

Seeking Justice Beyond Legalism: Cultural Appropriation of Totem Poles on the Pacific
Northwest Coast

by

Isabelle Lefroy
B.A., McGill University, 2014

A Thesis Submitted in Partial Fulfillment
of the Requirements for the Degree of

MASTER OF ARTS

in Interdisciplinary Studies in the Faculty of Law and Indigenous Governance

© Isabelle Lefroy, 2018
University of Victoria

All rights reserved. This thesis may not be reproduced in whole or in part, by photocopy
or other means, without the permission of the author.

Supervisory Committee

Seeking Justice Beyond Legalism: Cultural Appropriation of Totem Poles on the Pacific
Northwest Coast

by

Isabelle Lefroy
BA, McGill University, 2014

Supervisory Committee

Dr. Rebecca Johnson (Faculty of Law)
Co-Supervisor

Dr. Jeff Corntassel (Indigenous Governance)
Co-Supervisor

Abstract

Supervisory Committee

Dr. Rebecca Johnson (Faculty of Law)
Co-Supervisor

Dr. Jeff Corntassel (Indigenous Governance)
Co-Supervisor

This thesis attempts to illuminate and problematize the marriage of capitalism and colonialism that results in the widespread appropriation of Indigenous expressions of culture, and in particular, totem poles. This project complicates our understanding of totem poles as they have been presented in the marketplace and restores some of the intricate legal meaning to these incredible works. First, I examine Canadian intellectual property law and colonial policies of cultural erasure like the potlatch ban. Next, I explore the use of rights discourse, or legalism, as a potential route for solutions to this issue. I then conduct case studies of three totem poles. I examine one totem pole as a commodity, one functioning as a piece of art and someone's livelihood, and one as part of a Tlingit legal tradition. This last totem, as a materially appropriated object, provides an opportunity to explore the treatment of totem poles in proper context and also functions as a suggested solution to Indigenous art appropriation more broadly. My intervention on this last totem reframes these issues in a non-Western legal cannon to attempt to address these difficult legal questions. My examination of these three totems serves to destabilize our understanding of totem poles sold in the marketplace, and to broaden our understanding of totems as manifestations of Indigenous laws.

Table of Contents

Supervisory Committee	ii
Abstract.....	iii
Table of Contents	iv
List of Figures	v
Acknowledgments.....	vi
Chapter I: Introduction	1
Chapter II: Terminology and Methodology.....	9
i. Terminology.....	9
ii. Methodology	14
iii. Self-location.....	18
iv. Literature Review: A Map.....	20
Chapter III: Colonial Context	21
i. Research Practices.....	21
ii. Canadian Intellectual Property Rights.....	23
iii. Policies of Cultural Erasure.....	27
iv. Legalism: Solution or Setback?.....	30
a) Rejecting Legalism	31
b) Renovating Legalism	38
c) Re-imagining Law	45
Chapter IV: Case Studies of Three Totems	51
i. The First and Second Totems: Brought to You by White Spot and BC Ferries.....	51
ii. The Third Totem: The Whale House Case.....	59
Chapter V: Conclusion	72
Bibliography	77

List of Figures

Figure 1. <i>Four Totems</i> , Sue Coleman, 2006.	1
Figure 2. Left: Original Inuit parka designed to keep its creator safe. Right: High-end fashion line’s interpretation of the original design, copied without permission or credit, and assumed to be part of the public domain.	3
Figure 3. Medals commissioned for the annual James Cunningham Seawall Run	5
Figure 4. Left: Ambiguously labeled totem poles for sale at BC Ferries Gift shop	51
Figure 5. Right: <i>Wonderbird Totem Pole</i> , Ellen Neel, 1953.	51
Figure 6. The Wormwood Post – one of four posts from the Whale House.	59
Figure 7. Social Structure of the Tlingit Village of Klukwan.	60
Figure 8. <i>The Daddies</i> , Kent Monkman, 2016.	72

Acknowledgments

I am very grateful to the community that helped me write this thesis. First, I would like to thank my parents for their continual encouragement. I am so inspired by you both, as educators, life-long learners, and parents. I would also like to thank my partner, Brendan Morgan, for his steady care and support. You help me in a thousand ways every day. I would like to thank my supervisory committee, Dr. Rebecca Johnson and Dr. Jeff Corntassel, for seeing me through this journey. I am grateful for your vision, humour, and encouragement. I would also like to thank Dr. Val Napoleon and Dr. John Borrows for their support and contributions to my work, and Dr. Carolyn Butler-Palmer for reviewing my thesis as an external examiner (and introducing me to Ellen Neel's work). Finally, I would like to thank the WSÁNEĆ, Lekwungen, and Wyomilth peoples on whose unceded territory I completed this work.

Chapter I: Introduction



Figure 1. *Four Totems*, Sue Coleman, 2006.¹

The above painting is priced at \$29,000 – a fair price, perhaps, for an original piece by a world-renowned artist. Many people would assume an Indigenous artist painted it. They would be mistaken.

Sue Coleman is a British born Canadian, who moved to the west coast of Canada in the 1960s. In the 1980s, she became fascinated with west coast Indigenous art. Coleman says of her work: "I didn't understand Native artwork at all, and when I was at a show beside a Native carver and asked if I could learn, he said no, because I wouldn't understand...I guess the British sense of indignity in me said, 'Well, of course I can't if no one will teach me,' so I got the idea to

¹ Sue Coleman, 2006. <<http://www.suecoleman.ca/Originals.htm>>

become a translator... I knew there was nothing like this and I knew it had something of a marketable value."² So, she began to teach herself.

Coleman's paintings now sell for anywhere between \$17,500 and \$29,000. She says throughout her career, Indigenous artists and people have expressed to her that they "appreciate her work and found it inspiring."³ However, patrons of her works have expressed surprise and dismay that she is British.⁴ There is a sense that these paintings are inauthentic.

Recently, Cary Newman, a Kwakwak'awakw and Salish artist, came forward to announce that his father was the artist that rebuffed Coleman's requests to learn from him. Supported by over 100 signatures from other Indigenous artists, scholars, community members, and allies, Newman wrote an open letter Coleman expressing his deep concern for her attitude towards her work.⁵ Newman first addresses how Coleman has positioned herself as a "translator" of Indigenous art. He writes, "[t]his notion of being an interpreter is nothing more than sidestepping the truth of what you do – you appropriate our cultures, take up public space that doesn't belong to you, and displace Indigenous bodies who have the inherent rights to practice this art form, replacing them with your own."⁶ He furthermore offers a different account of what transpired between his father and Coleman 35 years earlier. Newman explains that his father was interested in collaborating with Coleman on a children's book about how the loon got his "necklace." The potential partnership ended when Newman's father declined Coleman's request that he teach her how to do the designs herself. He explains that his father, though he had taught his style of art to hundreds of students "from all backgrounds, races and religions" in the Victoria

² Angela Sterritt, "Non-Indigenous BC Artist Defends Work Despite Calls for Authenticity," *CBC News*, October 25, 2017. <<http://www.cbc.ca/news/canada/british-columbia/indigenous-art-knock-offs-at-a-crisis-say-artists-1.4369639>>

³ *Ibid.*

⁴ *Ibid.*

⁵ Cary Newman, "An Open Letter to Sue Coleman from Members of the Indigenous Community," December, 2017. <<https://www.facebook.com/carey.newman.7>>

⁶ *Ibid.*

public school system, perceived that Coleman was singularly interested in the “marketable value” of the art, and was concerned that she would never be able to understand the responsibility and connection to culture that accompanies the creation of this kind of art.⁷ Newman writes, “after all these years, your refusal to hear the true meaning of his words continues to prove his instincts right.”⁸ Where Sue Coleman’s anonymized depiction of the exchange completely effaced Newman’s father, Newman’s letter gives his father (and many other Indigenous artists) a voice in the matter of appropriation.



Figure 2. Left: Original Inuit parka designed to keep its creator safe. Right: High-end fashion line’s interpretation of the original design, copied without permission or credit, and assumed to be part of the public domain.⁹

Another example adds further dimension to the appropriation of Indigenous art: in 2015, an Inuit family was shocked to discover that their great-grandfather’s caribou-skin parka had

⁷ *Ibid.*

⁸ *Ibid.*

⁹ “Nunavut Family Outraged After Fashion Label Copies Sacred Inuit Design,” CBC News. November 25, 2015. <<http://www.cbc.ca/radio/asithappens/as-it-happens-wednesday-edition-1.3336554/nunavut-family-outraged-after-fashion-label-copies-sacred-inuit-design-1.3336560>>

been duplicated by a high end European fashion line.¹⁰ On the left of Figure 2 is the original parka, worn by the maker, who envisioned the parka in the early 1920s. He designed it to protect himself – as his great-granddaughter explained, the two hands and the little man on the front represent safeguards. Awa, the great-granddaughter, checked with her family to make sure no contract had been arranged and that the company had never requested to copy the design. Kokon To Zai, the high-end clothing designer, probably got the design from the photos of Awa’s great-grandfather wearing the parka which have been featured in books and online. The coat was retailed for a whopping \$925. Awa emphasized that these were sacred designs, not to be duplicated, but the family has absolutely no options for recourse or compensation within Canadian law, regardless of the clear transgression in Inuit law.¹¹

A third example demonstrates the pervasiveness of the idea that Indigenous cultural expressions are part of the public domain. In October 2017, the Vancouver Running Festival posted a photo of the medals it commissioned for the annual James Cunningham Seawall Run in Stanley Park.¹² The caption said the design was "inspired by the work and aesthetic of Indigenous artists of Canada and the U.S., but was not created by a First Nations member."¹³ Inevitably, there was a significant backlash on social media, with users pointing out, "There's no shortage of [First Nations] artists you could have commissioned to design your medal and finding one isn't difficult."¹⁴ Many other users in turn challenged the backlash, wondering why inspiration couldn't be drawn from Indigenous art styles. Perhaps there would be no problem if there was a shortage of Indigenous artists available to design the medals, but that simply is not

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Rhianna Schmunk, "B.C. Race Pulls 'First-Nations-Inspired' Medal After Appropriation Backlash," CBC News, October 10, 2017. <<http://www.cbc.ca/news/canada/british-columbia/running-festival-medal-appropriation-1.4346686>>

¹³ *Ibid.*

¹⁴ *Ibid.*

the case. The organization pulled the medals and announced it would be working with an Indigenous artist to create a new design for the medals. Unfortunately, the question has to be asked: why didn't they originally seek out an Indigenous artist?



Figure 3. Medals commissioned for the annual James Cunningham Seawall Run¹⁵

The appropriation and mass distribution of Indigenous expressions of culture forms a large part of the tourist industry in British Columbia.¹⁶ This appropriation often fosters misrepresentation, caricature, and stereotyping of Indigenous cultures. Appropriation of Indigenous cultural expressions is particularly visible in tourist hotspots like downtown Vancouver and Victoria, which are inundated with souvenir shops that sell sweaters, sunglasses, and shot glasses sporting West Coast Indigenous designs. Tourists flock to these shops, buying

¹⁵ *Ibid.*

¹⁶ Authentic Indigenous website, Vancouver, 2016: <http://www.authenticindigenous.com/> [Authentic Indigenous Website].; Amy Mair, "The Rise of Aboriginal Tourism in BC," *BC Business*, July 3, 2012, <<https://www.bcbusiness.ca/the-rise-of-aboriginal-tourism-in-bc>>. It is important to note that not all of these products are appropriated. There are existing mechanisms (outside the Canadian legal system) to "authenticate" products that have been designed, crafted, and produced by Indigenous artists who have received fair compensation for their work. However, these consumer education programs are not widespread.

souvenirs for their families at home: mini bottles of maple syrup, tacky t-shirts, and conveniently sized replicas of totem poles. These tokens allow tourists and settlers to passively consume what they think is “Indigenous culture” without confronting the reality of violence and dispossession in Canada. Why is it acceptable for these souvenirs sporting appropriated cultural expressions to be sold without consequences?

All three examples above demonstrate that most of the public assumes that a certain style of art such as west coast Indigenous art, also known as formline art, is part of the public domain, and as such, belongs to no one. A large part of why this issue is so prevalent is that there is no recognition that these forms of expression hold an important place within Indigenous cultures. Indigenous legal orders have been so subsumed and oppressed by the settler state¹⁷ that many people cannot understand that Indigenous cultural expressions might play a large role in Indigenous communities. To the majority of audiences, these expressions of culture are simply aesthetic. I intend to disrupt that conception.

In this thesis, I consider three different manifestations of totem poles to explore the treatment of expressions of Indigenous cultures in the marketplace. I examine one totem pole as a commodity, one as a piece of art and someone’s livelihood, and one as part of a rich legal tradition. My examination of these three totems serves to destabilize our understanding of totem poles sold in the marketplace, and to broaden our understanding of totems as manifestations of Indigenous laws. Coleman’s *Four Totems* (Fig.1) represents how settler fascination with Indigenous cultures has skewed the meaning of totems, posts, or poles. I attempt to examine some of this distortion and demonstrate how some Indigenous communities have used their own laws to reassert proper use of these objects. I examine the power dynamics at play in Canadian

¹⁷ Rebecca Johnson & Lori Graft, “Learning Indigenous Law: Reflections on Working with Indigenous Stories” (2017) 2:2 *Lakehead Law Journal* 118 at 118-120 [Johnson and Graft]; see also John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [*Canada’s Indigenous Constitution*].

society that result in the commodification of Indigenous culture and explore the multiple functions of Indigenous cultural expressions to understand how capitalism and colonialism have put consumers in the position where they are participating in ongoing colonial violence against Indigenous peoples, embodied by the totems.

