopower denotes the hyper-calculations and strategic employment of calculations of life that inform a population's governability (Foucault 2003: 269). As Agamben (1998) suggests, Foucault had rightfully recognized the pivot from outdated juridical-institutional models of state power that underpin the basis of legitimate and moral governance "in favor of an unprejudiced analysis of the concrete ways in which power penetrates subjects' very bodies and forms of life" (10). The Western political project, which Foucault refers to as the double political bind, has integrated "techniques of subjective individualization with procedures of objective totalization" (Agamben 1998: 11). Simultaneously, the state concerns itself with the care of natural life (*zoē*/barelife) while also

conducting the conduct of subjects. These subjects, as opposed to the state of natural life, gain politically qualified existence (bios) (13). For Foucault “the conduct of living, and the living” is the basis of modern political power and therefore it is imperative to understand how “life” (zoē) becomes operationalized in its inclusion (or exclusion) as politically qualified existence (bios) (Gordon 1991: 8).

One must be wary of unilaterally using Foucault’s concepts within situations that he did not use himself, as this runs the risk of essentializing how power operates depending on the population the power is conducted upon. When we apply Foucault to situations of sovereign violence such as in the case of the treatment of Indigenous peoples within the settler-state of Canada, we cannot solely rely on the concept of biopower to explain the objective of the Canadian state’s politico-legal processes when we the conditions of death that states like Canada enable. By conditions of death, I mean the visceral and epistemological violence that Canada inflicts on Indigenous peoples through the enactment of the Indian Act (1876), and other actions that can include police brutality (Pasternak et al 2013), hyper-securitization (Pasternak and Dafnaos 2017), and the forms of violence that the TRC (2015) and the IMMIWG (2019) have condemned as genocide. Foucault’s rendering of biopower as that which characterizes the object of “modern” governance as opposed to an older form of sovereign power is flawed when applied to situations of visceral violence upheld by the sovereign state of exception. To borrow Agamben’s critique of Foucault’s overemphasis on biopower, one must recognize that “biopolitics is at least as old as the sovereign exception” (1998: 11). In applying the principle of the sovereign exception—that is the sovereign’s ability to decide the limits of life and death through the suspension of their own juridical order—, Agamben recognizes that biopower is not actually a break from an older period

characterised by sovereign violence, but rather that biopower has always been constitutive of said state power (6).

This is a crucial juncture to pause at when considering the peculiar nature of how settler-states include and exclude Indigenous peoples into their polities. In discussing the sovereign exception, Mark Rifkin (2009) explains how the assumption of American sovereignty is predicated on the inclusion of Indigenous peoples into their polity through Indigenous peoples' exclusion by their intended removal via American Indian policy (Rifkin 2009: 89-90). It is relatively easy to make the comparison that Canadian assertions of sovereignty rests upon the same state of exception. In Audra Simpson's (2014) ethnography *Mohawk Interruptus*, we see how "a suspension that in fact produces constitutionally sustained, *legalized illegality*," ([emphasis added] 154) creates a zone of indistinction that places Indigenous existence into a spatial ordering that "find[s] life stripped bare to cadastral form, ready only for death in a biopolitical account of sovereignty" (155). So, when biopower is applied to situations of Indigenous peoples' confrontation with settler colonialism, Foucault's conduct of living does not transpose well, as it negates that colonial sovereignty "necessitate[s] techniques of power that work upon [Indigenous peoples] to foment the exception...to proliferate state sovereignty" (Simpson 2014: 155). Simpson is careful in her account of Kanien'kehá:ka of Kahnawà:ke interactions with settler-sovereignty. Simpson's work centers around Kanien'kehá:ka peoples' refusal of Canadian and American sovereignty over their own. In what Simpson refers to as "nested" sovereignties, the Mohawk's sovereignty operates "within and apart from settler governance" (11). Simpson recognizes that the community's refusals actively interrupt each state's sovereignties—from refusing state passports to exercising Indigenous rights to trade as Nations unto their own (1, 126). These refusals do deny settler authority, but they are much more because of their unique contributions in forming

subjectivity, histories, and a pre-figurative politics (106). What must be recognized as an aspect of current political power then is the proliferation of biopower upholding the sovereign exception. These exceptions render certain subjectivities incompatible with the state's view of politically qualified existence. This is not to say that politically qualified existence only finds value when recognized by the sovereign, in fact as Simpson demonstrates there is always more going-on in the day-to-day actions of collectivities' self-formation.

THE ART OF LEGAL FICTIONS

Crown Sovereignty, Radical Title, and Aboriginal Title

In Canada, the highest Courts have consistently declared that the Crown acquired radical title³⁰ to Aboriginal title lands. This means that the Crown, in right of the Dominion of Canada and its provinces, held underlying title to public lands at the moment the Crown acquired sovereignty (Borrows 2019: 93; McNeil 2018; Nichols 2019: 365). However, the Courts have been relatively unclear on what grounds this acquisition of radical title occurred, begging the question what does the Crown's underlying title actually rest upon? Concurrently, this is about interrogating how Canada came to claim territorial and political jurisdiction over Indigenous peoples to begin with.

In 2014, the Supreme Court of Canada (SCC) delivered a landmark decision regarding Aboriginal title. In *Tsilhqot'in Nation v. British Columbia*, the SCC, for the first time, decided that a First Nation held title to lands³¹ in British Columbia with property rights:

Similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land and; the right to the economic benefits of the land; and the right to pro-actively use and manage the land³².

³⁰ Radical title, or underlying title, refers to the idea that in the absence of Indigenous title holders and private title holders, the Crown would hold absolute ownership to said parcels of land (McNeil 2018: 276).

³¹ This is not to be confused with the first SCC articulation that Aboriginal title may reasonably exist, which was in *Calder* 1973, but this is the first time that a decision was made to actually award title to a First Nation. Recall in *Calder*, that the case was rejected as its submission had not followed proper procedure.

³² SCC 44, [2014] 2 S.C.R. 256 [hereinafter "*Tsilhqot'in*"], supra, note 2, at para. 73.

Evidently, this was following the increasing willingness of the Courts³³ to elaborate on Aboriginal treaty and rights which has resulted in a broader rights-based approach to Aboriginal title. *Tsilhqot'in* should be celebrated as a win, but it is not without its faults. As Anishinaabe jurist John Borrows aptly puts, *Tsilhqot'in* brings with it a legacy of “broader doctrinal snares that have long characterized the [Crown-Indigenous relationship]” (2019: 93).

In the *Tsilhqot'in* decision, the Courts proclaimed that the concept of *terra nullius* never applied to Canada “as confirmed by the Royal Proclamation (1763)” (Drake 2018: 4). By doing so, the jurists were gesturing towards an understanding that Indigenous peoples, at the inception of the Crown’s sovereignty, had formulated coherent political communities and therefore *terra nullius* did not apply. However, how can the Court signal a progressive interpretation while in the very same paragraph proclaim that “at the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province” (as cited in Borrows 2019: 94)? If *terra nullius* at the time of European contact, as the Court iterates, through what processes or doctrines did British sovereignty and therefore title come to pass? In the following sections I explore the various doctrines that under British common law, according to Michael Asch (2002; 2014), supposedly justify Canada’s acquisition of territory. I interrogate the grandiose claims made by the Courts that *terra nullius* never applied to Canada. I privilege the understanding that Canada relied, and continues to rely, on the settlement thesis which hinges upon racist assumptions of the discovery of empty lands. I am not meaning to suggest I am the first to describe these “doctrinal snares”, as this has been done at length (Asch 2014; Borrows 2019). Rather, I hope to illuminate the connections between the legal discourses and the policy discourses as they pertain to Crown-

³³ As seen through *Calder v British Columbia (AG)* [1973] SCR 313, [1973] 4 WWR 1, *R. v. Sparrow*, [1990] 1 SCR 1075, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

Canada-Indigenous relations. Part of this requires attending to the intimate relationship between Aboriginal title and Crown underlying title to explore how interpreting Aboriginal title as subservient to Crown title allows the Crown to claim sovereignty under British common law.

Discussing what Aboriginal title is, as articulated in Canada's Supreme Court and their constitution, requires understanding early articulations of the relationship between the two from a colonial viewpoint. I am intentionally beginning from a colonial viewpoint due to my own positionality as a settler-researcher and my commitment to "study-up" (Nader 1997). This is not to neglect specific Indigenous peoples' perspectives on their own conceptions of inherent Indigenous law³⁴ and title, or to re-impose colonial normative assumptions as to what Aboriginal title is under Canadian law. This section will focus on a series of important precedent setting case law to understand those very colonial normative assumptions about Indigenous peoples. For some, it may seem peculiar to center a large portion of this chapter on the *St. Catherines Milling Co.* decision because it was made in 1888. I begin with the *St. Catherines Milling* (1888) decision as it is the first case in Canadian jurisprudence that discusses any semblance of "Indian title". The fact that it was rendered in nineteenth century makes it important in articulating the relative stability of colonial law.

St. Catherines Milling: The Context

Sixteen years after the confederation of the Dominion of Canada (in 1883), the *St. Catherines Milling and Lumber Company* was operating under a licence granted by the Canadian federal government to clear-cut approximately 2,000,000 feet of timber in northwestern Ontario (Drake 2018: 6). This licence was heavily disputed by the Ontario government due to the unclear

³⁴ To avoid essentializing, the final chapter of this thesis will review a series of Indigenous legal concepts and praxis from the Haudenosaunee Nations, to understand how they interrupt the relatively short collective memory of settler-colonial politics.

jurisdiction over public lands as outlined in section 109 of the British North America Act (BNA)—Canada’s constitution until it was patriated in 1982. Section 109 of the BNA (1867)³⁵ regards the division of federal and provincial jurisdiction in right of the Crown over public lands. In the early days of the Dominion of Canada, it had become clear that sorting out jurisdictions required answering the question, “did the Indian Nations have legal title to their traditional lands after the British Crown acquired territorial sovereignty” (McNeil 2019: 44)? Due to the ambiguity of “Indian title” and how this altered public land jurisdictions, Ontario sued Canada for wrongfully issuing a licence in a region that Ontario considered to be under their jurisdiction (Drake 2018: 6). To be sure, *St. Catherines Milling* was never meant, by Ontario or Canada, to be a case in progressing or in truly understanding the property rights and title Indigenous peoples within the so-called Dominion of Canada held. At the heart of the case was the dispute over “ownership and control of public lands and natural resources in the vast region of forests and lakes northwest of Lake Superior,” and how this jurisdiction would be interpreted under the BNA (McNeil 2019: 19).