The expressions of culture were chosen for their ability to function in multiple ways: as art, as commodity, as part of Indigenous legal orders, as resistance to colonialism, and as cultural signifiers on land, among other things. These expressions are a productive location to consider cultural appropriation because they offer opportunities to look at cultural interactions that cross boundaries of art and functionality. Not only are these objects being appropriated by a wider settler consumer culture, but they are operating as someone's income. In this way, I will be able to grapple with multiple layers of this issue, rather than simply understanding cultural appropriation as a flattening, single act of colonial violence.

I will first discuss the terminology and methodology informing my thesis. Next, I address some harmful research practices that facilitate appropriation of Indigenous cultures and examine some policies of cultural erasure carried out by the Canadian government against Indigenous peoples. I will then contextualize appropriation of Indigenous cultures in the framework of Canadian intellectual property law. Next, I explore legalism, the strategy of using law to resolve social justice issues, as a potential solution to these problems. Finally, I will compare three different totem poles to examine the commodification of Indigenous cultures, and resistance to that commodification, as well as the application of Indigenous laws to the complicated questions of ownership and commoditization that surround west coast Indigenous art. The contribution of this thesis, while seemingly of little consequence in the grand scheme of what is needed to

address the appropriation of Indigenous expressions of culture, offers a starting place where the moving pieces of this puzzle can be examined thoroughly.

Chapter II: Terminology and Methodology

In this section, I will discuss some definitions of the language I use. I will then describe the methodology informing my thesis, discussing some difficulties that can arise for a settler researcher. As part of my methodology, I conduct a self-location to make transparent my motivations for doing this type of work and to hold myself accountable for the privileges I benefit from as a settler. I then briefly outline a roadmap of my literature review, which is woven throughout my thesis.

i. Terminology

The term “cultural appropriation” has numerous connotations, and it is useful to go through a few of these definitions. Scholar Erich Hatala Matthes includes in his definition of the term: (1) the representation of cultural practices by “outsiders” or non-members; (2) the use of distinct artistic styles of certain group by non-members, and, (3) the buying and possession of cultural objects by outsiders.¹⁸ In this thesis, I focus on the second and third definitions outlined here.¹⁹ Cultural appropriation can be distinguished from equal cultural exchange due to the presence of a colonial element, or an imbalance of power.²⁰ In this work, I focus on appropriated objects and the context in which appropriation occurs, rather than the appropriators.

When discussing the “appropriation of Indigenous art” as seen in gift shops in Vancouver and Victoria, I am generally referring to the appropriation of West Coast Indigenous cultural expressions, which have been mass-produced and sold as clothing and souvenirs. I do not wish to

¹⁸ Erich Hatala Matthes, “Cultural Appropriation Without Cultural Essentialism?” *Social Theory and Practice*, 42.2 (April 2016): 343-366 at 343 [Matthes]; James O. Young, *Cultural Appropriation in the Arts* (Blackwell Publishing, 2008).

¹⁹ For a broader discussion of cultural appropriation, especially in popular culture, see scholar Adrienne Keene’s blog, “Native Appropriations.” On her blog, she deconstructs and critiques the popular settler culture’s representations of Indigenous imagery and culture, calling for education and awareness about the harmfulness of cultural appropriation. She covers everything from the Washington Redskins to J.K. Rowling’s appropriation of creatures from Indigenous oral stories. < <http://nativeappropriations.com/>>.

²⁰ Matthes, *supra* note 18.

delineate specific groups or geographical areas, because Indigenous artists, like everyone else, move around, or perhaps do not identify with any particular community or Nation. I also wish to note that this problem is not specific to the west coast – appropriation of Indigenous art and culture occurs across North America and beyond. As I will explain in my methodology section, I have decided to root my analysis in the general area of the west coast.

In the context of this paper, when using the terms “Indigenous art” and “Indigenous expressions of culture,” I am referring to designs, motifs, and styles used by Indigenous artists. However, I refer to pieces like masks and totem poles exclusively as “expressions of culture,” instead of “art.” I run the risk of trivializing their significance by considering them simply as “art.” Prominent Maa-nulth scholar Johnny Mack writes that the appropriation of almost any object results in a radical change in meaning for that object.²¹ He claims that totems, which are central to Nuu-chah-nulth governance structures, lose significance when they are appropriated. When placed in a new context, totem poles “are hailed or interpolated into a new conceptual field where they are understood primarily as fine works of art, rather than powerful and constitutive authorities.”²² I am doing appropriative work by analyzing Indigenous expressions of culture, so I must try to identify and minimize the negative impacts of my work as much as possible. I therefore refer to totem poles as “expressions of culture” instead of “art,” and will try to flesh out their significance more fully in the comparative section of this thesis.

I must also note that the phrase “expressions of culture” is imperfect. Culture is a vague term. By using the term expressions of culture, I risk restricting the object in question to a hazy and imprecise value.²³ I want to be very clear that when I use the term expressions of culture, I

²¹ Johnny Mack, *Thickening Totems, Thinning Imperialism* (LLM thesis, University of Victoria, 2009) at 1 [Mack].

²² *Ibid.*

²³ I would like to acknowledge Val Napoleon for pointing out that the vagueness of the term “culture” can unintentionally obscure or degrade the legal, economic, political, or social value of the object in question. For more,

am not precluding the possibility that the object is also an expression of law, or governance, or any other important institution. I want my use of the word “culture” to capture all these possibilities.

In this thesis, what is commonly referred to as “traditional knowledge,” “traditional ecological knowledge,” or “traditional cultural expressions” in academic literature and international organizations’ publications (such as WIPO) will also be referred to as “Indigenous cultural expressions.”²⁴ The term “traditional knowledge” itself is a good example of Western misunderstanding of Indigenous knowledge and expressions of culture, and reveals an impulse to label anything derived from Indigenous nations as “traditional” or “ancient.” The term “traditional” evokes the past, consequently aligning Indigenous knowledge and culture exclusively with the past. This is harmful.

In the past, Indigenous peoples have been depicted and treated as a dying race that is no longer relevant.²⁵ Indigenous peoples are embroiled in struggles to repudiate the stereotype of the

see “Looking Beyond the Law: Questions about Indigenous Peoples’ Tangible and Intangible Property” in Catherine Bell & Robert Paterson, eds., *Protection of First Nations’ Cultural Heritage: Laws, Policy and Reform* (Vancouver: UBC Press, 2009).

²⁴ See Industry Canada, *Intellectual Property Policy: Traditional Knowledge* (Ottawa: Parliament of Canada, 2011); Tonina Simeone, *Indigenous Traditional Knowledge and Intellectual Property Rights* (Ottawa: Political and Social Affairs Division, Parliament of Canada, 2004) [Simeone]; World Intellectual Property Organization, *Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore: A Guide for Countries In Transition* (Geneva: WIPO, 2013). It is important to note that the term “traditional” in WIPO documents encompasses a broader spectrum of knowledge than just Indigenous knowledge. The document refers to non-Indigenous knowledge as well as Indigenous knowledge. The use of the term “traditional” was debated and negotiated for years, and is a result of much thought and consideration. There is no harm intended by the WIPO. But documents commissioned by the Industry Canada, such as the report prepared by Tonina Simeone noted above, seem to have picked up on WIPO’s use of “traditional knowledge” but only with regards to knowledge held by Indigenous peoples. In the context of colonialism, the report’s use of the word “traditional” does not reflect a thoroughly debated term, but rather a lack of consciousness regarding the harmful and stereotype inducing association of Indigenous peoples with the past, as discussed in my following paragraph.

²⁵ Walter C. Fleming, in *The Complete Idiot’s Guide to Native American History* (New York: Alpha Books, 2003) at 290 [Fleming] discusses the prevalence of the myth of the “vanishing red man,” the subject of Robert Frost’s 1920 poem “The Vanishing Red.” The poem describes the violent death of “the last red man.” In 1918, James Earle Fraser sculpted his well-known bronze work titled “End of the Trail.” The sculpture depicts a seemingly defeated, dispirited man dressed as a Plains warrior sitting astride a horse that seems to be carrying him over an unobserved precipice. At the time both the poem and sculpture were created, Indigenous population levels were declining. As Fleming points

vanishing Indian, which is propagated through sports team mascots, in clothing, film, and tourism industries as well as law.²⁶ For example, the Supreme Court of Canada (“SCC” or “the Court”) has created a test to determine whether practices such as fishing or hunting can still be performed in certain communities. In *R v. Van der Peet*, the SCC established a test to determine the crucial elements of distinctive pre-contact societies instead of the relevant existing Indigenous communities, seemingly in order to avoid the influence of settler society.²⁷ The Court ruled that in order to be protected, “an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”²⁸ Furthermore, this activity must be of central significance to the culture and must have continuity with practices, customs, or traditions that existed prior to contact, “though the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity.”²⁹ Chief Justice Lamer (as he then was) held that the activity must have “truly made the society what it was.”³⁰ The Court’s over-emphasis on European arrival prevents Western perceptions of Indigenous culture from evolving past a pre-contact state from a legal standpoint.

Similarly, in *Delgamuukw v. British Columbia*, the SCC rooted Aboriginal title prior to the Crown’s assertion of sovereignty.³¹ The Court ruled that Aboriginal title to land

out, this is no longer the case. Populations of Indigenous peoples are rising and show no signs of stopping. However, the stereotype of the vanishing or dying race persists in popular culture.

²⁶ *Ibid* at 291. See also Philip J. Deloria’s *Playing Indian* (New Haven: Yale University Press, 1998). He discusses how settler culture has appropriated Indigenous cultures and acted out Indigenous roles throughout American history, at times to fabricate a national identity, and at other times to dress provocatively at rock concerts. He argues that this appropriation of Indigenous culture is a way for settlers to deny their participation in the destruction of Indigenous Nations while bolstering their own identity.

²⁷ *R v Van der Peet* [1996] 2 SCR 507 at para 46 [*Van der Peet*]. The Court’s attempt to crystalize Indigenous cultures in a pre-contact time to avoid contamination from settler society is problematic because it insinuates that Indigenous cultures had an element of purity before settler society arrived.

²⁸ *Ibid*.

²⁹ *Ibid* at para 65.

³⁰ *Ibid* at para 55.

³¹ *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010 at para 15 [*Delgamuukw*].

“crystallized”³² at the moment of the Crown’s assertion of sovereignty, requiring that present-day Indigenous communities must show continuity and exclusivity of occupation of a specific area in order to establish Aboriginal title.³³ It is important to note that the continuity doctrine does not require continuity to be unbroken, “which would undermine the purposes of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples.”³⁴ Instead, there must be substantial maintenance of the connection.³⁵ While the Court rooted title in a historical moment and risked relegating Indigenous peoples once again to the past (as it did in *R v. Van der Peet*), the Court also made provisions for future generations in establishing inherent limits to Aboriginal title. Aboriginal title gives an Indigenous group the right to use and enjoy the land, but the group cannot deprive future generations’ benefits from the land.³⁶ The Court links the past and future through the present, and in doing so provided an analogy for the protection of Indigenous cultural expression. Cultures and their cultural expressions are inherited from the past but must also be maintained for future generations. It is important to consider future generations of Indigenous peoples, but it is just as important to avoid relegating Indigenous peoples to the past, which perpetuates stereotypes.

In his book, *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon*, Paul Nadasdy critiques the term “traditional ecological knowledge” or “TEK.”³⁷ His critique illuminates how the word “traditional” allows non-Indigenous people to deny that Indigenous cultures are adaptable and dynamic. He argues that many settlers see adapted practices as evidence that Indigenous cultures and knowledge are

³² *Ibid* at para 145.

³³ *Ibid* at paras 21 and 49.

³⁴ *Ibid* at para 153.

³⁵ *Ibid*.

³⁶ *Ibid* at para 111.

³⁷ Paul Nadasdy, *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon* (Vancouver: UBC Press, 2003) at Chapter 3: “The Politics of TEK: Power and the Integration of Knowledge” [Nadasdy].

eroding, once again perpetuating the frozen-in-time myth. This denial of adaptability brings up problematic issues of “authenticity” that allow non-Indigenous people to discount the opinions of Indigenous people who do not live up to their preconceived notions of Indigenous knowledge or culture.³⁸ Indigenous peoples are thus left out of consultation processes. I am committed to undoing harmful stereotypes and resisting further marginalization of Indigenous peoples. For these reasons, the term “traditional” shall be eschewed.

Finally, the term “totem pole” merits a brief discussion. Totem poles, also referred to as posts, crest posts, or poles, have proliferated in popular culture.³⁹ Their many designations reflect their multitudes of meanings and purposes. Totems have been used as markers on land, territorial claims, interior structures to hold up roof beams, memorials of individuals, markers of social standing, and welcome signs, among many other uses.⁴⁰ All of these functionalities have been subsumed under one label, obscuring the cultural, legal, and political purposes behind these objects. Furthermore, totems have exploded in the popular imagination, as can be seen in tourist shops, representing “Indigeneity” as a concept, and in fashion, advertisements, and movies.⁴¹ Thus, much of the complexity of totems in their original contexts has been effaced by appropriation. However, this is not to say that totems should not be commoditized – I do not want to reduce totem poles to either a commodity or a cultural artifact. In this thesis, I hope to complicate our understanding of totems as they have been presented in the marketplace and restore some of the intricate legal meaning to these incredible works.

ii. Methodology

³⁸ *Ibid.*

³⁹ Aldona Jonaitis & Aaron Glass, *The Totem Pole: An Intercultural History* (Seattle: University of Washington Press, 2010) at 5 [Jonaitis & Glass].

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

In this paper, I attempt to do comparative decolonizing work with objects as entry points for analysis of political forces acting on Indigenous expressions of culture. In discussing the protection of Indigenous art, I have often found myself moving between a desire to reject western ways of dealing with appropriation, namely, Canadian law and intellectual property instruments, and an underlying colonial reflex to reframe discussions in the language of law and property. In this paper, I attempt to resist this colonial reflex and instead consider Canadian law and the intellectual property regime as merely a piece of a larger puzzle, rather than the framework informing the whole picture. By making this methodological move to decenter the Canadian state, I hope to contribute to decolonized resistance against state forms of regulation and oppression.⁴²

As an interdisciplinary student, I have the privilege of interacting with and learning from multiple scholarly disciplines. I believe my insights are enriched by this experience. For example, many publications addressing the appropriation of Indigenous cultural expressions focus primarily on the deficits of Canadian intellectual property law.⁴³ My exposure to critical Indigenous theory and methodology have demonstrated that there is a much bigger field to be discussed than simply intellectual property law. Rather than asking how the current system can be changed, why not examine what sort of mechanisms exist within Indigenous legal orders to help address these issues? What sort of complexities are revealed when we look at the

⁴² Jerry H. Bentley, “The Task of World History” in John H. Bentley, ed., *The Oxford Handbook of World History* (Oxford: OUP, 2011) 1-16; H. Patrick Glenn, “The State as Legal Tradition” (2013) 2:4 in *Cambridge Journal of International and Comparative Law* 704; Mariana Valverde, “The Crown in a Multicultural Age: The Changing Epistemology of (Post)colonial Sovereignty” (2012) 21:1 *Social & Legal Studies* 3. Bentley, Glenn, and Valverde demonstrate the pitfalls of limiting oneself to a state-centered methodological approach. As Valverde points out, the shape-shifting tendencies of the “Crown” have resulted in often insurmountable difficulties for Indigenous peoples engaging in state-centered forms of recognition. Centering the Canadian legal system only serves to validate the Canadian state as a benefactor of justice and excuse its history of racism and oppression. Ignoring the Canadian state and intellectual property rights completely, however, would give an incomplete picture of the issue.

⁴³ For examples, see Simon Brascoupé & Karin Endemann, *Intellectual Property and Aboriginal People: A Working Paper*, eds. Jock Langford & Michael Cassidy (Ottawa: Department of Indian and Northern Affairs Canada, 1999) [Brascoupé & Endemann]; Industry Canada, *Intellectual Property Policy: Traditional Knowledge* (Ottawa: Parliament of Canada, 2011); Simeone, *supra* note 23.

appropriated objects themselves, rather than the laws that should have protected them? I believe my multidisciplinary training has allowed me to ask more productive questions.

As a settler examining these issues, it is imperative for me to carefully consider my methodology.⁴⁴ I therefore considered current publications in this field, evaluated their strengths and weaknesses, and decided to locate my research in a specific place. As mentioned, there are many papers and reports on the lack of fit between Indigenous expressions of culture and Canadian intellectual property law.⁴⁵ Many of these papers go no further than simply calling for action. Very few scholars have made concrete suggestions as to how to approach this seemingly insurmountable problem. When suggestions are made, they are often theoretical proposals and lack concrete ideas about how to grapple with this problem.⁴⁶ Robert Paterson is a scholar from the University of British Columbia known for his many publications that propose possible solutions for protection of Indigenous cultural expressions. In his recent report for Industry Canada, “Domestic and International Traditional Knowledge and Cultural Knowledge Systems,” Paterson points out that the elusiveness of the content of Indigenous cultural expressions lies in the great variety and richness of Indigenous cultures.⁴⁷ Because there are so many different types of knowledge and cultural expressions to protect, it is hard to know where to start when proposing new policy or law. What exactly needs protection? What sorts of knowledge or expressions of culture should *not* be protected under Canadian law due to their sacred status within communities? These difficult questions can be overwhelming and discouraging. Proper answers to these questions require intensive and ongoing individual engagement with

⁴⁴ See Bagele Chilisa, *Indigenous Research Methodologies* (SAGE Publications Inc., 2012).

⁴⁵ *Ibid.*

⁴⁶ For an example of a paper on the topic of appropriation of Indigenous cultural expressions lacking concrete suggestions, see Simeone, *supra* note 23.

⁴⁷ Robert K. Paterson, “Domestic and International Traditional Knowledge and Cultural Knowledge Systems” (Ottawa: Industry Canada, 2015) at 4 [Paterson].

communities, artists, and knowledge holders. These questions should not be answered by a committee made up of settler policy makers and academics. Creating a solution without engagement with stakeholders would reinscribe the colonial power imbalance that exoticizes and appropriates Indigenous cultural expressions in the first place.

Eve Tuck and Marcia McKenzie, in their article “Relational Validity and the ‘Where’ of Inquiry,” offer a method of approaching this seemingly insurmountable problem. In their article, they address the erasure of place from qualitative research.⁴⁸ Academics make place abstract in order to create generalizable theories that can be applied and cited by others, and in turn reap rewards in the form of research grants, awards, and tenure positions.⁴⁹ The authors argue that theorizing and practicing place in research is a step towards addressing our treatment of our increasingly unlivable and unequal world. They present *critical place inquiry* as a methodology in research. Critical place inquiry, among other things, increases accountability to people and place and “addresses spatialized and place-based processes of colonization and settler colonialism, and works against their *foregone-ness* or naturalization through social science research.”⁵⁰

In order to avoid participating in the harmful practices of colonial academia, I attempt to avoid purely theoretical engagement and instead specifically apply my examination to west coast Indigenous cultural expressions. By grounding the paper in a particular setting, I am accomplishing two things. First, the proposal is rooted in a real life problem that artists on the

⁴⁸ Eve Tuck & Marcia McKenzie, “Relational Validity and the ‘Where’ of Inquiry” (2015) 21.7 *Qualitative Inquiry* at 633 [Tuck & McKenzie].

⁴⁹ *Ibid* at 634. Tuck and McKenzie are not suggesting that settler scholars do this consciously, but point out that settler scholars benefit from the status quo by receiving research grants and awards for their work that, for example, theorizes the barriers to justice that Indigenous peoples face. Even if the work itself is useful, it originates from a site of harm to Indigenous peoples.

⁵⁰ *Ibid* at 635.

west coast encounter regularly. The problem is not abstract.⁵¹ Rooting the proposal in a concrete problem creates a smaller, more workable environment to lay out the many obstacles and barriers. Second, the focus on specific artists creates accountability. I will have particular artists in mind, which will inevitably foster a more personal and thoughtful approach to the problem. While some may view this focus on specificity as a weak starting place, I believe that some of the harmful practices in research can be undone by attending to Tuck and McKenzie's proposed methodology of critical place inquiry.

iii. Self-location

Part of my methodology is to self-locate in relation to the work I am doing. I am a settler who has lived on Squamish, Kahnien'keha:ka, and now Lekwungen territories. When a settler such as myself engages in a research question involving Indigenous peoples, we run the risk of reinscribing the power imbalance of colonizer/oppressed that has plagued research for centuries. Researchers need to keep in mind the past and contemporary power dynamics of research projects, wherein Indigenous peoples have been and continue to be considered as disposable sites of knowledge production.⁵² As a settler, I am complicit in systems of oppression that benefit from Indigenous dispossession of land and knowledge, and I need to carry this awareness with me in my work and do my utmost to resist these systems.

My father's side of the family has been living on stolen, unceded land for generations. In fact, I do not really think of them as being from somewhere else other than the state of Canada. This attitude presents multiple problems. First, this view shirks the truth that my family has been

⁵¹ To a certain extent, law operates on abstract principles in order to avoid "palm tree justice," in Oxford Reference website, <<http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100302992>>. However, John Borrows warns that law can be dangerous when it is "abstracted from the real world struggles faced by ordinary people" in Borrows, "Unextinguished: Rights and the *Indian Act*" at 1 (unpublished paper). Therefore, I am attempting to root my proposal in a concrete and specific problem to ensure my own accountability.

⁵² Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*. 2nd ed. (Dunedin: University of Otago Press, 2012) at 64.

participating and continues to participate in settler colonialism. My view of my dad's side as being "from here" presents further problems because it demonstrates how the settler psyche neutralizes colonialism and adopts the land as belonging to them. Authors Eve Tuck and K. Wayne Yang would classify this attitude as a "move to innocence."⁵³ They state that this sort of mindset "kills the very possibility of decolonization; it recenters whiteness, it resettles theory, it extends innocence to the settler, it entertains a settler future."⁵⁴ By saying "my family is from here," I am rendering people, cultures, languages, perspectives, struggles, and voices completely invisible. I am participating in every colonial activity that Tuck and Yang point out.

It is much easier to look at my mother's parents, who immigrated here from Britain in the 1950s, and call them (as well as my mother and myself) settlers. I would be correct to do so. They are obvious settlers. They had accents. They came from the belly of the beast itself.

Looking at my family history is only useful to an extent. Ultimately, it allows me to offload responsibility onto my grandparents and great-grandparents. This denial of responsibility is so often the view of settlers who are uncomfortable with their implication in settler colonialism: "I didn't do anything." But I am here, and I benefit every day from Indigenous dispossession.

I wrote this self-location to participate in the "re-storying" of both the physical and academic landscape.⁵⁵ "Re-storying" means relocating my family when I am asked where I am from: we are not from "here." In this particular work, I hope to participate in "re-storying" by removing "y" and *restoring* what has been appropriated. I also hope to continue to reflect on my attempts to self-locate within political, social, economic, and academic systems of oppression.

⁵³ Eve Tuck and K. Wayne Yang, "Decolonization is Not a Metaphor" (2012) 1:1 *Decolonization: Indigeniety, Education and Society* 1, at 1.

⁵⁴ *Ibid* at 3.

⁵⁵ Megan Bang et al. "Muskrat Theories, Tobacco in the Streets, and Living Chicago as Indigenous Land," (2014) 20:1 *Environmental Education Research* 1, at 5.

Lynn Gehl's "Ally Bill of Responsibilities" reminds non-Indigenous researchers and aspiring allies to constantly self-critique, self-examine, and self-reflect on our positions within these systems.⁵⁶ Persistent engagement with self-location will allow me to become more accountable, responsible, uncomfortable, and unsettled.

iv. Literature Review: A Map

I have opted not to condense my research of current publications on appropriation of Indigenous art into one section. Rather, the reader will find my presentation and critique of a breadth of scholars throughout my work. Chapter 3 in particular could be presented as a literature review. In Chapter 3, I discuss policy papers and government reports on issues of appropriation of Indigenous art and the problem of intellectual property laws, as well as articles written by prominent scholars in the field. I also go over the current Canadian legislation governing this area. I then draw from both Indigenous and non-Indigenous scholars to evaluate the benefits and drawbacks of using rights discourse as an avenue to resolve issues of appropriation of art. In Chapter 4, I use three manifestations of totem poles to bring depth and dimension to the issues outlined above. In particular, I examine a prominent tribal court case from Alaska that dealt with the illegal removal of totem poles to illustrate the potential of Indigenous legal orders to address these problems.

This section of the paper has attempted to explain the terminology and methodology underpinning the study. The next section of the paper will contextualize the appropriation of Indigenous expressions of culture within the settler-colonial state of Canada.

⁵⁶ Lynn Gehl, "Ally Bill of Responsibilities." <http://www.lynngehl.com/uploads/5/0/0/4/5004954/ally_bill_of_responsibilities_poster.pdf>

Chapter III: Colonial Context

“Property becomes part of our very being, and cannot be wrested from us without wounding to the very quick.”⁵⁷ – Jeremy Bentham, *Principles of the Civil Code*

This section of the paper will contextualize the ongoing appropriation of Indigenous culture. First, I will examine the long trend of harmful research practices. Next, I will analyze the framework of Canadian intellectual property law and broader Canadian policies of cultural erasure. I will then examine legalism as an avenue to resolve social justice issues, discussing its benefits and drawbacks in the context of Canadian courts and their treatment of Indigenous legal matters.

i. Research Practices

Many scholars have demonstrated that there is a need for protection of Indigenous expressions of culture.⁵⁸ Some of these scholars, however, have failed to discuss why Indigenous culture needs protecting.⁵⁹ To do so would be to implicate themselves in the existence of colonial structures governing the lives of Indigenous peoples and the settler society that continues to appropriate Indigenous culture and occupy Indigenous lands.⁶⁰ It is much more comfortable not

⁵⁷ Etienne Dumont, ed., *Bentham's Theory of Legislation* (London: Oxford University Press, 1914) at 152.