The reason that “Indian title” became central to *St. Catherines Milling* lies in how then Prime Minister John A. MacDonald argued that this was federal public lands, not provincial. In attempting to create a strong federalist parliament, MacDonald saw an opportunity to bolster his position by using the concept of “Indian title” as he was aware that the Crown in right of Canada was the only body legally allowed to acquire Indigenous lands. As Walters (2015: 61-2) suggests, the case was “as much about the vision of federalism that would prevail in Canada as about the

³⁵ Whereas section 109 of the BNA divided jurisdictions over public lands, section 91 and 92 set forth the division of legislative authority between the provincial and federal governments. Particularly section 91 (24) provides exclusive authority over “Indians and Lands reserved for Indians” to the Parliament of Canada. Increasingly, these divisions of authority over Indigenous peoples are becoming blurred with *Tsilhqot’in Nation v. British Columbia* and *Grassy Narrows First Nation v. Ontario (Natural Resources)*, both opening avenues for provinces to abrogate Aboriginal title and rights. The Court in both decisions was more willing to demonstrate that interjurisdictional immunity may not apply to Aboriginal title and rights (i.e., that exclusive authority does not fall under Parliament anymore) and was less willing to imagine a space where “Indigenous laws can operate” to limit provincial authority (Banks & Koshan 2014: 3; see Wilkins 2017 for a deeper analysis).

nature of Aboriginal title”. What was unclear at the time was whether or not “acquiring” meant purchasing “Indian title” in the sense of an interest in the land similar to the Crown, or if in the colonial reading of the *Royal Proclamation* (1763), it meant unburdening encumbered lands that Indigenous peoples were using. Certainly, Ontario and Canada believed that the Crown always had a beneficial interest in said lands, but the question was if the public lands were held in right of Ontario or Canada. As is well recognized, MacDonald was instrumental in the creation of the racist *Indian Act* and its precursors, yet MacDonald, no doubt for political motivation, advocated for an understanding in this case that the Anishinaabe surrendered title as “they and their ancestors had owned the lands for centuries until the Dominion government purchased them” (as quoted in McNeil 2019: 37). However, in typical Canadian fashion, MacDonald understood these “purchases” as the complete surrender of political authority and lands, rather than the original intent of the treaties as not land transactions but promises of friendship and sharing of the land—not land transactions (35).

Ontario’s attorneys took the position that even if, as Canada had argued, the region in question was purchased and ceded to the Crown via Treaty 3 with the Saulteaux Nation, the Crown did not retain the right to permit timber logging (29). Instead of arguing to what extent Ontario’s jurisdiction derived from section 109, Ontario’s attorneys began their argument in seeking to dismiss Canada’s right to purchase title from Indigenous peoples as “[Indians] have no legal or equitable estate in the lands” (37). In other words, Ontario argued that Indigenous peoples could never hold absolute title as they were inferior subject’s incapable of holding title in ways understood by common law interpretations. Evidently this form of social ordering is tied to who is a recognizable subject under the law. Derived from Enlightenment philosophy, and as I argued in my previous chapter, cultural theory, the idea that a subject recognizable under the law required

a liberal formation of private property, was so salient at the time of *St. Catherines Milling* that Indigenous peoples were perceived to be “underdeveloped” or “primitive” because of differing property and political conceptions (Chaplier 2018; Tully 1994). This enabled Ontario’s attorneys to claim that due to a perceived lack of private property and governance structure, the Saulteaux could not be understood to possess the capabilities to hold title in the same way the Crown was. In a self-interested ploy, Canada argued that they held legal sovereign title over the lands in question because the Saulteaux held the rights to sell their lands as their property interest was a transferable legal and equitable right (Drake 9; McNeil 28). Canada’s attorneys pulled from the *Royal Proclamation* of 1763 in arguing that “public lands” cannot exist where “Indian title” exists, unless through surrender of said title which unencumbered the title (McNeil 41). Within the trial, the burden of proof lay with Canada and the company’s ability to demonstrate that the Saulteaux Nation actually held title, and that the “Crown in right of Canada had acquired that title when the Dominion commissioners entered into Treaty 3” (40).

I do not wish to go too far into the specifics of the case, but the trajectory of the two arguments is informative. While Canada sought to become more dominant through a self-interested understanding of “Indian title”, Ontario sought to explain that no such concept in the law had ever existed. This is a telling example of what occurs when two colonial powers meet to discuss the “Other”—that is, it is purely a practice in their own imaginations. The Saulteaux were never included in the case, and according to Kent McNeil (2019), the Treaty 3 commissioner Alexander Morris was only brought to speak very briefly (35). The Saulteaux Nation were “neither parties, nor interveners, nor witnesses” in the entire case, evidently reflecting the inferiority-superiority complex at play at the outset in interpreting Indigenous title (Drake 2018: 8). This speaks to how the production of the “other” subject rests upon the subjugation into an external

figure that is included into the body politic through its exclusion as the “other” (Agamben 1998). This othering becomes even more explicit in the Privy Council’s decision as rendered by Lord Watson in *St. Catherines Milling* (1888).

A Jurisprudence Contradiction: British Doctrinal Snares

In the simplest terms, Lord Watson ruled in favour of Ontario. The British Judicial Committee of the Privy Council’s decision as brought forth by Watson stated that the Crown in right of Ontario held the underlying title to the lands in question—the lands were only “burdened” by Aboriginal title (McNeil 127). Karen Drake (2018) identifies four crucial aspects that appear in the British Judicial Committee of the Privy Council’s decision that help understand how Crown title and territorial sovereignty relate to Aboriginal title. These four aspects are that (1) the *source* of Indian title is the Royal Proclamation, (2) Indian title is a personal and usufructuary right, (3) Indian title is dependent on the good will of the sovereign, and (4) Indian title is a burden on the Crown’s underlying title. Reviewing each claim as it relates to the foundations of Crown sovereignty and to the most recent Aboriginal title articulation in *Tsilhqot’in* offers an opportunity to look at the (in)consistencies in Canadian policy and legal decisions that derive from *St. Catherines Milling*.

Lord Watson’s decision relied on the understanding that the Crown gained sovereignty in the former French colonies through conquest following the capitulation of France in Montreal in 1763. To what extent France ever had sovereignty in their mere assertions of sovereignty over Indigenous territory has rarely been questioned in case law, yet this is beyond my scope. In the rest of so-called Canada, the Crown was said to have acquired sovereignty at the moment of the Proclamation which relies on the discovery/settlement explanation. What is interesting to Watson’s choice in relying on the Proclamation is that the Proclamation serves two pertinent

purposes: on the one hand, it was supposed to “recognize” the existence of “Indian title” (Borrows 1997: 161); while on the other, it was intended to create a British administration to be “as near as may be agreeable to the Laws of England” (Fenge and Aldrige 2015: 17), which set the stage for a period of intense British colonization and imperial supremacy. Watson relies on the first purpose of the Proclamation to state that any existence of “Indian title” derives from said recognition and is therefore dependent on the good will of the sovereign. Though this may not have been argued within the case, it is debateable what the original intent of the Proclamation was (Borrows 1997; Fenge and Aldrige 2015)³⁶. It was the second purpose of the proclamation that enabled Watson, alongside the rest of the Privy Council, to claim the authority to decide on the substance of “Indian title”, due to the assumption of the supremacy of British law over Indigenous law. It was largely a result of the Proclamation that a British administration was created with codified practices, which informed the normative epistemological entailments within Watson’s decision (Harring 1998: 93). As Borrows (1994: 19) reminds us, from the outset the Proclamation was contradictory at best, while at its worst, deceptive.

With the Privy Council’s decision to anchor “Indian title” to the Royal Proclamation—even if this was a flawed understanding from the outset—, a precedent was set. Michael Asch and Patrick Macklem (1991) refer to this anchoring as the “contingent rights approach” to explain that the approach oft taken within Aboriginal title jurisprudence is to treat Indigenous title as never being able to rival that of the Crown’s. In one fell swoop the Privy Council set a “flawed precedent” (McNeil 2019), and Asch & Macklem (1991: 501) recognize that this meant interpreting

³⁶ I specifically gesture here to the colonial interpretation of the Royal Proclamation (1763) to demonstrate that this is only one understanding of the document. If we follow Fenge and Aldrige (2015) and Borrows (1997), amongst others, with what might be called an Indigenous interpretation, the Proclamation must be read alongside the Niagara Treaty (1764). This treaty recognized that “the Crown would be in possession of a thin version of sovereignty that would not include unilateral legislative power or underlying title, as these would be subject to treaty negotiations” (Nichols 2019: 360).

Aboriginal title as something that does not derive from Indigenous legal systems and is therefore not inherent. Instead, this approach holds that Aboriginal title is based in Crown proclamations and therefore subservient to Crown sovereignty and title. Additionally, McNeil (2018) recognizes that the Courts have been relatively quick to suggest that the Crown acquired sovereignty and title through “original modes”, but that “the precise method of acquisition—whether discovery, settlement, or mere assertion—has never been entirely clear” (303). Evidently, the doctrines of conquest, prescription/assertion, discovery, and settlement appear within Watson’s decision, and even though these have supposedly been repudiated (see Dickson 2018; McNeil 2019) in “modern” case law, I question the extent that this is true.

Empty Lands and the Return to the Tsilhqot’in Decision (2014).

St. Catherines Milling very clearly utilizes a colonial epistemological rendering of Indigenous peoples to claim that “Indian title” is a burden on Crown title and therefore is contingent on the Crown. It was also decided that if such a thing as “Indian title” exists, that it only comes into realization through the assertion of Crown sovereignty and title (i.e., the Royal Proclamation). What I am proposing here, alongside companion academics, is that this case continues to hold weight within Canadian legal discourse, which is enacted through Canada’s land claims policy suite. It continues to maintain on some level that Aboriginal title is in need of extinguishment so that Canada can reconcile its sovereignty (Asch 2014). When in fact, from critical anthropologists and Indigenous perspectives, it is “Canadian sovereignty that needs to be reconciled with the prior and ongoing sovereignty of First Nations” (Nadasdy 2017: 59).

In *Tsilhqot’in* and previous cases, the Court decided that Aboriginal title is no longer considered to be a personal use-based right conferred to Indigenous peoples. In fact, Aboriginal title is now considered to be *sui generis*—unique under the law. *Delgamuukw v. British Columbia*

(1997) involved the hereditary chiefs of the Gitksan and Wet'suwet'en Nations' claim to ownership and jurisdiction over 58,000 square kilometres in northern British Columbia. By the time it had reached the Supreme Court, "ownership" and "jurisdiction" were translated by the Courts as Aboriginal title (Slattery 2000: 14). The Gitksan and Wet'suwet'en Nations would not be successful in the Courts due to overlapping claims to the territory, but the precedent it set regarding the source of Aboriginal title is relevant to the *Tsilhqot'in* decision.

Within the Court's decision, the *St. Catherines* interpretation of "Indian title" as use-based was overturned in favour of *sui generis*, because Aboriginal title's "characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems", and because it is inalienable except to the Crown (as quoted in Drake 2018: 13). This uniqueness of Aboriginal title allowed the Court in *Tsilhqot'in* to broaden where Aboriginal title can be applied and to what lands. The second aspect that the Court corrected was the source of title. In *St. Catherines*, the assertion of the Royal Proclamation was said to be the source of Aboriginal title. This meant that it was inconceivable that Aboriginal title could be on par with Crown title, as it was by the good will of the Crown that Aboriginal title existed in the first place. In an attempt to displace this, *Delgamuukw* held that "while the Royal Proclamation recognizes aboriginal title, it does not bring it into being" (Slattery 2000: 16). Both the source and the content of Aboriginal title that figured into *Tsilhqot'in* via *Delgamuukw* had positively changed. As Drake (2018) suggests, those aspects of "Indian title" represented in *St. Catherines* are no longer good law, however this is not the case for the nature of the title.

Since Aboriginal title is not contingent on the assertion of colonial doctrines and is recognized as pre-dating Crown sovereignty, then how exactly does Crown title come into being? In other words, how does the Canadian government continue to claim jurisdiction over Indigenous

Nations? Following Borrows (2019), I suggested at the beginning of this section that the only option Canada can rely upon is the *terra nullius* and settlement thesis. This is evident in the *Tsilhqot'in* decision. Chief Justice McLachlin re-affirmed that the Crown's title was acquired when sovereignty came into being:

At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown (as quoted in McNeil 2018: 285)

Exactly how and when the “time of assertion” occurred seems to be anyone's guess. The Courts have consistently debated what the source of Aboriginal title is, but this phrase of “at the time of assertion” is all it requires to suggest that Europeans gained sovereignty and therefore the Crown had the vested interest in underlying title (Borrows 2019; Drake 2018; McNeil 2018; Slattery 2000). And even though Aboriginal title is supposed to be an independent interest in the land, and a unique one at that, Justice McLachlin continued to define the Aboriginal interest in the land as a “burden” on the Crown's radical title. If it is unclear to the reader what Crown title and sovereignty rests upon, this is because the Courts themselves do not know how to explain it. Further, if Aboriginal title continues to be a burden upon the Crown's interest, then “Crown sovereignty can displace Indigenous sovereignty through a bare assertion [that] presumes the land is empty of governance or that Indigenous governance powers are inferior” (Borrows 2019: 103). The wording of “burden” in *Tsilhqot'in* (2014) is the exact same as it was in *St. Catherine's* (1888). It is this assumption, which rests upon uneasy foundations, that provides the Crown the claim to superiority it needs to further infringe upon and diminish Aboriginal title (Borrows 2019: 105). The Crown can encroach on this title, where justified, as outlined in *Sparrow* (1990) and *Tsilhqot'in* (2014),

but “Aboriginal peoples have no right to unilaterally diminish or impede the Crown’s constitutional or other rights” (Ibid). On some level, Aboriginal title continues to be dependent on the Crown’s recognition, but the Crown’s authority comes into being when it says it does, thereby implying that empty lands and the doctrine of discovery continue to exist, as the Crown holds ultimate title even before any land surrender or treaty occurred. All the Crown requires is an assertion.

EXTINGUISHMENT AND THE GOALS OF MUNICIPALIZATION

The Extinguishment Clause

From the unclear foundations of Crown sovereignty and title to the normative ideas that Aboriginal title is dependent on those foundations, little room is left for innovative partnerships between Canada and Indigenous peoples. This brings the conversation to the last point that further inhibits this relationship, namely the continued need of Canada to extinguish the burden of Aboriginal title.

During my fieldwork, I had a chance to sit down with First Nations policy analyst Russ Diabo. Russ is Kanien’kehá:ka from Kahnawà:ke who has a long personal history with a wide range of Indigenous activism across the political entities of Canada and the United States. Russ has dedicated his life to furthering the goals of his community and Indigenous rights alongside scholars like Vine Deloria Jr. and Arthur Manuel. Russ and Arthur Manuel were crucial in organizing the Defenders of the Land Network—a grassroots Indigenous-led organization whose aim is to “defend their lands from non-consensual resource extraction and non-Indigenous allies and supporters across Canada” (Diabo 2019). All of his experiences make Russ an important figure in Indigenous politics. I spoke with Russ on a few occasions, and the majority of our conversations centered on Canada’s “extinguishment clauses”.

By “extinguishment clauses”, Russ was referring to Canada’s need to extinguish the burden that is known in common law as Aboriginal title. For Canada to fully exercise its territorial sovereignty, it needs to reduce other interests to those lands to access its radical title. With the Court’s interpretation of Aboriginal title as being a burden and not an equitable interest to the Crown, the way to extinguish this burden is through treaty, as outlined in the Courts since *Calder* 1973 (see McNeil 2002). When I told Diabo I was interested in Canada’s land claims policy suite response to Aboriginal title, he pointed me to the “extinguishment clauses” apparent within Comprehensive Land Claims. From the James Bay Agreement to the Yukon Land Claims and Self-Governing agreements, each share some semblance of the clause to “cede, surrender, and release” the Indigenous Nation’s Aboriginal title as it pertains to their traditional territories in exchange for serious of specific authorities and rights. As Russ shared with me, this has always been the Canadian state’s goal, the extinguishment of Indigenous property interest and territorial self-determination. It is striking that from 1888 to 2014, the Courts’ logic continues to render Aboriginal title as a mere burden requiring extinguishment via treaty, not a sharing of land or sovereignty and definitely not an equitable cession of title from one independent political community to another. This is the type of continuity that enables the ongoing displacement of Indigenous peoples, which reflects the type of colonial goal that Shiri Pasternak (2017) describes as the need to “perfect sovereignty”.

Both Diabo and Pasternak have worked with the Algonquins of Barriere Lake in their continued struggle to maintain their self-determination and self-governance. Pasternak (2017) understands that the settler-colonial goal is to repeatedly suggest “that the sovereign possessed all underlying title to the land” (Pasternak 6). Accordingly, it is the colonial conflation “of jurisdiction, sovereignty, and territory” that serves as the avenue through which perfection is meant

to be achieved (Pasternak 280). This form of extinguishment, via land claims, that Russ touched on, with its attachment to the Courts' jurisprudence regarding Aboriginal title, lays bare that those conflations of "jurisdiction, sovereignty, and territory" seek to conceal the ways Aboriginal title and Indigenous sovereignty are disposed of. According to Russ, the goal since the Royal Proclamation was "that title was surrendered to the Crown. There's no reverse. You know, that's still the case today, so here we are 250 plus years later after the Royal Proclamation, and everything's about extinguishing, surrendering, ceding to the Crown, you know title". And I think this underpins most Indigenous Nations' interactions with the Canadian state and its bureaucracies. It is these settler legalities, a term borrowed from Pasternak (2017) and Lisa Ford (2010), that underpin all Indigenous and settler-state relations. For Ford (2010), settler legalities refer to the whole body of law that began as a practice of legal pluralities in initial colonial interactions with Indigenous Nations but would eventually hold that colonial law was the sole recognizable and enforceable body of law. Extinguishment clauses that seek to "deal with" Aboriginal title are one such way that settler-colonialism continues to universalize itself as the sole and justifiable legal actor. The forms of modified self-government that follow the cession of Aboriginal title are then subsumed under one legality—that is the Canadian constitution (see Chapter three).

The Monopoly on Legitimizing What is Legitimate.

At this point, I am suggesting that the settler-colonial state and its interactions with Indigenous peoples requires a unique iteration when explaining what power does and what it means to govern and who is authorized to govern. The question to answer is not whether a certain political order is legitimate, but how it came to naturalize itself as legitimate. I argue that this naturalization occurs through many avenues, and in this chapter, I focused on the legal discourses which are contradictory and steeped in colonial philosophy. Previously, I situated myself within a

Foucauldian account of governmentality and the biopolitical objective apparent within his account. I added a corollary stating that if we are to take Foucault's analytics seriously when we apply him to situations where he did not do so himself, one must account for the nuances that exist. In my case, this was the interactions between Indigenous peoples and the Canadian state. I said that introducing Agamben's state of exception alongside Foucauldian analytics would more accurately depict the forms of violence occurring with settler-colonialism. I want to turn to one more aspect that I have been nudging at in this chapter before I conclude and turn to my final pages.

In *Homo Sacer*, Agamben (1998) interrogates the claim that modern sovereignty is founded upon the liberal principle of the popular will of the *people*. To do so, the figures of the "People" and the "people" formulate an important critique to this assumption. Agamben problematizes this notion that the so-called will of the people derives from a unitary subject by offering two poles of subjects that appear within the body politic (177). In a liberalist rendering of what is assumed to be the popular will of the people (which is supposed to justify the legitimacy of governments) is actually the subset of citizens who are idealized within the political body. This is what Agamben refers to as the "People". What is often neglected in the account of modern sovereignty is that the exception requires a subset of subjects that are understood "as a fragmentary multiplicity of needy and excluded bodies," called the "people", or those who have been subsumed into the body politic as a result of their exclusion from politically qualified existence (Ibid). It is not just that modern sovereignty creates "excluded bodies" but that it needs these exclusions to cement and perfect the claims to sovereignty, which in turn informs the ideal citizen subject.