⁵⁸ Marie Battiste and James Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing Ltd., 2000) at 61 [Battiste & Henderson]; Catherine Bell, “Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform,” in *Protection of First Nations Cultural Heritage: Laws, Policy and Reform* (Vancouver: UBC Press, 2009) at 65; Brian Noble, “Poomaksin: Skinnipiikani-Nitsiitapii Law, Transfers, and Making Relatives: Practices and Principles for Cultural Protection, Repatriation, Redress and Heritage Law Making with Canada,” *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) at 260; Mira T. Sundara Rajan, “Intellectual Property and Aboriginal Peoples: Conflict or Compromise?” (Vancouver: The Scow Institute, 2008) at 26 [Sundara Rajan]; Norman Zlotkin, “From Time Immemorial: The Recognition of Aboriginal Customary Law in Canada,” in *Protection of First Nations Cultural Heritage: Laws, Policy and Reform* (Vancouver: UBC Press, 2009) at 343.

⁵⁹ Many scholars do provide reasons why Indigenous cultural expressions need protecting. For a brief but thorough account of why Indigenous cultural expressions should be protected, see Robert G. Howell and Roch Ripley, “The Interconnection of Intellectual Property and Cultural Rights (Traditional Knowledge)” in *Protection of First Nations Cultural Heritage: Laws, Policy and Reform* (Vancouver: UBC Press, 2009) at 230-232.

⁶⁰ Leanne Simpson, “Anticolonial Strategies for the Recovery and Maintenance of Indigenous Knowledge” (2004) 28:3 *American Indian Quarterly* 373 [Simpson].

to do so. However, Leanne Simpson, a Mississauga Nishnaabeg scholar, argues that it is crucial, especially for settler scholars, to indicate why Indigenous cultures are at risk of being appropriated.⁶¹

Another crucial element contributing to the problem is the role of researchers who collect, compile, translate, and distribute Indigenous knowledge and expressions of culture. Leanne Simpson writes that researchers who remove Indigenous knowledge or expressions of culture from its roots for the benefit of settler scholars or pharmaceutical companies are participating in the ongoing oppression and dispossession of Indigenous peoples.⁶² Researchers are under no obligation to credit the knowledge to the communities and individuals from whence it came.⁶³ Often, when researchers do present Indigenous knowledge, Western science and social science is privileged over Indigenous knowledge in an effort to appeal to academics who give more authority to Western knowledge. For example, Simpson points out that the journal *Ecological Applications* dedicated a special feature on the topic of “traditional ecological knowledge” in 2000.⁶⁴ Most of the eight papers published were written by non-Indigenous people advocating that ecologists should consider Indigenous knowledge as valid and useful.⁶⁵ While this may seem harmless and even be construed as a compliment, it should be considered as another assault on Indigenous peoples. Their knowledge is not an “untapped resource” for settler scholars to use for their own purposes without consent and profit sharing agreements.⁶⁶ The taking of Indigenous knowledge is just another manifestation of the ongoing colonization and attempted genocide of Indigenous peoples.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Benefit-sharing agreements should be required in research agreements, which could include payment of royalties, as discussed in Paterson, *supra* note 46 at 77.

⁶⁴ Simpson, *supra* note 59 at 376.

⁶⁵ Paul Nadasdy also notes that a large proportion of publications on TEK simply focus on the potential use of TEK rather than its actual application. Nadasdy, *supra* note 21.

⁶⁶ Simpson, *supra* note 59 at 375.

Furthermore, researchers often make Indigenous knowledge systems more publishable and palatable to other academics by ignoring underlying issues of colonial injustices and removing spiritual aspects from elements of Indigenous knowledges. Simpson notes that editors of journals often remove references to colonialism from her manuscripts because they are “too off-topic.”⁶⁷ As Simpson eloquently writes, non-Indigenous researchers “sanitize Indigenous knowledge of the ugliness of colonization and injustice, so scientists can comfortably engage with the knowledge but not the people who own and live that knowledge.”⁶⁸ Depoliticizing Indigenous knowledge and expressions of culture allows researchers to disregard their participation in the ongoing colonization of Indigenous peoples. Disconnecting Indigenous knowledge and cultural expressions from the experience of colonial oppression perpetuates the researcher/researched and colonizer/colonized relationship.

ii. Canadian Intellectual Property Rights

Invariably, the commodification of Indigenous culture raises the topic of intellectual property rights, which are the primary tools used for regulating the production and use of knowledge in Canada. In this section, I will examine the theory underpinning Canadian intellectual property law. Next, I will illustrate some of the barriers that Indigenous artists and communities face when attempting to use intellectual property law to protect their expressions of culture. I will then explore two areas of potential flexibility in Canadian law: moral rights and the requirement of fixation.

Legal scholars Angela Riley and Kirsten Carpenter write, “the experience of cultural appropriation is broad and nuanced, while the law is typically narrow and obtuse.”⁶⁹ For the most

⁶⁷ *Ibid* at 376.

⁶⁸ *Ibid*.

⁶⁹ Angela K. Riley & Kirsten A. Carpenter, “Owning Red: A Theory of Indian (Cultural) Appropriation” (2016) 94 *Texas Law Review* 859 at 865 [Riley & Carpenter].

part, Canadian intellectual property laws are rooted in a utilitarian theory or economic understanding of rights. Those with intellectual property rights over a product have exclusive use over the goods and services protected. They are able to reap any profit from the sale of their goods and services, and in the domain of patents, for example, are ensured exclusive monopoly over their good or service. This understanding of rights has been confirmed by the Supreme Court of Canada in *Théberge v. Galerie D'Art du Petit Champlain Inc.*⁷⁰ The Théberge principle holds that copyright law, and by extension, all intellectual property rights, are utilitarian. The purpose of copyright law is to promote public interests by incentivizing the creation and dissemination of creative works. The creator's rights must be balanced by their limited nature.⁷¹

While economic rights over goods and services may be useful to some Indigenous individuals or communities, many scholars and policymakers have pointed out a lack of fit between Canadian intellectual property rights and Indigenous cultural expressions.⁷² There are many requirements that bar Indigenous artists from protecting their work using Canadian intellectual property rights. For example, there is almost nothing in Canadian law that would protect Indigenous designs from being appropriated and copied by non-Indigenous artists and sold for profit.⁷³ Non-Indigenous artists or designers, like academic researchers, are under no legal obligation to credit original artwork to the communities and individuals from whence it came.⁷⁴ For example, in copyright law, protectable knowledge needs to be “original” and “fixed,” thus leaving knowledge held in orally transmitted stories vulnerable. Similarly,

⁷⁰ *Théberge v Galerie D'Art du Petit Champlain Inc.* [2002] 2 S.C.R. 336.

⁷¹ *Ibid.*

⁷² For an exploration of the lack of fit between Canadian intellectual property rights and Indigenous expressions of culture, see generally Brascoupé & Endemann, *supra* note 42.

⁷³ Brascoupé & Endemann, *supra* note 42 at 2.

⁷⁴ This problem is further complicated by the difficulty in differentiating inspiration from appropriation. Should non-Indigenous artists be barred from drawing inspiration from Indigenous cultural expressions? Most art borrows inspiration from other art – that is how artists develop and innovate. However, in the context of colonialism, drawing inspiration from Indigenous expressions of culture can quickly turn into cultural appropriation.

copyright protection expires fifty years after the author dies.⁷⁵ This tenet of copyright law appears harmless, unless the “author” died thousands of years ago or is not ascertainable. If certain knowledge is sacred and not to be shared with everyone, Indigenous communities and artists once again find that their knowledge is not eligible for protection under Canadian intellectual property laws.⁷⁶ Even if a certain case met all these requirements, it is very expensive to pursue litigation, and is not always an option for artists who see copies of their work being sold without authorization. It is important to note that this is not an exhaustive list of the many bars to protecting Indigenous cultural expressions under Canadian property law, which would be beyond the scope of this thesis. This thesis is meant to contextualize these problems in the broader picture of colonialism and ongoing appropriation under a colonial government.

While Canadian intellectual property law poses many problems for Indigenous artists, there are a few flexibilities and promising areas in the current intellectual property system that might be useful when thinking about potential solutions. For example, moral rights protect the creators of copyrighted works, and last for the same amount of time as copyright. They include the right of attribution, the right to publish anonymously or pseudonymously, and the right to the integrity of the work.⁷⁷ The philosophies underpinning moral rights stem from the French

⁷⁵ Copyright Act, R.S. C., 1985, ch. C-42, s. 5.1 and 23.1.

⁷⁶ Sacred knowledge presents many difficulties, as described in Paterson, *supra* note 46 at 32. For example, if a certain sacred image is produced and shared by a community member who is not supposed to share the image in question, difficult questions arise regarding individual rights and communal rights. Should the community be able to object to the use of their sacred image as a commodity? It is my opinion that if a case like this were to come before a Canadian court, judges should defer to internal community rules. For example, in *Bulun Bulun v. R & T Textiles* [1998] ALR 157, the Court held that John Bulun Bulun, an Aboriginal artist whose work had been appropriated, had a relationship with his community that made him a trustee of his artwork and bestowed on him the responsibility to protect sacred tribal knowledge. Because of his fiduciary obligation to his community, he was required to pursue remedying any infringement by a third party. This case demonstrates how colonial law can be integrated with community principles. Local fact finding tribunals could be useful in determining hierarchy of individual versus community rights on a case-by-case basis.

⁷⁷ Copyright Act, R.S. C., 1985, ch. C-42, s. 14.1 and 14.2.

Revolution, wherein the state was divorced from the Church.⁷⁸ Moral rights in France, or *droit d'auteur*,⁷⁹ have an almost spiritual aspect to them, protecting the moral integrity of the author.⁸⁰ They are much broader than copyright, and stem from John Locke's theory that man has a natural right to his intellectual creations.⁸¹ Moral rights, which have a relatively small capacity in Canada⁸² in comparison to the moral rights regimes in place in France, hold potential for Indigenous artists and knowledge holders.⁸³ For example, *Snow v. The Eaton Centre Ltd.* protected the moral integrity of the author against the use of his art in an unauthorized public display. The remedy was granted on the grounds that the modification of the artist's work would damage his reputation.⁸⁴ The concept of an author's moral right to integrity could be adapted to a community or a culture's right to integrity.

Another area of potential flexibility within existing Canadian law is the requirement of fixation. Fixation mandates that material be in fixed form – written down, recorded, etc. Unlike the U.S. Copyright Act,⁸⁵ the Canadian Copyright Act does not actually have an official “fixation” requirement. However, Canadian judges have interpreted Canada's Copyright Act as

⁷⁸ Stef van Gompel, *Formalities in Copyright Law: An Analysis of their History, Rationales, and Possible Future* (Maryland: Aspen Publishers, Inc., 2011) at 76 [Van Gompel].

⁷⁹ *Ibid.*

⁸⁰ Lyombe Eko, *New Media, Old Regimes: Case Studies in Comparative Communication Law and Policy* (Maryland: Lexington Books, 2012) at 287.

⁸¹ Van Gompel, *supra* note 77 at 98. The natural rights theory asserts there is an “inextricable bond” between a work and its creator.

⁸² Moral rights in Canada meet Berne standards (*Berne Convention for the Protection of Literary and Artistic Works* at article 6*bis*, at WIPO website: <http://www.wipo.int/treaties/en/text.jsp?file_id=283698>), but are excluded from the Trade Related Aspects of Intellectual Property Rights Agreement (*Overview: The TRIPS Agreement*, at World Trade Organization website: <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm>).

⁸³ Paterson, *supra* note 46 at 53. Paterson argues that moral rights are considered “sympathetic to the concerns” of Indigenous peoples because the right to integrity may afford protection against distortion through inaccurate or unauthorized use of their cultural symbols. He warns that moral rights focus on the individual author, not a community, demonstrating a limitation to the usefulness of moral rights law. Nevertheless, the philosophy informing moral rights is worth exploring.

⁸⁴ *Snow v The Eaton Centre Ltd* (1982), 70 C.P.R. (2d) 105.

⁸⁵ U.S. Copyright Act, 17 U.S.C. 101-810, section 102.

if it requires fixation.⁸⁶ For example, a nation's oral creation story *could* be protected under the Copyright Act, but because of past judicial interpretation of the necessity of fixed form, it is unlikely that a Canadian judge would find that the oral story qualified for protection. David Vaver, a prominent scholar of intellectual property law, argues that despite precedents pertaining to this issue, fixation does not have to be a requirement of Canadian law.⁸⁷ However, Canada's adoption of international trade agreements, like the World Trade Organization's Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement, limits this potential flexibility. Article 9.2 of the TRIPS agreement requires works to have fixed form in order to qualify for protection. The provision is imported directly from the Copyright Act in the United States, another country facing the problem of appropriation of Indigenous expressions of culture.⁸⁸

Considering the potential flexibility in moral rights and the fixation requirement, it should be clear that it is possible to find flexibility within the existing intellectual property system. Overwhelmingly, however, intellectual property rights are incompatible with Indigenous cultural expressions.

iii. Policies of Cultural Erasure

Though the scope of this thesis limits my ability to illustrate every attempt by the Canadian government to extinguish Indigenous cultural systems, I can point to a few examples.⁸⁹

Canada's residential school system was "created for the purpose of separating Aboriginal

⁸⁶ *Canadian Admiral Corporation Ltd v Rediffusion Inc* [1954] Ex. CR 382, 20 CPR 75.