In a critical reading of sovereignty, it is evident that it requires boundary making between "what is inside the state and what is or those that are outside it" (Nadasdy 2017: 17). More important for my argument is that settler-sovereignty, understood as a unique formation of a

European nation-state, is constituted through the very rejection of Indigenous peoples, yet is also bent on subsuming Indigeneity into its discourses under its own terms to further perfect sovereignty (Canessa 2017: 70; Coulthard 2014; Povinelli 2002; Shaw 2008). In Agamben's problematic of liberal sovereignty, there are only two subject categories, however this does not reflect how Indigenous *peoples* fit within the analytical framework.

As established, the regulation and management of *barelife* embodiment evidently exists as Indigenous peoples are often "excluded from meaningful participation while remaining the objects of state control" (Rifkin 94). This is very evident when we think about the legal discourses that so easily comment on the nature, content, and source of Aboriginal title, but do not do the same in relation to Crown sovereignty and title. However, there is more that occurs in the production of settler-state sovereignties, namely *bare habitance* (Rifkin 2009). The issue at stake here is that *barelife* does not attend to political collectivities and how they attach to unique forms of land occupancy. In other words, *barelife* is more concerned with embodiment (read: subjectivity), and less concerned with the fact that a settler-state's territoriality materializes and legitimates itself through the erasure of Indigenous *peoples* as distinct nations. Therefore, in Agamben's reading of sovereignty, the category of the "people" does not fit with Indigenous *peoples* as they cannot be considered ethnic or minority groups under a multi-cultural polity. Settler-states, by deciding what is considered legitimate and meaningful forms of land occupation and political participation, seek to erase Indigenous Nation's that have "had their nationality *forcibly changed in their own homeland*" (Trask 1999: 30). In a sense, the goal of settler-sovereignty is to complete the project of the minoritization of Indigenous *peoples* into the "*people*" subject position. And as Russ Diabo explained to me, this has been the goal since the beginning and can be clearly seen from the 1969

White Paper all the way to Justin Trudeau's policies that I referenced at the beginning of this chapter, and will discuss more so in the following chapter.

Rifkin warns that using Agamben's *barelife* without introducing the idea of *bare habitance*, which allows one to ask how the settler state came to define the bounds of what is legitimate, merely results in re-inscribing the colonial fantasy of territorial sovereignty i.e., the right to render one *barelife*. This is an issue of jurisdiction which requires an interrogation into the "gap between the state's assertion of sovereignty over Indigenous peoples and its legal authority to exercise territorial jurisdiction over Indigenous peoples and their lands" (Pasternak 2017: 3). From this perspective, the fight for Indigenous self-determination is less about control over policy domains, and is really about "the ability to define the content and scope of 'law' and 'politics,'" and the norms governing these jurisdictions (Rifkin 90). It is essentially questioning the monopoly to claim the legitimacy to have legitimacy, which, as we have seen within the Courts, only requires one line for settler-colonial authority: "at the time of assertion of European sovereignty".

It is crucial to interrogate the settler-state's claims to legitimacy and to understand the arts (or techniques) of government (Foucault 2007) they employ to maintain the colonial alchemy—to borrow Anishinaabe legal scholar John Borrows' term (1997)—that enables these acts of violence. This alchemy is employed to obscure the workings of the legal violence, or lawfare (Comaroff 2001), committed against Indigenous peoples that builds a world that is not simply metaphorical or theoretical, but creates real legal "commitments that place bodies on the line" (Cover 1986: 1605). It is liberalism's self-proclaimed quest for truth and knowledge that seeks to obscure the very fantasies it rests upon, namely the Doctrine of Discovery, *terra nullius*, and unilateral declaration of sovereignty (Povinelli 2002: 155). If Canada is to truly reconcile with Indigenous nations, then restitution is necessary, yet it is not simply about the returning of land, but about the

transformation of Canadian institutions (see King and Pasternak 2018), so that we may return to questioning who has the right to set the conditions for legitimacy.

CHAPTER 3

LAND BACK: THOUGHTS ON CANADIAN-ABORIGINAL AFFAIRS, INDIGENOUS LAW, AND DIRECT ACTION

August 9, 2021 was the International Day of the World's Indigenous peoples. I was in the Yukon, sitting in the Kluane Lake Research Station (KLRS) operations room, preparing for an interview with Russ Diabo. Noting the coincidental concurrence of the day and my interview—and all of the political entailments both would have—I was reflecting on my first few days at the research station. The KLRS is a facility opened in 1961 as part of the Arctic Institute of North America operations in the Yukon, operated by the University of Calgary. The station is situated on the traditional territory of the Kluane, Champagne and Aishihik, and White River First Nations. KLRS predominantly houses researchers in the fields of climate science from glaciology to hydrology, but this past field season I was lucky enough to join my partner as the only two anthropologists that had stayed at the station in six years. For the next three months, I would have several conversations regarding the role of the station in relation to the three Indigenous Nations whose land it sat on. It was almost as if the KLRS acted as a microcosm to what my partner and I were discussing in our ongoing dialogue about our research, methods, and goals. I think for both of us, many researchers staying at the KLRS demonstrated the type of research we vehemently tried not to do.

In our first week there, we were inevitably questioned by other researchers about what our research was. We were the strange new anthropologists. Most wondered what hypothesis we hoped to “prove”. I remember getting this question about twenty times, and each time assuring the person asking that I was not out to particularly “prove” anything. Of course, I hoped to document a phenomenon, but what authority did I have to “prove” something? It was a weird experience being

surrounded by that type of researcher, as I had never before been questioned on that aspect of needing to “prove” something new and exciting. I remember a particular instance around our first week staying there, my partner and I were sitting in the mess hall trying to meet some of the researchers. There was a man from an Ontario university pursuing a PhD. After my partner discussed her broad research goals of working in partnership with Kluane First Nation to meet to their land management and research aims, and explained that it was not up to her to decide the outcomes—which provoked bewildered faces across the table—, it was my turn. I was dreading this question because I myself was confused at the time about what my project was. It was not what I initially hoped for, but I knew I was doing some legal analysis, philosophy, and history, while attempting to privilege Indigenous laws. So, I started with saying that I wanted to document how the lands claims process was flawed, as the very idea of Canada controlling the terms of engagement is based on a flawed precedent going back to early treaty relationships and Court cases. The biologist wanted something more specific, so I started with explaining the impositions of band councils throughout Canada, which I made sure to add was often done violently. I explained that Indigenous Nations across Canada, including those whose land we inhabited in that moment, had their own legal and political systems that Canada was unwilling to recognize. And when they did, like with many of the Yukon self-governing Nations, those systems were subsumed under the Canadian constitution, and electoral politics became the norm in both band councils and self-governments (Nadasdy 2017). The PhD student was clearly puzzled by these statements, but nonetheless answered, “Yeah, but self-government is better than nothing right? And aren’t they more just and democratic now?” I was shocked. “Just” as in justice? What did he even mean by democratic, as if representative electoral politics was the epitome of a democratic way of life? I explicitly mentioned that these councils were often violently imposed at the expense of Indigenous

Nations' own governing bodies, and yet he chose to focus on the perceived benefits for "them" that "they" have democracy now. If we concede they had now attained democracy, the next step in that line of thought could reasonably be, what were Indigenous peoples even fighting for if Canada had the best system to offer? These conversations happened often, and they always left me reflecting on the state of reconciliation in Canada. This exchange with the Ph.D student portrays core settler anxieties, and in particular as I show in this chapter, the one around having things settled and neatly packaged in order to be positioned as legitimate to claim that "things have been set right, that they are 'just'". To some, it may seem trivial to begin with this discussion and relating one person's feelings to Canada's larger goal. However, these discussions are not an isolated occurrence. In fact, it is those very sentiments, expressed repeatedly, that enable the obscuring of what occurs in the present-day form of colonization. In this chapter, I want to expose those contemporary occurrences by demonstrating the ongoing nature of colonization through selected conversations with federal government negotiators and a case study with Indigenous land defenders, in order to untangle the logics at play within these land claims, the failure of them, and the policing of self-determined, alternative forms of recognition.

...

Up to this point, I have presented a skeptical view as to the ability of the Canadian state to adhere to an Indigenous understanding of self-determination. As mentioned, one of the conversations that motivated me to question the continuity of settler-colonialism's objectives in the context of legalism was Russ Diabo's continued insistence that "all the issues boil down to self-government. Is it an inherent right or is it a contingent right based on recent agreements with Crown governments?" Russ was referring to the confusing claims made by the Court in recent decades that I discussed in the previous chapter, while also recognizing that the modern treaty

process seems to suggest that Indigenous title and rights are still dependent on the “good will of the sovereign” as Lord Watson had suggested in *St. Catherines* in 1888. If Indigenous Nations are required to enter into a modern treaty process with the federal government to become “recognized” as an entity that is outside of the *Indian Act*, what does this say about the source of Indigenous self-government and the possibility of Indigenous sovereignty writ large?

I attended a radical conference entitled “Land Back: Land Back Governance” in April 2021, where one of the settler contributors representing Ontario Nature—a charity that has been protecting wild species and wild spaces through education, conservation and public engagement since 1931—was speaking about the misunderstanding that settlers have about the Land Back movement. She commented that it is ironic that the rhetoric is that “Land Back means that settler people will be displaced. If the fear is about settlers being displaced, it is a deep irony that at once recognizes settlers displaced Indigenous peoples, and recognizes the fact that this land is unsettled”. I think this portrays the anxieties that are afforded to white settlers in positions of power. On the one hand, that settlers even acknowledge they are fearful of being displaced means they on some level realize that the land upon which they live is unsettled. On the other, their anxiety exposes their beliefs that Indigenous peoples have no right to displace them. It dangerously echoes those earlier colonial conceptions of Indigenous peoples as sub-human and undeserving of equal interest to the land, and thus demonstrates that they are still alive and well. The idea that settlers must be displaced already sets the framing that the restitution of land will inevitably be a conflict relationship. A classic us versus them. But, as Anishinaabe/Métis lawyer Aimée Craft said during the conference, “it is not just about conflict; that is a myth that is perpetuated. It can be collaborative, mutual respect, and love for the land”. The myth that Canada and the lands it covers is settled is another one of those myths. Another is that Canadian law is natural and inevitable.

The Land Back movement is one of various Indigenous and allied movements over the past twenty years aimed at interrupting Canada's "settler legalities"—those myths that seek to naturalize themselves (Pasternak 2017: 6). I have had the opportunity to speak with a few members of Six Nations at the Grand River and other Mohawk communities in both Quebec and Ontario—all Indigenous land defenders. I will not discuss individual actions or their personal experiences, as I seek to avoid any potential harm that could result from this thesis. However, I also do not want to silence those experiences. As one of the contributors in the "Land Back Governance" conference said, you must "start where you are". I hope to do so through critiquing and interrupting Canada's narratives of Indigenous land defenders by sharing my understanding of what it means for the Haudenosaunee involved in these actions to embody an activist position focused on bolstering Indigenous nationhood in a settler-state that is unwilling to recognize and reconcile with its own past. This involves broadly documenting what it can mean to interrupt and yet be portrayed as the "disruptors" to so-called progress, as is often the rhetoric used by the media and political figures.

Whereas my last chapter concerned what the Court's precedents mean for the enablement of a particular kind of Indigenous self-determination that leaves Canada's ultimate sovereignty and Crown title relatively untouched, this chapter centers on what it can mean to refuse and *interrupt* Canadian sovereignty, from Indigenous perspectives. I further unpack how Indigenous sovereignty represents a legal risk as identified by Canada's risk-based approach, read through the current logics of the Specific Claims and Comprehensive Claims policies' goals of extinguishment of title, reduction of future claims, and an increase in certainty for capital investment. These final sections will identify alternatives to Canada's politics of recognition informed by the centering of Haudenosaunee jurisdictions. I also reflect on the need to attend to diverse forms of Indigenous

legal systems and jurisdictions due to their potential to enact the *politically otherwise*³⁷, which opposes Canadian attempts to perfect the setter-state's claims to sovereignty through policing and its policy suite regarding recognition.

POLITICS OF RECOGNITION

In 1974, the Office of Native Claims (ONC) was established to deal with specific and comprehensive claims³⁸. Forty-eight years later, there have been twenty-six signed comprehensive land claims agreements, with eighteen of those outlining self-governing abilities. Many more continue to be in negotiation at various stages of the process. In specific claims, a total of 1036 claims have been concluded, where the success rate sits at 59%, meaning 434 claims have either required litigation or were rejected outright (see appendix A). To reiterate from my introduction, Canada has two avenues of redress for land restitution. These are the two policy arms referred to as the “modern treaty” approach. The first and most widely critiqued is the comprehensive land claim enacted through the Comprehensive Claims Branch (CCB). The CCB is meant to address Indigenous claimants who hold that their Aboriginal title is unceded and has been unlawfully expropriated. The second avenue is for an Indigenous community to submit a specific claim which is enacted by the Specific Claims Branch (SCB). The SCB is meant to redress situations where Canada breached its historic fiduciary responsibility to Indigenous peoples and their lands as outlined in treaties and the Indian Act (Pasternak et al. 2013: 68-9). The assumption for a specific claim is that it deals with already ceded and extinguished Aboriginal title through previous treaties with the Crown. However, this is not actually the case for many Indigenous Nations that continue

³⁷ Here I am adding the political to the otherwise as a way to gesture to Foucault's concept of counter-conduct as he frames it: the exercise of “being conducted otherwise” (Foucault 2009: 201).

³⁸ Canada. Parliament. Senate. Standing Committee on Indigenous and Northern Affairs. Report on Indigenous Land Rights: Towards Respect and Implementation. 1st session., 42nd Parliament. 2018.

to advocate that their title has not been adequately considered in Canada's interpretation of historic treaties. I will discuss this below with reference to the Six Nations of the Grand River's status case.

The politics of recognition refers to the critical intervention by Indigenous scholars (Coulthard 2014; Simpson 2017; Simpson 2014) and allied settler scholars (Nadasdy 2003, 2017; Pasternak 2017; Povinelli 2002) into the Canadian and settler-colonial policy regimes that seek to set the framing of Indigenous terms of recognition, land reclamation, and governance. Michi Saagiig Nishnaabeg scholar Leanne Betasamosake Simpson (2017: 170-76) argues that the entirety of this policy system is meant to frame Indigenous title and rights claims under the terminology and legislative authority of the Canadian government. Coulthard (2014), in *Red Skin, White Masks*, points to the idea that radical resurgence through a generative politics is necessary to subvert the Canadian recognition avenues. As Russ told me, the whole claims process is about converting "pre-existing sovereign rights into post-treaty defined rights...where only local or municipal powers are left" to First Nations. In a piece that Russ wrote for his *First Nations Strategic Bulletin*, he explains that:

[The Liberal government's] 5-year plan (2016-2021) from the Prime Minister's Office and the Privy Council Office (Trudeau and Wernick) [was] to set up a two track, pan-Indigenous process (First Nations, Métis, Inuit) to convert Indian Act Bands into 4th level "Indigenous governments" by negotiating modern agreements to define section 35 rights on a band-by-band basis, essentially transforming each Band's legal and political status from being "Indigenous Peoples" with the international right of self-determination into ethnic minorities as "Indigenous-Canadians", similar to, for example, Italian-Canadians or Indo-Canadians, that's why the term "Indigenous Governing Bodies" is now defined in federal legislation, because it bridges the two tracks (from status quo to 4th level governance) with a list of signed agreements, using the existing Modern Treaty and Self-Government agreements as templates (2021: 7).

Recall that according to Agamben (1998), a liberalist interpretation of sovereignty requires the subject positions of the "People", meaning the ideal citizen subject, and the "people", or the "fragmentary multiplicity of needy and excluded bodies" (177). The "people" are included into

the body politic through their exception, in other words they are rendered as minority subjects that are incapable of reaching the ideal citizen subject. Above, Russ questions the intent of Canadian recognition and restitution policies as supposedly being about justice, when in fact it seems the ultimate goal is the erasure of the category of self-determining Indigenous Nations. The government opts in favour of relying on the inclusions of Indigenous peoples into the Canadian polity by transforming Indigenous peoples into “Indigenous-Canadians”. This category of “Indigenous-Canadians” becomes Agamben’s “people”, a minority interest group with some municipal decision-making powers, rather than Indigenous Nations unto their own right.

When I spoke with the director of Specific Claims, I had this idea in mind. I did not want to be leading by directly questioning the efficacy of both comprehensive land claims and specific claims, but I asked him what the significance was of splitting Indigenous and Northern Affairs Canada (INAC) into Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) and Indigenous Services Canada (ISC) in 2017. When Canada’s Prime Minister Justin Trudeau announced this split would occur, his justification was that CIRNAC would better service those Indigenous groups hoping to settle their claims, while ISC would act as the service delivery arm for Indian Act band councils. ISC is intended to dissolve eventually, while CIRNAC would remain to implement modern treaties with a mandate to have every Indigenous group under a “treaty”. The intention is to have no remaining Indian Act Bands that require service from a unique federal body. Service delivery for post-settlement Indigenous governing bodies would come directly from federal branches serving all Canadians—for instance, Health Canada, CMHC, and provincial/territorial authorities. When this occurred in 2017, I remembered thinking this did not seem like the nation-to-nation relationship being touted by the Liberals while they were campaigning in the prior election. How could you divide service delivery from the goals of

Indigenous self-determination? If it was truly about a nation-to-nation relationship, why was service delivery being treated as something similar to how the rest of Canada's citizens experience their service delivery, through bodies such as the Canadian Revenue Agency (CRA) and Employment and Social Development (ESDC) or those listed above? When I asked the director about the split he said:

So, over the last few years, you've seen an unprecedented increase in overall government spending on Indigenous programs, services, supports. However you want to put it, Indigenous spending has gone up significantly. Yeah, and it's not really a result of the split of departments, but most of that money is going toward...the roles and responsibilities split with CIRNAC. As you probably know, it's like kind of the center of gravity for our strategic relationship with Indigenous peoples across Canada. At CIRNAC, it's this whole concept of forward-looking. Modern treaties, comprehensive agreements, all this kind of stuff. And that was the centerpiece of the previous government's mandate.

Framed under the idea of “forward-looking”, the director used the same terminology common in Trudeau's own discourse. The departmental split was about building a connection going forward that was dependent on a relationship, albeit a “strategic” one. The director mentions how CIRNAC receives a large amount of funding from the budget, money which funds the roles and responsibilities needed for the “strategic” relationship the department has with Indigenous peoples. However, that “strategic” relationship seems to be a stand-in for government priorities of settlement of claims to unceded land—which always includes extinguishment of rights and title in favour of what Canada calls “certainty”. Following that logic, Canada is predominantly concerned with the extinguishment of title and the settlement of these claims because they pose a real risk to the “certainty” of Canadian sovereignty and Crown title (see *certainty* for further discussion). As I have shown, it is unclear what that sovereignty and title rests upon in the first place, so Canada's concern is merited.