⁸⁷ David Vaver, *Copyright Law* (Toronto: Irwin Law, 2001) at Chapter 3.

⁸⁸ Section 102 (a) of the U.S. Copyright Act states: "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

⁸⁹ *The Report of the Royal Commission on Aboriginal Peoples: Looking Forward and Looking Back*, Vol. 1, Ottawa: Supply and Services Canada, 1996 [RCAP] provides a thorough overview of many issues experienced by Indigenous peoples in Canada as a result of their relationship with the Canadian government. See also Riley and Carpenter, *supra* note 68. They articulate the notion of "Indian Appropriation," which describes how the process of the U.S. legal system has facilitated the large-scale dispossession of Indigenous land, property, bodies, and identities. Similarly to my thesis, they argue that the phenomenon of cultural appropriation in the U.S. cannot be divorced from this context.

children from their families in order to minimize and weaken ties and cultural linkages, and to indoctrinate children into a new culture – the culture of the legally dominant Euro-Christian Canadian society.”⁹⁰ The damage of this attempted cultural removal has been well documented.⁹¹ Many social problems in Indigenous communities can be traced to harms from residential schools.⁹² Disruption of intergenerational transmission of knowledge and culture from residential schools has had devastating effects on Indigenous cultures.⁹³ Furthermore, the ongoing occupation of unceded territories removes tools with which Indigenous cultures are practiced and safeguarded for future generations.

Another significant example of Canada’s policies of cultural erasure is the potlatch ban. Potlatch ceremonies are practiced by many west coast Indigenous nations. They are extremely important ceremonies that regulate kinship and economic redistribution, as well as community relations.⁹⁴ Potlatches are used to confer rights to names, authority, or certain territories or objects. Large amounts of goods are given away, with honor bestowed on hosts and attendees for their demonstrations of generosity.⁹⁵ Potlatches consist of feasting, dances, and singing, among many other things.⁹⁶

Art historian Aldona Jonaitis describes how dances, songs, and stories are presented along with culturally significant objects such as robes, button blankets, shields, or masks at

⁹⁰ For an account of how the Canadian government has attempted to assimilate Indigenous peoples and destroy their cultures through the residential school system, see Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada Volume One: Summary* (Toronto: James Lorimer & Company Ltd. Publishers, 2015) at v [TRC].

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ “Potlatch”, *The Canadian Encyclopedia*. February 7, 2006. <<http://www.thecanadianencyclopedia.ca/en/article/potlatch/>>

⁹⁵ Chip Colwell, *Plundered Skulls and Stolen Spirits: Inside the Fight to Reclaim Native America’s Culture* (University of Chicago Press, 2017) at 139 [Colwell].

⁹⁶ As a settler who has never attended a potlatch, this information comes from published articles. I do not intend to misrepresent or distort the purposes or proceedings of potlatch ceremonies.

potlatches.⁹⁷ The accompanying songs and dances affirm the clan rights to the objects. “The more often the group presented its crest objects at potlatches, the more worth those objects accrued – and the greater prestige of the family that owned them.”⁹⁸ Thus, potlatches are a means of imbuing objects with ownership rights as well as value – this process could easily be analogized to the values underpinning intellectual property law.

However, these incredibly important ceremonies were banned by Canada’s colonial government from 1884 to 1951.⁹⁹ Prosecution of potlatch hosts and attendees began in 1913. In 1921, over thirty people were arrested and charged in Alert Bay, BC, for holding a massive potlatch. Approximately 450 objects were apprehended and ended up in private collections and museums.¹⁰⁰ Under the threat of persecution, some people felt that since they could no longer use their ceremonial objects, they might as well sell them rather than have them removed forcefully. In addition to this loss of important ceremonial objects, the practice of the potlatch itself, and all its accompanying dances, songs, and stories were nearly completely abandoned for fear of persecution.¹⁰¹ Despite the Canadian government’s policy of cultural oppression, some potlatches were still held underground, many songs, stories, and objects survived, and many Indigenous communities along the coast today hold potlatch ceremonies.

The values and purposes underpinning the potlatch tradition could be considered anti-capitalist, as the Canadian government believed at the time of the ban.¹⁰² While that somewhat imprecise comparison may not shed any light on possible solutions to the issue of appropriation of Indigenous expressions of culture, it does demonstrate how purely economic valuations of

⁹⁷ Aldona Jonaitis, *Art of the Northern Tlingit* (University of Washington Press, 1986) at 67.

⁹⁸ *Ibid* at 68.

⁹⁹ Colwell, *supra* note 94 at 140.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*.

“art” embodied in intellectual property law are largely inadequate for Indigenous cultural expressions. Indigenous cultural expressions, especially those created for ceremonial purposes, are extremely valuable, not simply in an economic sense. Intellectual property law fails to account for those cultural, legal, social, governmental, and political values.

The appropriation of Indigenous art is a manifestation of the settler state’s continued assault on Indigenous cultures. Although the appropriation of art is not informed by policies of assimilation, as the residential school system and potlatch ban were, they are all underpinned with similar exoticizations of Indigenous cultures. For the better part of the 19th and 20th centuries, the settler-state conceived of Indigenous cultures as pagan and dangerous cultures that needed to be “civilized.”¹⁰³ Now, Indigenous art is exoticized to the point where you cannot walk into a Canadian tourist shop without being swamped with formline art tokens. While the exoticization is perhaps less sinister now than it was in the 19th and 20th centuries, it is important to realize that this “othering” of Indigenous cultures comes from a place of cultural violence.

iv. Legalism: Solution or Setback?

In this section, I want to examine this call for the creation of rights to accommodate Indigenous cultural expressions against arguments made by a selection of interdisciplinary scholars. I want to explore the following questions: what are the theoretical underpinnings of rights discourse? Should legalism (the strategy of using law to resolve social justice issues) be avoided? Why should the Canadian government create rights to protect Indigenous cultural expressions? What sort of engagement can we expect from the colonial government legislating rights? Is legalism, and specifically rights discourse, a productive place to craft workable solutions to the problem of appropriation of Indigenous art and knowledge?

¹⁰³ *Ibid.*

First, I will examine Taiaiake Alfred's "'Sovereignty' – An Inappropriate Concept"¹⁰⁴ and Wendy Brown and Janet Halley's Introduction to *Left Legalism: Left Critique*,¹⁰⁵ two texts that reject the use of legalism. I will draw from their critiques to discuss the limitations of pursuing rights in the context of Indigenous expressions of culture. Next, I will examine the critical and careful use of legalism as an instrument in Mariana Valverde's "Spectres of Foucault in Law and Society Scholarship"¹⁰⁶ and Michael M'Gonigle's forthcoming article "Logics as Law: Rethinking Social Regulation in a Full Planet."¹⁰⁷ Taking cues from these theorists, I will explore why the use of legalism might be productive in protecting Indigenous expressions of culture, if wielded correctly. Finally, I will examine two texts that offer something completely different from legalism: Gordon Christie's "Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty"¹⁰⁸ and Donna Haraway's "Staying with the Trouble: Anthropocene, Capitalocene, Cthulucene."¹⁰⁹ I will draw from these texts as a site of inspiration for my own legal imagining.

a) **Rejecting Legalism**

The rights discourse is the main venue where social justice projects are currently being carried out.¹¹⁰ In this section, I will examine Wendy Brown, Janet Halley, and Taiaiake Alfred's

¹⁰⁴ Taiaiake Alfred, "'Sovereignty' – An Inappropriate Concept," in *Peace, Power, and Righteousness*, 2e (Oxford University Press, 2009) [Alfred].

¹⁰⁵ Wendy Brown & Janet Halley, "Introduction" in *Left Legalism: Left Critique* (Duke University Press, 2002) [Brown & Halley].

¹⁰⁶ Mariana Valverde, "Specters of Foucault in Law and Society Scholarship" (2010) 6 *Annual Review of Law and Social Science* 45 [Valverde].

¹⁰⁷ Michael M'Gonigle, "Logics as Law: Rethinking Social Regulation in a Full Planet, That Is, Green(ing) Legal Theory in the Animacene" (Faculty of Law, University of Victoria, 2016) [unpublished] [M'Gonigle].

¹⁰⁸ Gordon Christie, "Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty" (2011) 110(2) *The South Atlantic Quarterly* 329 [Christie].

¹⁰⁹ Donna Haraway, "Staying with the Trouble: Anthropocene, Capitalocene, Cthulucene" in Jason W. Moore, ed, *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism* (Oakland: PM Press, 2016) 37 [Haraway].

¹¹⁰ Brown & Halley, *supra* note 104 at 5.

arguments against legalism as a means of carrying out justice projects.¹¹¹ I will then relate their critiques of legalism to appropriation of Indigenous cultural expressions, and discuss the potential usefulness (or lack thereof) of the creation of rights to protect knowledge.

Brown and Halley, in their introduction to their book, *Left Legalism: Left Critique*, argue that law reform is not the only way forward.¹¹² They ask, quite strikingly, whether certain legal projects would “seem liberatory...if the acid of critical theory had a chance to work on them?”¹¹³ Brown and Halley argue left critique is often discounted as elitist, offensive, and/or too abstract, among other things.¹¹⁴ This “prohibitive dicta” precludes the possibility of left critique and leftist projects becoming normative.¹¹⁵ Instead, left legalism takes the place of left critique, flattening enriching perspectives that may illuminate new possibilities and “that which is hidden.”¹¹⁶ Halley and Brown argue that left legalism is a form through which regulatory power is exercised.¹¹⁷ They believe this form of social regulation should be scrutinized carefully before being taken up.

If one sets store by Halley and Brown’s critique, the pursuit of rights to protect Indigenous expressions of culture will not be “a monolithic installment of justice.”¹¹⁸ Rather, it will narrow the scope of redress for Indigenous individuals and communities seeking to stop the appropriation of their culture. It will flatten perspectives from different communities and pose exclusionary and colonial questions like “who qualifies for this protection?” Halley and Brown are more interested in interrogating what social powers create the dichotomy of qualification or

¹¹¹ Brown & Halley, *supra* note 104; Alfred, *supra* note 103.

¹¹² Brown & Halley, *supra* note 104 at 4.

¹¹³ *Ibid* at 3-4.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid* at 5.

¹¹⁶ *Ibid* at 33.

¹¹⁷ *Ibid* at 6.

¹¹⁸ *Ibid* at 13.

non-qualification through identity.¹¹⁹ To use Halley and Brown's frame of reference, just as the institution of marriage narrows how people envision their adult selves intimately, in relationships and as parents,¹²⁰ cultural property rights would limit how Indigenous artists/knowledge holders envision/create/value their art/knowledge. For example, artists would be hampered by questions of whether their particular form expression met fixation (or some other) requirements. When thinking about creating rights to protect Indigenous expressions of culture, we must remember the limitations of legalism.

In his work, "Sovereignty' – An Inappropriate Concept," Alfred rejects pursuing sovereignty, which he claims is incompatible with "traditional Indigenous notions of power."¹²¹ He argues that sovereignty is based on undesirable necessities of statehood: coercive force and control of territory, and should not be a goal that Indigenous communities should strive for.¹²² Alfred focuses his critique on land claims, or the pursuit of a right to land through proving title. He asserts that to engage in the land claims process with the federal government is to accept the "fiction of state sovereignty," which he claims is founded on unbalanced approach to justice. In land claim processes, the state structures the relationship between community and government and dictates the terms of the negotiations. For Alfred, a land claim can only achieve self-administration, not real "sovereignty" as characterized by nation-states.¹²³ He states, "...the struggle for justice would be better served by undermining the myth of state sovereignty than by carving out a small and dependent space for Indigenous peoples within it."¹²⁴ In other words, Alfred believes it would be better to reveal the unjust foundations of colonial law rather than to

¹¹⁹ *Ibid* at 6.

¹²⁰ Brown & Halley, *supra* note 104 at 17.

¹²¹ Alfred, *supra* note 103 at 55.

¹²² *Ibid* at 56.

¹²³ *Ibid* at 58.

¹²⁴ *Ibid*.

strive for absorption into that same colonial framework. Instead of focusing on the advancement of “Aboriginal rights” that will be diminished by legal parameters, Alfred advocates for the taking up of responsibilities. Alfred argues that Indigenous philosophies of governance are grounded in stewardship principles – the idea that humans have responsibilities to land, not rights to land through title. Alfred encourages bypassing state systems and looking elsewhere for justice.

Many people, including myself, are hesitant or outright reject the idea of using a colonial framework to address problems caused by colonialism. As Audre Lorde famously wrote, “using the master’s tools will never dismantle the master’s house.”¹²⁵ Canadian laws are ultimately there to hold up the Canadian state, the existence of which many Indigenous peoples and their allies are struggling against. As noted above, the Canadian government has a long history of attempts to destroy Indigenous land bases, languages and culture, and is consequently regarded with deep distrust by some Indigenous peoples. The *Indian Act* is the main provision that considers Indigenous peoples in Canada, and provides precisely the sort of ‘protection’ to Indigenous peoples that one would expect from a 150 year old document written by colonialists.¹²⁶ The infamous White Paper of 1969, which recommended assimilating Indigenous peoples into mainstream Canadian culture, characterizes one of the attempts by the government to reform laws pertaining to Indigenous peoples.¹²⁷ Many Indigenous nations felt that their relationships with the British Crown were founded in a nation-to-nation understanding, a crucial distinction from a relationship with the state holding Indigenous groups hostage within its borders,

¹²⁵ Audre Lorde, “The Master’s Tools Will Never Dismantle the Master’s House” in *Sister Outsider: Essays and Speeches*. (Berkeley, CA: Crossing Press, 1984) at 110.

¹²⁶ John Borrows & Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials, and Commentary* (Markham: LexisNexis Canada Inc., 2012) at 92 [Borrows & Rotman].

¹²⁷ *Ibid* at 93.

legislating away their lands and recognition as separate peoples.¹²⁸ Consequently, the Canadian government does not have a good track record in terms of creating rights for Indigenous peoples. As John Borrows notes, the rights provided by the *Indian Act* amount to absurdities such as beekeeping and destruction of noxious weeds, and do not provide an acceptable base upon which to build Indigenous self-determination.¹²⁹

Canadian courts have also contributed to the Canadian government's bad track record in terms of rights for Indigenous peoples. For example, in developing "Aboriginal title," the courts are trying to reconcile what may not be reconcilable: pre-existing Indigenous nations with the Crown's subsequent assertion of sovereignty.¹³⁰ The SCC has built the Crown's claim to Canada on a rickety foundation. In *Delgamuukw v. British Columbia*, the Court slates Aboriginal title below Crown sovereignty, seemingly applying the philosophy underpinning the doctrine of discovery.¹³¹ The doctrine of discovery holds that when European nations 'discovered' foreign lands, they gained title and sovereignty over that land regardless of its pre-existing inhabitants.¹³² The doctrine of discovery derives from the assumption that the land was empty, or *terra nullius*, at the time of discovery, a notion that the Royal Commission on Aboriginal Peoples has declared "morally, politically, and factually wrong."¹³³ The SCC has more recently found that "the doctrine of *terra nullius*... never applied here," despite their continued reliance on it in application of the law.¹³⁴ These conflicting narratives manifest themselves intermittently in common law, exhibiting the SCC's simultaneous rejection and espousal of the belief "that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the

¹²⁸ *Ibid* at 94-95.

¹²⁹ *Ibid* at 49.

¹³⁰ *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256 at para 69 [*Tsilhqot'in*].

¹³¹ *Delgamuukw*, *supra* at note 30.

¹³² Borrows & Rotman, *supra* note 125 at 198.

¹³³ RCAP, *supra* note 88 at recommendation 1.16.2 at page 969.

¹³⁴ *Tsilhqot'in*, *supra* note 129 at para 69.

Crown.”¹³⁵ The interplay of these narratives is problematic and needs to be examined closely.

The Court’s vacillating position with regards to Aboriginal rights undermines the usefulness of rights discourse.

Considering Brown, Halley and Alfred’s critiques of rights alongside the problematic application of Aboriginal rights in Canada, the creation of new rights to protect Indigenous expressions of culture does not seem particularly useful or promising. One of the key problems I would expect from the creation of rights protecting Indigenous cultural expressions is the problem of identifying the “Indigenous” part, as alluded to earlier.¹³⁶ For example, the creation of rights that protect visual art raises a lot of practical questions. For example, would a design created by a Coast Salish artist and put on a t-shirt qualify for protection? Does the artist need to physically create the material manifestation of each piece in order for it to be considered “authentic” Indigenous expression of culture? Is there a threshold? For example, would carved silver rings qualify for protection but the t-shirt, printed at a non-Indigenous-owned manufacturing company, be disqualified? The production and sale of t-shirts printed with unique designs could be a large source of revenue for Indigenous artists, especially in tourist destinations like Vancouver. Should the reprinting of a design be offered the same amount of protection as a carved bentwood box?

The creation of laws protecting specifically Indigenous art and knowledge raises further difficult questions that are undergirded with colonial philosophies. For example, how would one distinguish Indigenous artists from non-Indigenous artists? Surely, an artist would not have to

¹³⁵ *R v Sparrow* [1990] 1 S.C.R. 1075 at para 1103.

¹³⁶ See also WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (Geneva: WIPO, 2001), online: Fact Finding Missions Report <http://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf>. This report compiles information gathered from nine fact-finding missions to identify the needs and expectations of what they termed “traditional knowledge holders” conducted in 1998-1999. The sheer size of the report indicates how difficult it is to identify the content of “traditional knowledge.”

prove his or her Indigenous ancestry to qualify for protection. That idea smacks of identity debates based on race like Indian “status” and band membership conflicts. Colonialism and its progeny once again rear their ugly heads.

Alfred’s critique of legalism suggests that Indigenous peoples should be focusing on responsibilities, not rights.¹³⁷ In the context of the protection of Indigenous cultural expressions, Alfred’s concept of responsibilities translates well. Instead of pursuing rights that protect Indigenous cultural expressions that may reinscribe harmful colonial identifications, perhaps communities and knowledge holders should focus on revitalizing community practices that protect knowledge. For example, Cheryl Bryce, a member of the Lekwungen community and Lands Manager for the Songhees First Nation, practices her own responsibilities by reintroducing the harvest of kwetlal (or camas) around Victoria on both private and public lands.¹³⁸ Up until about 150 years ago, the bulb of kwetlal was a main starch food for the people that lived in what is now Victoria. Cheryl Bryce’s female ancestors owned and managed the kwetlal fields that provided the fertile soil that was so appealing to settlers.¹³⁹ Her cultural knowledge is intrinsically protected and practiced by her harvesting of kwetlal. In an interesting wrinkle, her practice of her responsibilities (or laws) on private land is seen as illegal by the state.¹⁴⁰ For Cheryl Bryce and theorists like Alfred and Jeff Corntassel, the question is not “how

¹³⁷ See also Jeff Corntassel, “Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse,” (2008) 33 *Alternatives* 105. Corntassel argues that rights discourse can only take Indigenous peoples so far, and that it is much more productive to root strategies for self-determination in practices that are culturally and environmentally linked to the land. Corntassel explores the larger implications of a shift from strategies focused on rights to those focused on responsibilities.

¹³⁸ Jeff Corntassel & Cheryl Bryce, “Practicing Sustainable Self-Determination: Indigenous Approaches to Cultural Restoration and Revival,” (2012) 18:11 *Brown Journal of World Affairs* 15 [Corntassel & Bryce]; Jen Bagelman & Mike Simpson, “Decolonizing Urban Political Ecologies: The Production of Nature in Settler Colonial Cities,” (2017) 0:0 *Annals of the American Association of Geographers* 1 [Bagelman & Simpson]; Briony Penn, “Restoring Camas and Culture to Lekwungen and Victoria: An Interview with Cheryl Bryce” (2006) *Focus Magazine* at 1 [Penn].

¹³⁹ Corntassel & Bryce, *supra* note 137 at 158; Bagelman & Simpson, *supra* note 137 at 8; Penn, *supra* note 137 at 2.

¹⁴⁰ Corntassel & Bryce, *supra* note 137 at 159; Bagelman & Simpson, *supra* note 137 at 8; Penn, *supra* note 137 at 1.

can we make her practice legal?” but rather, “which law gets the job done?”¹⁴¹ Spaces like these must be found in which to practice responsibilities, and as a settler, I must help make room for these spaces by problematizing colonial laws. For Cheryl Bryce, protection requires fulfilment of obligations and responsibilities, not rights.

It must be mentioned that revitalizing community responsibilities is not a fix-all for the appropriation of Indigenous cultural expressions. Bryce’s harvest of kwetlal is not a perfect analogy for what is needed to adequately protect Indigenous expressions of culture from appropriation, but it illustrates a theoretical basis for rejecting the colonial system of law that fails to protect Indigenous expressions of culture. However, the misappropriation of Indigenous designs being printed on t-shirts and sold to unwitting tourists cannot be prevented without engaging in some way with existing legal mechanisms, which is why Canadian law cannot be entirely excluded as a possibility for recourse.

b) Renovating Legalism

Rights discourse has been both an aid and a liability for Indigenous peoples in Canada.¹⁴² Significant improvements in so-called “Aboriginal rights” have been made. For example, the creation of Section 35 (1) of the *Constitution Act, 1982*¹⁴³ in particular marked a seeming departure from the assimilative oppression of Indigenous peoples up to that point. Section 35 (1) recognized and affirmed “existing Aboriginal and Treaty Rights of the Aboriginal Peoples of Canada.”¹⁴⁴ On one hand, section 35 (1) prevents Canada from unilaterally extinguishing

¹⁴¹ In fact, camas has its own power to enforce rights. The Lekwungen harvesters were careful to weed out the strikingly similar but toxic bulb *Toxicoscordion venenosum*, also known as “Death camas.” If someone who did not have Lekwungen legal entitlement to harvest accidentally consumed Death camas, they would suffer the consequences. Bagelman & Simpson, *supra* note 137 at 3.

¹⁴² John Borrows, “Unextinguished: Rights and the *Indian Act*” (Faculty of Law, University of Victoria, 2015) [unpublished] at 1 [Borrows].

¹⁴³ Constitution Act, 1982, Being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

¹⁴⁴ *Ibid.*

Aboriginal rights. However, it also facilitates the Crown's ability to justifiably infringe Aboriginal and treaty rights.

Given legalism's inconsistent and vacillating position as both a help and hindrance to Indigenous peoples, the use of legalism as a practical basis for a justice project must be careful and critical. In this section, I will examine two theorists' orientations to law and use their insights to reflect on the potential for legalism to protect Indigenous cultural expressions. In his forthcoming article "Logics as Law: Rethinking Social Regulation in a Full Planet, That Is, Green(ing) Legal Theory in the Animacene," Michael M'Gonigle prompts us to rethink our conceptions of what law means.¹⁴⁵ Similarly, Mariana Valverde in "Spectres of Foucault in Law & Society Scholarship" asks academics to remain critical of their disciplines in order to reconfigure what is possible within their fields.¹⁴⁶

In his forthcoming article, Michael M'Gonigle argues that the attention given to "legal law" (state-made law) distracts us from social ordering through other "logics," such as cars, private property, and corporations, which are equally if not more responsible for the way our world works.¹⁴⁷ As such, the logics aiding the progression of environmental degradation of a full planet go unchecked, and any critique of this social ordering is largely ignored.¹⁴⁸ M'Gonigle proposes Green Legal Theory ("GLT") as a new legal paradigm. He argues for a new conception and vocabulary of "law."¹⁴⁹ According to M'Gonigle, GLT applies to a plethora of fields beyond the narrow scope of environmental law, including constitutional law, corporate law, city planning, social justice projects, and most importantly, economics and politics.¹⁵⁰ The

¹⁴⁵ M'Gonigle, *supra* note 106.

¹⁴⁶ Valverde, *supra* note 105.

¹⁴⁷ M'Gonigle, *supra* note 106 at 3.

¹⁴⁸ *Ibid.*, at 5.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

interdisciplinary nature of GLT takes its form as both a verb, reshaping, or “greening,” various disciplines, and also as a noun, that integrates “green” content into new disciplines.¹⁵¹ GLT recognizes as law the logics of social and natural animations that inform and transcend the “legal law.”¹⁵² Rather than recognizing human autonomy and rationality as the point from which social ordering flows, GLT embraces the fact that the individual is a relational being who “collectively constructs the extensive conditions of its own existence.”¹⁵³ M’Gonigle wants us to take note of the constructed nature of the conditions humans and other actants¹⁵⁴ have created for ourselves and our planet. He beseeches us to understand that what has been constructed can be deconstructed and reanimated in the form of social ordering that changes the path we are on.

In a similar vein, internationally recognized scholar and intellectual property expert Professor Mira T. Sundara Rajan notes that “rights are ultimately instruments of policy that are malleable in the service of the public interest.”¹⁵⁵ Laws are not born out of universal truths and have not stood for thousands of years.¹⁵⁶ Laws are malleable in the interests of policy, and it is that thread that is often forgotten, and of which M’Gonigle reminds us. Laws are constructed and acted upon by human agents, and it is those humans that give laws their expression.

Similarly, it is humans that give shape to their disciplines. In her article, “Specters of Foucault in Law and Society Scholarship,” Valverde argues that instead of “domesticating” a theorist such as Michel Foucault in the service of a sociology or philosophy, we should “try to think about Foucault’s work not as a source of concepts to be applied to renovate our existing

¹⁵¹ *Ibid.*

¹⁵² *Ibid* at 10.

¹⁵³ *Ibid.*

¹⁵⁴ See generally Bruno Latour, *Reassembling the Social – An Introduction to Actor Network Theory* (Oxford: Oxford University Press, 2005).