The Little Sovereigns

What I am suggesting above is that the objectives of Canada's land claims policies are not what they are presented to be. An important aspect of these recognition policies is how conducting governance according to settler-colonial objectives enables subjectivities to be readable and therefore manageable. That is, Canada authorizes a certain type of Indigeneity to exist (i.e., post-settlement Indigenous governing bodies) while seeking to erase other forms of Indigenous self-determination (i.e., traditional councils, Indigenous law and sovereignty). In the last chapter, I discussed Agamben's state of exception and Foucault's rendering of politics as the power to conduct. I am concerned that blindly applying the two leaves little room for understanding how the sovereign apparatus is explained, when those who are enabled by delegated authority (i.e., the police, health officials, and bureaucrats) use their power to weaponize subjectivities deemed unacceptable to the settler-colonial project. This weaponization positions a certain unruly subject as requiring suppression—often through violence such as extra-judicial killings, medical neglect, material dispossession, and imprisonment. Whether these violences are technically illegal or not widely accepted as what occurs, they simultaneously uphold the sovereign's will, informing who is considered legitimate or unruly subjects. Importantly, it is not directly the sovereign who is doing such acts. The question that both Agamben and Foucault seem to neglect asking is: how does one explain the actions of the individual or institutional subject that commits violence in the name of the sovereign, which may technically be legal and therefore exist within the juridical order, but seeks to further the sovereign's goal of their exception (in this case the erasure of certain Indigenous subjectivities)? In this context, I am concerned with how we attend to the epistemic violence that manifests within the Canadian politics of recognition's translations of Indigenous

self-determination, which is supposedly “reconciliation” and “forward-looking”, yet can result in serious harm.

In speaking about the modes of sovereign conduct of torture at Guántanamo bay, political scientist Halit Mustaga Tagma (2009) makes an important connection between what Foucault sees as the contemporary mode of disciplinary conduct, that of biopower, and that of the Schmidtian sovereign. These modes of conduct are, as Tagma suggest, intimately intertwined and inseparable (409). Tagma observed that within Guántanamo, there were clear instances of sovereign torture that rendered the prisoners sub-human. These moments were of an extra-judicial nature, where the American guards acted as their own sovereign subjects when they did not treat the prisoners according to their own legal ritualistic regimes. In this sense, one can read this as the enactment of the sovereign exception—the suspension of legality in this case—thereby supporting Agamben’s privileging of the sovereign power as necessary for the enactment of biopower, as it is about the control over life and death of the prisoners (Tagma 410). However, what Tagma is careful to note is that although the political violence is occurring in the name of the sovereign state, “it is at the micro-level that *sovereign subjects* come to decide on whom violence is to be inflicted,” meaning that any analysis of sovereignty must also include what I propose to call “little sovereigns”. To caveat my use of Tagma’s work, I am not suggesting by any means that the activities of the Guántanamo guards are the same, or even similar to Canada’s treatment of Indigenous peoples. I am merely delineating on the context of Tagma’s work, to explain how he utilizes his concept and where I differ.

In the realm of policing, these little sovereigns could be considered the police themselves, but also the intelligence network that aids and instructs various levels of law enforcement. I think this is an apt description of the ways law enforcement operates in relation to policing the

Indigenous subject. Though technically illegal, police have been documented to be involved in extra-legal abusive actions against Indigenous protestors (for more extensive discussion see Dafnos 2013; Pasternak et al. 2013). By committing such acts, they continue to align with the settler-colonial project of the erasure of Indigenous peoples. On the one hand, the police are not explicitly instructed to commit such illegal acts, yet on the other hand they are surrounded by implicit encouragement to do so. These little sovereigns can then make their own decisions in terms of how their violence is used, thereby suspending legality. Yet, remember they are small actors who are unable to have the ultimate sovereign figure's ability to entirely subvert the law. In many ways, these forms of law enforcement and their relationship to the intelligence community act in such a way that mimic conventional sovereign power, but, as Tagma notes, they also have the power to conduct. This is critical when we consider how the work of any delegated state authority operates in conjunction with Indigenous peoples and bodies. It is apparent that political violence is informed by the sovereign state and its exceptions, but those who hold sovereign power in conventional political rendering of the state are not always the ones who commit said forms of violence. This system of sovereignty with its attachment to racialization, colonialism, and capitalism allows the creation of "little sovereigns" who are then relatively free to decide, though sometimes constrained by legal conventions, whom the violence is inflicted upon.

I want to reproduce a conversation I had in 2021 with Russ about the *Recognition and Implementation of Indigenous Rights Framework* (RIIRF), a policy that was meant to replace the framework of negotiations for comprehensive claims. Recall that the RIIRF was created with very little Indigenous consultation and was eventually disbanded, but from my own experience working in the government, it was still business as usual, and the policy continued to inform many of the conversations that occurred separately from the comprehensive claims policy. To avoid litigation,

negotiation tables ensue between federal negotiators and Indigenous representatives. Hearing of the constraining nature of these two policies from Indigenous interest groups, the government created the RIIRF with self-determination tables being the negotiation arm of the policy. These self-determination tables have continued even after the policy was said to be defunct.

Diabo: In a statement from Bennet, [it appeared] that they were going to continue, you know, discussions on the rights and recognition framework with their partners at the various tables. So they try to change and replace the Inherent Rights policy, which is the umbrella policy, and the Comprehensive Claims policy... They bypassed and offered it regionally at the different tables.

Goslin: Right, that was what they called the self-determination tables when I was working there, in 2018.

Diabo: Well, yes, they call them self-determination tables, but they also are creating tables with modern treaty groups, because there's two sets of tables. There's the nonbinding discussions at the recognition tables and they're trying to get them to accept the larger policy. So, they're basically trying to soften them up to agree to move to a negotiation table, to move to the big boys table from the kids table. (Laughs) That's what I call the recognition tables, the kids table, because they are basically training them to.... agree to these terms kind of thing, then [Canada] will go into negotiate”

My own experience working at the federal government and Diabo’s analysis of what is happening at these negotiation tables coincide. Diabo refers to the self-determination tables as the “kids tables”. For him, the “kids table” is the non-binding discussion that Indigenous groups are invited to have with federal negotiators. In his experience, Diabo explains that these tables by their nature are meant to get the Indigenous group to agree to a series of principles and methods of engagement at a future negotiation table that has little legally binding force. In my experience, it essentially allows the Indigenous group to come to Canada and voice their grievances without Canada having any duty to accomplish anything at those self-determination tables. Where I think Diabo’s comment on those tables is informative to this section, is that Canada’s negotiators are actively demonstrating their power to conduct. This idea of “softening them up”, is essentially the idea that the government negotiators need to create an environment where the Indigenous negotiators accept

the basic premises to begin moving to the binding negotiations tables which are the comprehensive claims and specific claims tables. On some level, it is those tables that seek the lowering of uncertainty in favour of certainty.

I am not suggesting that CIRNAC employees are committing political violence in the same way that police are. That suggestion would be demeaning/belittling for those who experience visceral brutality at the hands of policing organizations. I argue that the similarity between the two delegated authorities is that they both can commit violence, albeit in different forms, while also able to enact the types of rationality of a larger system delegates to them. It is evidently the process of the conduct of conduct, of Foucault's governmentality (2009), where these delegated authorities intervene in the process of governing to adjust said relations to ensure they are manageable and legible for governability (Li 2007: 276). I hold that delegated work should not be read as the by-product of a nation-state's instrumental function, but as something that both creates and maintains populations to create a specific ordering of people (Gupta 2012: 165). In other words, forms of delegated authority that here I represent as public service employees involved in lands claims, have the ability to oscillate between the power to conduct, and the power of the sovereign exception—though limited by their structural positions. As we will see in the Land Back section, the results of said political formation are not abstract but are instead a powerful material tool of colonization.

Certainty

I have one final comment to make before I turn to Land Back. Canada's position on certainty and the ability to frame their goals of certainty is a pre-condition in creating Indigenous partnerships. One of the outlined goals on the federal government's website claims that these settlements provide "certainty with respect to Aboriginal land rights in approximately 40 per cent of Canada's land mass" (CIRNAC 2015). Certainty to who, is the question at stake. When I asked

the director how extra-legal actions effect land claim negotiations, he willingly broached the subject of the government's position on "certainty":

First Nations in some cases are asking for things to be done in a way that legally doesn't, it's either not possible or won't, provide Canada with the *certainty* it's seeking, that's what bogs things down. It's not lack of effort or lack of creative thinking it's just, I mean, we need to make sure that if we are going to do anything related to lands or compensation, that at the end of the process, there is *clarity* for the First Nation, there's *clarity* for Canada, and there's *clarity* for people living around that area that that's what the future holds. [Emphasis added]

Pasternak and Dafnos (2017: 4) argue that this discourse of certainty/uncertainty is a euphemism. Providing certainty "does not refer to the status of Indigenous land rights, as governments claim, but to the economic implications of what these land rights might mean" for economic investment in critical infrastructure projects. Critical infrastructure refers to the four sectors of capital investment that state governments protect: finance, transportation, energy, and cybersecurity (Pasternak 2017: 241). Where the uncertainty comes into play is when Aboriginal rights and title threaten the exclusivity afforded to Canada's sovereign authority to govern the land and therefore protect those investments³⁹. Therefore, the Court's jurisprudence on Aboriginal title is critical to the discussion of Indigenous self-determination because it motivates Canada to respond to the supposed "uncertainty" it creates. Pasternak (2017: 241) identifies that it is the transportation and energy sectors that Indigenous movements affect directly, and therefore it is security agencies—through the invocation of critical infrastructure—that police those sectors more heavily. So, when a senior official in CIRNAC identifies that it is clarity and certainty that the government seeks to

³⁹ For an extensive discussion regarding the relationship between seeking certainty and protecting critical infrastructure, Crosby & Monaghan (2018) review the relationship between how security agencies' usage of critical infrastructure relates to Canada's discourse of certainty/uncertainty. They demonstrate that seeking certainty for investment requires invoking critical infrastructure to authorize the surveillance of Indigenous self-determination movements. This is echoed by Stanley (2016) in her essay that documents how Indigenous sovereignty is a risk to be managed through "flow-through share" financing agreements, which often engage with imposed band councils over inherent Indigenous governance structures.

provide to all parties involved, or when the government's own policy suggests as such, what this really says is that certainty is a necessary outcome for land claims to promote capital investment and avoid the unnecessary "uncertainties" that unceded Aboriginal title supposedly promotes.

This allows the abstract concepts of sovereignty and Crown title to come to the forefront. As I outlined how in the courts Canada tries to perfect its sovereignty and ensure Crown title is not diminished, placed in the context of the motivations and outcomes of the claims process, it becomes clear that it is the bureaucracy that enacts these fictions on a quotidian level. The bureaucrats may not understand their relationship with Indigenous peoples as being one marked by settler-colonialism, but the fact remains that it "mark[s] and [codifies] relationships on the ground by virtue of delegated authority from the Crown" (Pasternak 2017: 19).