¹⁵⁵ Sundara Rajan, *supra* note 57 at 32.

¹⁵⁶ Borrows, *supra* note 141 at 1.

academic homes, but rather as inspiration to go and do likewise.”¹⁵⁷ We must “question the rules of the game” and be critical of the limitations of our disciplines.¹⁵⁸ Academics must understand that rights discourse can be limiting, but attempt to push through these boundaries or work around them. We must ask what is meant by “the law” when it is used “in the singular and without qualification.”¹⁵⁹ How can “the law” be transformed? Valverde’s rejection of disciplinary homes and encouragement to critique and reshape our academic fields demands that we constantly take a step back from our work and view it with a critical, interdisciplinary eye. With interdisciplinary eyes, we can find flexibility.

Our disciplines, like rights, are more malleable than we think. If the parameters of “law” can be expanded as Valverde and M’Gonigle suggest, we must be critical of law’s limitations in order to renovate our disciplines and open up new possibilities. In the following paragraphs, I will critique and evaluate existing forms of legal rights to determine whether they may be of use in protecting Indigenous cultural expressions.

As previously mentioned, there are no instruments specifically for Indigenous individuals or collectives wishing to protect their knowledge. Intellectual property rights, like Aboriginal rights and title, are based on colonial concepts and reflect the historical origins of the law. The Canadian intellectual property regime depends on Western concepts that need to be unpacked. In a world where “undifferentiated economic growth remains the primary goal of policymakers worldwide,”¹⁶⁰ the Canadian intellectual property regime is based on an economic understanding of culture, resulting in appropriation and commodification of Indigenous culture. Economic valuing of culture threatens to overpower those cultures that reject an economic basis for valuing

¹⁵⁷ Valverde, *supra* note 105 at 46.

¹⁵⁸ *Ibid* at 54.

¹⁵⁹ *Ibid* at 55.

¹⁶⁰ M’Gonigle, *supra* note 106 at 4.

it, potentially wiping out huge stores of cultural wealth.¹⁶¹ The rationales behind intellectual property protection, like economic importance of innovation, are deeply entrenched in the law. If these rationales could be deconstructed, as M'Gonigle suggests, what would legal protection of Indigenous expressions of culture look like?

For example, while intellectual property rights help secure economic benefits and encourage further innovation,¹⁶² the intellectual property regime runs the risk of further commoditizing Indigenous culture by turning unique designs into property. As Wade Mansell et al. point out, rights create property from things.¹⁶³ In applying intellectual property rights to Indigenous designs, one makes property out of culture. While intellectual property instruments may be useful in some cases, it is important to note that property is about holding rights against other people, which ultimately benefits some (i.e. property owners, or someone who has taken out a copyright on a particular design) and not others (for example, an Indigenous artist or community who feels their design has been appropriated without their consent).¹⁶⁴ The co-constitutive nature of law and property reveals the ways in which Canadian intellectual property laws are not simply inappropriate for protecting Indigenous expressions of culture, but also adversarial. The previously mentioned gaps in Canada's intellectual property regime serve as conduits to ongoing cultural erasure and exoticization.

There have only been a handful of court cases concerning Indigenous expressions of culture brought before the Canadian judiciary. One in particular raises many questions about how legalism might be used to protect Indigenous cultural expressions. In 1996, the Comox First Nation and an Indigenous artist from another community went to court in British Columbia over

¹⁶¹ Sundara Rajan, *supra* note 57 at 17.

¹⁶² Sundara Rajan, *supra* note 57 at 3.

¹⁶³ Wade Mansell et al., *A Critical Introduction to Law*, 3e (London: Cavendish Publishing Ltd., 2004) at 42.

¹⁶⁴ *Ibid.*

use of the trademark “Queneesh.”¹⁶⁵ The artist used the name to describe his art business. For the Comox Nation, however, “Queneesh” referred to a sacred story, and was also the name of the nation’s development corporation.¹⁶⁶ The British Columbia Supreme Court (“BCSC”) turned down the Comox Nation’s attempt to have its Aboriginal right to the term “Queneesh” reviewed as a trademark case and rejected the idea of an Aboriginal claim to the word “because Aboriginal rights are outside the scope of trademark law.”¹⁶⁷ The BCSC’s logic prompts the following questions: are Aboriginal rights outside the scope of trademark law because they are constitutionally protected? Would constitutionally protected Aboriginal rights trump trademark law? If that is the case, then shouldn’t the Aboriginal right to the word win? Or is the BCSC saying that Aboriginal rights don’t encompass protection of knowledge and heritage? The ruling seems to be in violation of section 35(1), and prompts the question whether Indigenous culture and heritage are inherently protected by section 35(1) as an Aboriginal right.

Indigenous scholars and educators Marie Battiste and James Youngblood Henderson, in their book *Protecting Indigenous Knowledge and Heritage: A Global Challenge*, argue that section 35(1) protects Indigenous “heritage and knowledge” as an Aboriginal right and offers the highest form of protection in Canadian law.¹⁶⁸ I find this argument theoretically persuasive. Section 35(1) could indeed be a very powerful tool to protect Indigenous expressions of culture, but there are some practical gaps in this theory. Battiste and Henderson fail to account for the problematic and historicized approach of the judiciary in creating tests for the scope and nature of Aboriginal rights and title. Battiste and Henderson cite *R v. Sparrow*, *R v. Van der Peet*, and *Delgamuukw v. British Columbia* as cases proving that Indigenous culture are theoretically

¹⁶⁵ *Queneesh Studios Inc v Queneesh Developments Inc.* (1996) 67 CPR (3d) 452 (BCSC).

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ Battiste & Henderson, *supra* note 57 at 215.

protected under section 35(1), but fail to take into account the harmful frameworks informing the tests created in these cases. For example, Battiste and Henderson write, “[l]ittle doubt exists that language, systems of ecological and spiritual beliefs and knowledge and ceremonies are an integral and distinctive part of Indigenous knowledge and heritage.”¹⁶⁹ This statement operates out of the tacit acceptance of the problematic framework of the Van der Peet test, which roots Indigeneity in the past.¹⁷⁰ While Battiste and Henderson also champion the seemingly promising fact that Parliament has never explicitly extinguished Indigenous knowledge or cultural systems,¹⁷¹ and the fact that any infringement of rights must meet the justification test, their argument embraces the paternalistic idea of all power residing with the Crown. They write, “[a]t the center of these constitutional rights is the ability of Aboriginal peoples to define their own contexts or ideas of existence, or meaning, and of spirituality surrounding the mystery of human life and to control their own thoughts and identity.”¹⁷² This statement, evoking language of self-determination, literally centers the very “constitutional rights” that restrict the exercise of Indigenous self-determination.

Battiste and Henderson are not sufficiently critical of the frameworks they are engaging with. While working within the existing legal system is necessary and realistic, it is also useful to

¹⁶⁹ Battiste & Henderson, *supra* note 57 at 213. Unfortunately, the Supreme Court of Canada recently handed down a decision that suggests that spiritual beliefs, knowledge, and ceremonies are not an integral or distinctive part of Indigenous culture worthy of protection. In *Ktunaxa Nation v British Columbia (Forests, Lands, and Natural Resources)* [2017] SCC 54, the SCC held that the Ktunaxa Nation’s freedom of religion extended to the protection of people and their actions, but not the sites where religious practices occur. The majority held that the Nation’s rights were not violated by British Columbia’s decision to allow the Jumbo Glacier resort to develop in a spiritually significant area where Grizzly Bear Spirit lives. It held that the ability to believe in the Grizzly Bear Spirit was not impinged, regardless of the activities in the location. Once again, legalism fails to be a viable strategy for Indigenous peoples.

¹⁷⁰ The *Van der Peet* test characterizes the SCC’s attempt to crystalize Indigenous cultures in a pre-contact time, *supra* note 26 at 4.

¹⁷¹ It is important to note that the Canadian government has attempted to extinguish Indigenous knowledge and cultural systems, though not through explicit legislation. For example, the residential schools system was “created for the purpose of separating Aboriginal children from their families in order to minimize and weaken ties and cultural linkages, and to indoctrinate children into a new culture – the culture of the legally dominant Euro-Christian Canadian society.” TRC, *supra* note 89 at v.

¹⁷² Battiste & Henderson, *supra* note 57 at 212.

draw attention to the colonial principles embedded in the frameworks that prop up the legal system. Section 35(1) is an important and useful tool, but not when it is only used to protect those far-and-few-between rights proven using the rights or title tests. Section 35(1) needs to be expanded from the restrictive definition and scope of rights so that the potential extent of constitutionally protected rights can be exercised.

The humans giving expression to law are for the most part settlers who benefit from the dispossession of Indigenous peoples. It is important to note, however, laws are not universal – they are shaped and given expression by political circumstances of the day. It is possible, then, that section 35(1) becomes a useful tool for protection of Indigenous culture. If the courts, in a future case, were to find that the Crown has a constitutional obligation under section 35(1) to protect Indigenous cultural expressions, there are further questions to be asked. Considering the way the courts have implemented their own judiciary creations, what would section 35(1) protection of knowledge look like in practice? Would the judiciary simply make up a new test? Would protection of Indigenous cultural expressions then be established on a case-by-case basis? This method of rights protection is expensive and presents other issues as well. It is hard to get community consensus for constitutional challenges, and once more puts faith in institutions that have been used to oppress Indigenous peoples. It is important to remember the practical limitations of the tools we have, even though they may have great potential. Remembering the practical limitations of law incentivizes us remain critical of our disciplines and to answer Valverde’s call to question the rules of the game. How can we reconfigure “law;” how can we imagine rights to protect Indigenous expressions of culture?

c) Re-imagining Law

As Brown, Halley, Alfred, M'Gonigle, and Valverde have demonstrated, using legalism has severe limitations and drawbacks. Law, if used at all, needs to be rethought in order to address the protection of Indigenous cultural expressions. The parameters of law must be expanded, and the destructive growth policies underpinning laws must be deconstructed. In fact, law must be almost completely reimagined. Can law be reoriented in order to effect transformative change? To address this question, I will examine articles by Gordon Christie and Donna Haraway, which offer new ways of thinking about our social ordering.

Gordon Christie, in his article “Indigeneity and Sovereignty in Canada’s Far North: The Arctic and Inuit Sovereignty,” offers a reoriented perspective on law. He draws attention to the narrative of Western law, demonstrating the “magical” and constitutive power of language.¹⁷³ Christie deconstructs the language and narrative of the “sovereign” state. He argues that sovereignty is used as a convenient tool to assert territorial claims over vast tracts of land in the Arctic – the word functions as though it is “owed obedience.”¹⁷⁴ Resisting further dispossession within the state’s “story” of sovereignty by citing the right to self-determination as promised by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is limited by the fact that article 46 of UNDRIP states that the territorial integrity and political unity of a sovereign state must remain intact.¹⁷⁵ As such, “imagination is constrained within this model – our plans and strategies can only reach out so far.”¹⁷⁶ Christie proposes his concept of “meeting story with story” to combat further dispossession.¹⁷⁷ He offers “indigeniety” as a tool to meet the story of the sovereign nation and deconstruct the fabrication of sovereignty as the only way to

¹⁷³ Christie, *supra* note 107 at 330.

¹⁷⁴ *Ibid* at 330 and 338.

¹⁷⁵ United Nations. *The United Nations Declaration on the Right of Indigenous Peoples* (New York: United Nations, 2008).

¹⁷⁶ Christie, *supra* note 107 at 339.

¹⁷⁷ *Ibid* at 342.

relate to land.¹⁷⁸ In particular, Christie claims that the Inuit can tell stories about their relationships to land and animals as “*alternate stories*” about how humans should act in relation to land and animals.¹⁷⁹ These stories, “inhabiting a normative universe with roots distinct from the cultural and social history of the West” have the ability to challenge the sovereignty model and its ontological relationality with land and animals – a relationship undergirded by domination and extraction.¹⁸⁰ Christie suggests we reorient ourselves towards sovereignty and its aids (the law, for example), and perceive them simply as story.

In a similar vein, Donna Haraway in “Staying with the Trouble: Anthropocene, Capitalocene, Cthulucene,” attempts to open up space to see the possibility in what is generally considered to be an ecologically doomed world.¹⁸¹ Haraway believes we must reorient our thinking by reworking the tools we use to think, know, and relate, in order to imbricate ourselves in collective practices that take up caring about one another across species. Haraway is de-centering the human, in a sense zooming out her lens, to bring together all species in a symbiotic network that must work together to cultivate conditions wherein survival is a possibility. In her model of collaborative survival, legalism is absent. Collaborative survival takes up the space that law usually inhabits: caring for other species in a meaningful way will produce new social regulation, much the same way law regulates social ordering. However, progress and capital accumulation will not be the driving forces.¹⁸² Instead, collaborative survival and multispecies caring will create a world in which humans pick up response-ability (echoing Taiaiake Alfred).¹⁸³ For example, Haraway discusses an example of a group of women’s collective

¹⁷⁸ *Ibid* at 340.

¹⁷⁹ Christie, *supra* note 107 at 342.

¹⁸⁰ *Ibid*.