LAND BACK

Land Back as a movement is a newer iteration about what has always been at the heart of Indigenous resistance to colonization: land dispossession and land restitution. According to the Land Back Manifesto published by the Indigenous-led NDN (a shorthand for Native Indian) Collective, Land Back is "the reclamation of everything stolen from the original peoples" (LANDBACK 2021). The movement itself in the NDN's own words "has existed for over 10 years, with ownership or control by no single group or organization" (Pieratos et al 2021: 51). The Yellowhead Institute understands this type of reclamation as an action of "assertion of jurisdiction beyond reserve boundaries and corresponding to efforts to enforce that assertion" (King & Pasternak 2019: 11). Land Back is often positioned in opposition to Canadian political and legal systems, but it is important to recognize that conflict is not inherent in the goals of Land Back. The shared factor for all forms of Land Back is the demand for jurisdictional control over Indigenous lands alongside the return of land.

The most visible form of Land Back is physical direct-action reclamation through land occupations, blockades, and other forms of being on the land (11-12). With physical reclamations, bodily and material enforcement of Indigenous jurisdictions become necessary to protect waters and lands slated for critical infrastructure development. Here I focus on a physical reclamation at the Six Nations of the Grand River called 1492 Land Back Lane, but I want to recognize that Indigenous jurisdictions can be asserted in many ways. Pasternak (2017), in her work with the Algonquins of Barriere Lake, reminds us that there is more beyond the blockade where Indigenous jurisdiction can be seen “through daily practices such as going to the bush, hunting and fishing without permits, tending traplines, harvesting syrup at family sugar bushes, maintaining their language, and by living in their traditional territory” (50). Leanne Simpson (2021) echoes this in the CLC Kreisel Lecture Series saying, “you will notice a mobilized network of support and solidarity extending well beyond the barricades” (11). As a white settler, the intimate details of 1492 Land Back Lane are not mine to share, especially since I want to avoid romanticizing the blockade. Thus, I want to be transparent in what motivates me to write this section. I will only present the broad strokes of what happened at this land reclamation so as to provide enough context to delineate on how the logics of the politics of recognition that I have discussed unfold, and to identify the importance of privileging Indigenous jurisdictions in research.

Context: 1492 Land Back Lane

A few days after the conference I mentioned in the introduction to this chapter, I was attending a Land Back unity concert hosted by Haudenosaunee organizers of the 1492 Land Back Lane occupation. That day, April 24th, 2021, marked the 15th anniversary of the 2006 Kanonhstaton (Kanien’kehá:ka for “The Protected Place”) land reclamation on Six Nations territory. Just southwest of Hamilton—known as Canada’s steel capital—is Caledonia’s municipality and the Six

Nations of the Grand River. In 2006, Caledonia became the centre of one of the most well-known land back occupations, when the Haudenosaunee exercised their rights as a nation to reclaim 40 hectares of land slated for residential development (Devries 2011: 11). At the unity concert, the mood was celebratory but also reflective of the long process of land reclamation.

Starkly similar to the land defense in 2006, in July 2020, Haudenosaunee land defenders began occupying a residential development called Mackenzie Meadows. In 2015, a residential development company called Foxgate Developments purchased 10 hectares of land for five million dollars from Haldimand County. Foxgate Developments engaged in consultation with the Six Nations of the Grand River band council from 2016-2019. However, the traditional governing authority, the Haudenosaunee Confederacy Chiefs Council, was not consulted and did not consent to the development on lands they considered to be unceded as part of the Haldimand Proclamation (1784). The Haldimand Proclamation produced what has become known as the Haldimand Tract. The Tract of 950,000 acres in the Grand River valley was outlined by Governor Sir Frederick Haldimand who ceded it to the Six Nations in 1784 (Johnston 1994: 170; Six Nations Lands & Resources Department 2020: 4). Canada and private interests maintain that this land was fully surrendered in 1841, and that the original deed was not properly authorized (Johnston 170). Instead of utilizing Haldimand's cession as confirmation of Six Nations title, Canada opts to follow the problematic agreement known as the Simcoe Deed 1793, which only recognizes 250,000 acres⁴⁰

⁴⁰ In the new colony of Upper Canada in 1791, Governor John Graves Simcoe took issue with Joseph Brant's interpretations of the Haldimand tract deed. In fact, Simcoe felt that there were very clear regulations outlining how the Crown holds and deals with Indigenous lands, in that they hold them for "protection" as a fiduciary responsibility to their now "Indian" subjects. He believed that Brant's sales of their granted lands amounted to proof that the Six Nation's could not be accountable to their own affairs, as they had allowed unscrupulous land speculators to take hold of their lands. Evidently, this was very much in line with the status quo of Indian wardship under the Crown's protection, and to no surprise Brant argued from the beginning that the Six Nations were "fully capable of protecting their own interests". Brant felt the sale of their granted territory was both necessary as the Nation could not use all the land and they would be able to collect lease annuities from the white farmers. For Brant, it was both financially necessary and politically important as an act of sovereign will (Johnston 1994: 172-3). The

(Ibid). The Confederacy maintains that this title was never relinquished, and that Canada's arguments are based on false pretenses that are related to improper recognition of governing authorities, systemic favouring of settler land occupation (i.e., illegal squatting), and finally imposing a reservation in 1841 without proper consent (Harring 1998: 51). All of these resulted in the reduction of Six Nation's lands to 47,000 acres, which "constitutes just 4.8% of the original Haldimand Tract" (Morden 2015: 178).

The Six Nations of the Grand River are no strangers to Canada's land claims policies. In attempts to rectify their dispossession, from 1980 to 1995, the elected band council on behalf of the community has submitted 29 specific claims. To be sure, those claims were not technically rejected by the Government of Canada, but they were "closed" as resolutions that would satisfy both parties could not be found. Then in 2007, Canada offered \$125 million to settle four of the 29 unresolved claims to provide "certainty" and cease the land occupation that began in 2006 (Forester 2021). This was an insult to the Six Nations negotiators, as the claims are valued anywhere from \$13.9 billion to \$8.7 trillion, depending on the land values and adjustments for inflation and interest rates (Six Nations Lands & Resources Department 2020: 12). I was also told by a Six Nations member familiar with this case that the Federal offer of \$125 million was contingent on Six Nations no longer pursuing the rest of the claims. This essentially asks that the Six Nations give up their inherent rights and title to the rest of the land stemming from the Haldimand Tract, meaning they would no longer have the ability to litigate for those lands. In 2016, the elected council's legal team submitted a statement of claim to the Ontario Court of

Simcoe deed was then crafted contrary to Brant's perception of the grant, even though he held power of attorney for thirty chiefs. In 1793, the deed for the tract stated that none of the land could be disposed of, except through the offices of the Crown, and therefore would be interpreted by colonial offices as a leasehold estate rather than fee simple (Ibid).

Justice to pursue legal action to rectify these abuses (Court File No. 406/95). A trial to discuss these dispossessions and the original intent of the Haldimand Tract is set for 2023 (Forester 2021).

One of the claim areas is where the land defenders continue to occupy the land slated for residential development by Foxgate Developments. These Haudenosaunee land defenders have remained on the land for over 460 days, as of April 2022. In order to protect the lands and peoples from further harm due to the policing operations, blockades were set up to ensure the safety of those on the land. An organizer told me that the aim of the reclamation was the immediate halt to the residential development, the requirement to seek informed consent from all Indigenous title holders, and the return of lost Six Nations' land. As I mentioned, I do not want to discuss the intimate events that occurred at 1492 Land Back Lane, but I want to focus on two practices that one of the organizers had told me about, and the importance this holds for Haudenosaunee law. I will then turn to Canada's rhetoric surrounding the reclamation and the attempts to reimpose the "rule of law" (Devries 2011: 18).

Counter-Conduct and Haudenosaunee Law

Haudenosaunee author and educator Theresa McCarthy (2016), in her book *Divided in Unity*, discusses the concept of traditionalism as understood through the Kanien'kehá:ka language. Traditionalism, much like culture and its entailments, is an object of knowledge that has been "researched to death" (Castellano 2004: 98; Simpson 2014). Tradition and traditional "are Western-applied concepts that possess their own connotations of time, relevance, [and] authority," which implies that to have tradition means one is pre-modern (McCarthy 14). McCarthy notes that traditionalism is not something of the past, nor is it an object subject to timelessness (19). She recognizes that tradition is loosely translated into English as "our ways" which "is understood to

be about action. It is participatory and oriented toward practice” (16). Learning language, braiding corn, and ceremony are “ultimately a radical political act” (19).

In August 2020, Oneida Bear Clan journalist Karl Docksteder (2020) went to stay at 1492 Land Back Lane. When discussing the spirit and intent of the 2020 land reclamation, Docksteder mentioned that “[w]hen we make a decision, you should really make some time with your family to add something to the conversation that helps that decision get made. Our democracy, our society, and even our musical ways are meant to be participatory” (Docksteder 2020). Docksteder was pointing to what McCarthy also mentions. When it comes to understanding land reclamations for the Haudenosaunee Nations, it is about enacting Haudenosaunee law and its related practices upon their lands.

Enacting Haudenosaunee law occurred in a myriad of ways at 1492 Land Back Lane. The organizer I mentioned before told me that “there is an obligation to the land. A duty to respect. And that’s why we are here”. This obligation for that organizer in my own understanding meant returning life to the land. One such obligation to the land was the gardening and planting of the three sisters of the Haudenosaunee planting cycle. The three sisters refer to corn, squash, and beans. This type of planting actively interrupts what that parcel slated for residential development meant. It refuses Canada’s, Caledonia’s, and Foxgate’s understandings of the land, as something to be disposed of and exploited. These obligations to the land are outlined in Haudenosaunee law through the Great Law. Kaianerekowa, or the Great Law, is often cited as the source of Haudenosaunee laws “that provide the political and spiritual structure of the Haudenosaunee Confederacy” (Hoover 2017: XIII). This land reclamation and all the political practices that go with it are not purely a negative response or refusal but are importantly a generative refusal. Those involved in the occupation are enacting their own laws as opposed to Canada’s. They are not

resisting Canada by saying they simply do not want to be under Canadian law, it is that the Haudenosaunee are partaking in and implementing their own laws and governing systems. For those involved in the reclamation, it was not that they “do not want to be governed at all” (Foucault 2007: 44); rather, that the Haudenosaunee Nations seek to be conducted “properly and appropriately” (Foucault 2007: 231). Enacting Haudenosaunee law, like the responsibility to plant the three sisters at Land Back Lane, is about refusing a type of conduct in favour of their own conduct, allowing a process of transformation to enact the otherwise, and bolstering Indigenous self-determination. In these spaces, it is the role of the researcher and the public to reflect on the fact that Haudenosaunee people “should be seen as legitimate contemporary political actors,” so that we may treat these forms of political conduct seriously (McCarthy 2016: 27).

Canada and Ontario Respond

On August 5th, 2020, Ontario Provincial Police (OPP) raided the land occupation. Pursuant to a temporary injunction (which would later be made permanent) granted by the Ontario Superior Court’s Justice R. John Harper, the OPP arrested land defenders using anti-riot weaponry (McCullough 2020). According to a briefing from the Canadian Secret Intelligence Service (CSIS), which has since been declassified, “critical infrastructure near the camp has been damaged, vandalized or disrupted during the protest. The damage to critical infrastructure and the potential disruption to services have implications not only for Caledonia, but southern Ontario as a whole” (CSIS 2020: 3). Further into the document there is a section titled “Notable Concerns Regarding Critical Infrastructure”, however this section is entirely redacted so it is unclear how these concerns were being addressed. With CSIS invoking the “critical infrastructure” criteria, the land occupation was identified as a “liability to the securitization of supply chain infrastructure”, opening avenues to mandate the authority for increased surveillance to mitigate the uncertainty the participants

posed (Pasternak and Dafnos 2018: 7). By positioning the Six Nations land defenders' claims of Indigenous rights and title as a "liability" to critical infrastructure, Indigenous sovereignty was placed in direct opposition to Canadian sovereignty. It was seen as a threat to Canadian national security and therefore, certainty.

Andrew Crosby and Jeffrey Monaghan (2018) argue that the Canadian security apparatus involving policing agencies, private interests, and the Canadian bureaucracy armed with critical infrastructure, enable those actors to claim Indigenous land defenders are "national security threats" (73). Doing so creates a divide between legitimate and illegitimate Indigenous actors which is a result of racial discourse. In a press release, Doug Ford, the Premier of Ontario, responded to the barricades being set up at 1492 Land Back Lane. He said:

I don't know if a few folks are going rouge. But the way you get things settled is by sitting down at the table talking about solutions. You don't go after our police, you don't burn telephone poles, you don't dig up roads. That's unacceptable, we won't tolerate it. If you want to sit down, you come to my office, and we come up with a solution... It's unfortunate we have a couple of bad apples... Don't let a few bad apples turn it into a bad relationship. (CBC 2020)

Ford invoked the idea that these were "bad Indians" that had no legitimacy to represent the First Nation's community. In a clearly agitated tone, he implored those acting that all they needed to do was appeal to him and his government to come to some sort of solution that would satisfy all involved. He did not recognize those acting at the reclamation site as legitimate political actors, nor did he really seem to understand the breadth of the issue. They were just a few "bad apples" ruining "good working peoples'" abilities to get a home, as he later says in his comment. Ford's idea of settling these issues was for the Six Nations to come to the proverbial "table" to discuss their outstanding issues, yet as I have already made clear, the Six Nations have been repeatedly forced to go to the Courts to pursue their land grievances.

There exists a “cultural line” (Martin 2018) to what forms of policing will occur. Those “bad apples”—a stand in for “bad Indians”—authorized the forms of violence that CSIS and the OPP would commit. I think Leanne Simpson summarizes this racist tendency perfectly when she explains that “there is an assumption that if we behave as ‘good Indians’ in the eyes of white liberals and even of what remains of the Canadian Left, we will be rewarded with rights and recognition” (2017: 234). On the flip side, if Indigenous peoples behave as “bad Indians” then they become cast as “rouge” as Ford makes evident. This type of discourse casts Indigenous peoples that are not favourable to government priorities as rouge disruptors. DeVries (2011: 21-22) details the extensive use of the phrase “rule of law” by Canadian authorities as a way to position Indigenous land defenders in opposition to Canadian law and therefore civility. DeVries documented that discourse around the 2006 land reclamation. In 2022, little has changed.

Ford’s statement, the policing of the occupation, and the high level of securitization involved is in fact displacing attention from the ways in which the lack of political recognition alongside colonial property regimes, continue to commit violence upon Indigenous peoples and their lands. It also acts as a naturalizing technique that seeks to reimpose these relations of domination and the supremacy of Canadian law, at a time when they are called into question. As Justice Harper said when he granted the injunction, Canadian law “applies to everyone, without exception” (quoted in Docksteder 2020). This continuous need to reimpose Canadian law seems to suggest that due to its unsettled nature, the requirement of enforcing certainty is necessary to maintain the unilateral supremacy of Canadian law. Land Back as a whole and the occupations at Land Back Lane beg the question: what happens to the land and the people in a scenario where governments and private interests are refusing to engage with Indigenous law? It is this practice of privileging Canada’s common law interpretation of their sovereignty rather than implementing

title and rights that derive from Indigenous law that continues to plague Canada's ability to adequately decolonize itself.

CONCLUSION: A FINAL COMMENT ON THE OTHERWISE

In the introduction to this thesis, I asked how Canada came to claim the authority to have legitimacy over unilateral decision-making with regards to Indigenous peoples. I wondered what this meant in relationship to giving land back that was not Canada's in the first place, while equally hoping to demonstrate the legal, political, and social justifications that Canada relies on as a liberal settler-colonial polity to claim land as its property. In chapter one, I documented anthropology's historical complicity with this project. To do so, I retraced the racialized discourses of the anthropological theory of culture's relationship to liberal theory, and how this authorized the social and material dispossession of Indigenous peoples in Canada. In Chapter two, I then turned to critically engaging with the Court's jurisprudence of Aboriginal title, Crown sovereignty, and Crown title in Canada. I argued that, implicitly and explicitly, the Courts have consistently relied on assumptions of Indigenous peoples that entail the type of cultural and racial theories of the nineteenth century, and as a result the Courts have been relatively unclear as to what Canada's sovereignty and title rests upon as it is accepted until proven otherwise. As such, this leaves Canada unsettled. In my final chapter, I relied on my ethnographic data to materialize that Canada's policy regimes' reliance on the need to extinguish Indigenous title in favour of "certainty" results in the burgeoning uncertainty that Indigenous movements such as Land Back attempt to grapple with. By privileging Haudenosaunee legal traditions involved in the 1492 Land Back Lane reclamations, I hoped to demonstrate the need for research to take Indigenous self-determination seriously in order to engage in decolonial perspectives. There is one final aspect I want to end with. This is understanding what kind of relationship is necessary for truth and reconciliation.

In the final chapter I discussed the issues of seeking "certainty" over recognizing the "uncertainties" that exist in Canada's relationship with Indigenous peoples. On the one hand,

Canada and the Courts boast that land claims agreements are positively providing certainty for all parties involved (the government, the Indigenous Nation, private business, and citizens). Yet, on the other hand, decolonization is discussed as a journey and, as Ritseks (2012: 1) recognizes, “uncertainty is not to be feared”. Uncertainty should be a celebrated notion for its ability to imagine what could be otherwise, what could be reimaged. Imagining, as the late David Graeber (2007) argues, can be considered a radical quest to envision new ways of being, making, and relating. Imagining inhabits this space of uncertainty similar to the way that decolonization does. If we are to imagine otherwise in a way that is meant to reimagine new forms of relationships with Indigenous Nations, we must also commit to decolonizing. Committing oneself to the quest of certainty, as governments and their bureaucracies have, will contribute to further violence and inequalities.

Additionally, this form of seeking certainty relates to what the anthropological discipline has mostly been concerned with, namely, uncovering the “truth” to human existence. What has become fashionable is to suggest that what makes us human is our “culture”, but the reasons “culture” provides certainty, is the same reasoning it firmly cements Indigenous nations as cultural artifacts—that is, unitary and static. Culture is not simply a theoretical and abstract concept. As I have shown, culture is a paradigm used in policing, legal realms, and political systems, all of which is operationalized to benefit the settler-project. Once again, the quest to find certainty surrounding Indigenous identity becomes an all-too-familiar colonial act. Perhaps the only way out of these problems is to reflect on what it means to inhabit a space of uncertainty. That is, to interrogate what we consider to be certain in order to allow for new forms of politico-ethical arrangements in an environment of uncertainty. Decolonization must be an act in thinking what could and should be otherwise, and perhaps by doing so we can “first envision things, then bring them into being”

(Graeber 2007). This is not to advocate that decolonization is solely a thought project. In other words, it is not a metaphor, to borrow Tuck's and Yang's (2012) oft-cited phrase. It is important to recognize that it requires a material redistribution: land, capital, decision-making. It is about having the authority to set the terms of engagement, the authority to have authority. Imagining otherwise, celebrating uncertainty, and remaining critical to the notion of certainty are the main tenants of this thesis.

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Appendix A



Crown-Indigenous Relations
and Northern Affairs Canada

Relations Couronne-Autochtones
et Affaires du Nord Canada

Canada

UNCLASSIFIED
Executed on: 2022/03/27

Specific Claims Branch National Summary on Specific Claims

IN PROGRESS

Under Assessment (161)

- Date Research & Analysis started	66
- Justice Department Preparing Legal Opinion	56
- Legal Opinion Signed	39

In Negotiations (395)

- Active	395
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TOTAL IN PROGRESS: 556

CONCLUDED

- Settled through Negotiations	602
- Compensation Awarded by the SC Tribunal Implemented	5
- No Lawful Obligation Found	396
- Claim Resolved through Administrative Remedy	33

TOTAL CONCLUDED: 1,036

OTHER

- Claim in Active Litigation	55
- Claim Active at the SC Tribunal	68
- File Closed	309

TOTAL OTHER: 432