¹⁸¹ Haraway, *supra* note 108 at 40.

¹⁸² *Ibid* at 58.

¹⁸³ *Ibid* at 45.

practice of crocheting coral reefs to raise awareness about how large swaths of reefs are dying at unprecedented rates due to the warming of our oceans.¹⁸⁴ Through crocheting, these women are becoming intimate with a coral reef, simultaneously learning and creating it. The collective practice of crocheting a living entity combines women's fiber arts, environmentalism, math, beauty, display, and intimacy without interference, raising the question of what is still possible in this century *when coral reefs still exist*. It is a reorientation to reality: the coral reefs exist in both realities (in one, as a dying species, in another, as an embodiment of humanity's ability to be intimate and caring with other species), but the way we think about them must be changed. Haraway is not rejecting legalism. She is simply reimagining what is possible when we change how we relate to other species.

In a way, the models offered by Haraway and Christie come full circle with Taiaiake Alfred's rejection of legalism. Christie's suggestion of stories and Haraway's offering of new relationships are reflective of Cheryl Bryce's practice of knowledge protection – by revitalizing her relationship with the land by harvesting kwetlal, she is creating her own story, her own law. Law, in a Western sense, must be reimagined. Haraway and Christie demonstrate the potential of new social ordering by reimagining through stories and relationships. Would Indigenous cultural expressions need protecting if we related to animals and land differently? If one removed “progress” and capital accumulation from the equation of our world, would Indigenous culture still be appropriated? Reimagining law as simply a story, or as a relationship with other species illustrates the extent of what is possible within this world.

¹⁸⁴ Donna Haraway, “SF: String Figures, Multispecies Muddles, Staying with the Trouble” (Presentation delivered at the University of Alberta, Edmonton, AB, March 24, 2014) [published] online: <<https://www.youtube.com/watch?v=Z1uTVnhIHS8>>.

Indigenous peoples and their allies are never going to be given the perfect tools and circumstances to create a better world.¹⁸⁵ Communities, scholars, lobbyists, activists, settlers, and other stakeholders must attempt to enact change with the mechanisms already in place. That is why it is worthwhile to examine legalism as potential tool for the protection of Indigenous cultural expressions. The implementation of “Aboriginal rights” so far has not been perfect: in fact, it has not even been acceptable. However, there is potential within law, and within the people who interpret it. Furthermore, as many of the theorists above have shown, there is vast potential beyond legalism.

In this section, I laid out why Indigenous cultural expressions are at risk of being appropriated in the first place, and attempted to determine whether legalism is a theoretically appropriate place to start searching for solutions to the appropriation of Indigenous art and knowledge. First, I contextualized the appropriation of Indigenous cultural expressions, explaining why it is at risk of being appropriated and discussing unethical aspects of research. Then I examined some of the barriers Indigenous artists face when attempting to use Canadian intellectual property laws to protect their work. Next, I examined Brown, Halley, and Alfred’s rejection of legalism, and used their insights to illustrate the limitations of rights discourse regarding the protection of Indigenous cultural expressions. I then considered Valverde and M’Gonigle’s recommendations to renovate law to make it a productive place where new possibilities can be unearthed. Finally, I explored reimagined social orderings in Christie and Haraway’s articles. These seven theorists have offered new ways to think about legalism in relation to the protection of Indigenous cultural expressions. While I have not offered a definitive answer about whether rights discourse is a productive place to craft workable solutions to the

¹⁸⁵ Jeff Corntassel, “Living in a Longer Now: Moving Beyond the State Centric System” in Waziyatawin & Michael Yellow Bird, eds, *For Indigenous Minds Only: A Decolonization Handbook* (Santa Fe, NM: School of Advanced Research Press, 2012).

appropriation of Indigenous expressions of culture, I hope readers feel inspired to think about law differently, and feel free to redefine what “law” means and what it can accomplish.

Chapter IV: Case Studies of Three Totems

In this section, I will conduct analyses of two contemporary manifestations of totem poles to illuminate the harmful consequences of commodification of cultures as well as the multiple functionalities of Indigenous cultural expressions operating in this landscape. I will then conduct a case study of an Alaskan tribal court case to examine the application of Indigenous laws to the problems of ownership and commoditization that plague west coast Indigenous art.

i. The First and Second Totems: Brought to You by White Spot and BC Ferries



Figure 4. Left: Ambiguously labeled totem poles for sale at BC Ferries Gift shop
Figure 5. Right: *Wonderbird Totem Pole*, Ellen Neel, 1953.

White Spot Restaurants commissioned Ellen Neel, the first Kwakwaka'wakw woman to carve professionally, to carve *The Wonderbird Pole* in 1953, as shown in Figure 5.¹⁸⁶ The pole was also featured on the company's menus along with "The Wonderbird Legend," authored by

¹⁸⁶ Carolyn Butler-Palmer, Lou-Ann Neel and David A. Neel, "Ellen Neel: The First Woman Totem Pole Carver – Gallery Guide" (Victoria: Legacy Art Gallery, 2017) at 3-6 [Gallery Guide].

Ellen Neel. “The Wonderbird Legend” was printed on the cover of White Spot menus in the 1950s and read as follows:

In the beginning, the men of the Pacific Coast were brown men and the totems were brown totems made of brown wood. With the coming of the white men came other white things also, and among these white things was a white rooster. The white rooster saw the birds and beasts so wonderfully carved on totems of the Kwakiutl and the Tsimshians. It became his great desire to be the first rooster to be placed on the top of the totem poles. He asked Chief Che-Che-Kin how this could come to pass.

“You will have to do something that no other rooster has ever done before,” said the Chief. “You will have to do something that neither Kolus the Thunderbird, nor Hwahwasa the silver salmon nor Gwa-tum the great whale has ever done.”

Then the white rooster thought and thought. In fact, he thought so hard that he brooded. Now everybody knows what happens when a chicken broods. It lays an egg. When the white rooster thought so hard that he became broody, he did something that no rooster has ever done before. He laid an egg. A big white egg. The white rooster was very proud of what he had done, and he took the egg to Che-Che-Kin. I have done what no rooster ever did before, eh, Chief...”

Quoted from the front page of White Spot menus from the 1950s.¹⁸⁷

The two totem poles, pictured above in Figures 4 and 5, represent an Indigenous cultural expression as a commodity (the “Canada” totem), and another Indigenous cultural expression as an assemblage of resistance, survival, satire, and humour (the “Wonderbird Totem”). The “Canada” totem, displayed without any information about its production, raises questions of ownership and artist recognition, which can be explained by the many gaps in Canadian intellectual property law discussed above. As mentioned, there is almost nothing in Canadian law

¹⁸⁷ Gallery Guide, *supra* note 185 at 5.

that would protect Indigenous cultural expressions from being appropriated and copied by non-Indigenous artists and sold for profit.

The “Canada” totem pole as shown in Figure 4, which has no other labeling other than a price tag (marked at \$12.99), is branded with the word “Canada”, indicating to the tourist or purchaser that this particular representation of Indigenous culture is a symbol of all of Canada, belonging to Canada. This decontextualization of a cultural symbol reduces Indigenous cultures to a one-dimensional commodity. Furthermore, this totem pole deterritorializes Indigenous culture from place. Totem poles have specific meaning in place. Johnny Mack writes about the importance of totem poles in Nuu-chah-nulth culture.¹⁸⁸ He describes totem poles as tangible representations of a particular community’s history, as well as symbols of the authority of hereditary chiefs. According to Mack, the totem poles bind chiefs to Nuu-chah-nulth governing principles of respect and generosity, and thus represent core governance structures.¹⁸⁹ Souvenir shops selling little totem poles and inuksuk statues across Canada decontextualize these cultural signifiers from their places on land.¹⁹⁰ This deterritorialization is evocative of ongoing land dispossession and the erasure of Indigenous cultures in residential schools.

As an analogy, it is helpful to examine Paul Patton’s discussion of Gilles Deleuze and Felix Guattari’s work, *a thousand plateaus: capitalism and schizophrenia*, in which Patton theorizes how the colonial state converted Indigenous territories into a commodity through a process of deterritorialization.¹⁹¹ Patton claims that the legal imposition of “Crown sovereignty” in jurisprudence “effects an instantaneous deterritorialization of Indigenous territories and their

¹⁸⁸ Mack, *supra* note 20 at 128-129.

¹⁸⁹ *Ibid.*

¹⁹⁰ Pierre Legrand, in his article “On the Singularity of Law” (2006) 47 *Harvard International Law Journal* 517, pays specific attention to the importance of locality and place in the construction of law. Though he is talking about the construction of state law, his point applies to Indigenous nations’ laws and governance. Locality cannot be ignored. Removing Indigenous nations’ cultures from place through the commodification of culture undermines those nations’ laws and governance and perpetuates ongoing assimilation of Indigenous peoples.

¹⁹¹ Paul Patton, *Deleuze and the Political* (London: Routledge, 2000) at 109-131.

reterritorialization as a uniform space of Crown land.”¹⁹² Similarly, this “Canada” totem pole instantly and insidiously captures Indigenous cultures as ‘Canadian,’ thus ‘indigenizing’ and naturalizing Canadian culture, the Canadian state, and its violent history. By extricating Indigenous culture from specific place, Indigenous people are absorbed into the body politic of Canada and all past harms are forgotten, making the reconciliation project complete –at least in the mind of the consumer. Thus, the seemingly harmless souvenir market is damaging because it participates in the narrative the state weaves: that land isn’t really central to reconciliation.

The “Canada” totem, as commodity, does harm by misrepresenting Indigenous cultures, encouraging stereotypes and generalizations, and deterritorializing Indigenous cultures from place. Ellen Neel’s Wonderbird totem pole is a stark contrast to the reductive totem-pole-as-commodity. Perhaps most importantly, Ellen Neel’s work provided for her family and was a means of survival. She stated, “Totems were our daily fare, they bought our food and furnished our clothing.”¹⁹³ Her husband, Ted, suffered a severe stroke in 1946, which prompted Neel to take up carving as the main source of income for her family.¹⁹⁴ In 1953, White Spot commissioned the Wonderbird Totem and a “legend” to accompany it.¹⁹⁵ With the Wonderbird Totem, Neel was not simply providing her family with income, she was also mocking White Spot’s request for a Wonderbird Legend, and through this humour, refusing to allow Indigenous art and peoples to be reduced to one dimensional and exotic relics from the past. Unlike the vagueness of the “Canada” totem pole, which reduces an Indigenous expression of culture to a placeless (yet) national symbol, Neel’s Wonderbird muddies the waters of Indigenous totem making, using mockery and playfulness to comment on appropriation of Indigenous culture.

¹⁹² *Ibid*, at 124.

¹⁹³ Gallery Guide, *supra* note 185 at 5.

¹⁹⁴ *Ibid*, at 3.

¹⁹⁵ *Ibid*, at 6.

Even the rooster's cheeky expression mocks the observer. The rooster's stare counters the colonial gaze which has exoticized Indigenous bodies and art, and commoditized Indigenous culture and peoples through production of imagery and consumer culture.¹⁹⁶ Her Wonderbird Legend, accompanying the totem, disrupts the colonial narrative of the "discovery" of Canada, satirizing the birthing of a nation (or the laying of an egg). In having a rooster lay an egg, she bastardizes Canada as an unnatural, forced product of the white man.

Ellen Neel's works beyond her Wonderbird Totem also made revolutionary contributions to art. Neel's work is defying norms from her own community, where women did not usually carve.¹⁹⁷ Hailed as the first woman totem pole carver, her work makes visible women's often unrecognized contributions to arts and crafts.¹⁹⁸ Her work also represents direct resistance to colonialism, as her career was launched during the prohibition of the potlatch in British Columbia.¹⁹⁹ Neel positioned her art in defiance to the Canadian state's ban on Indigenous cultural practices, stating, "[t]he production of art was so closely coupled with giving of the potlatch that, without it, the art withered and almost died."²⁰⁰ In examining all these facets of Neel's work, it is clear that her work functioned as a means of livelihood, satire, a challenge to gender norms, and resistance to oppression.

The contrast of these totems' functionalities is clear. The "Canada" totem pole is an example of ongoing colonial violence that is produced by and perpetuates deterritorialization, stereotyping, and misrepresentation of Indigenous cultures. Through art that commoditizes Indigenous culture and works as national symbols for the Canadian state, colonial violence and

¹⁹⁶ In fact, Neel's Wonderbird should be viewed partly as a commodity as well as a method of survival, satire, and resistance to oppression.

¹⁹⁷ Gallery Guide, *supra* note 185 at 5.

¹⁹⁸ See generally Sherry Farrell Racette's work. She explores the often unrecognized contributions Indigenous women have made to arts and crafts, in particular in beading work.

¹⁹⁹ Gallery Guide, *supra* note 185 at 5.

²⁰⁰ *Ibid.*

its existence is normalized. Ellen Neel's *Wonderbird*, on the other hand, is a counter to these relationships of power that commoditize Indigenous culture, using humour, satire, and appropriation of nation-building tropes to resist colonial violence. Neel's work resists passive consumption of Indigenous culture – it forces the observer to take a look at their own position in relation to her art.

It is necessary to approach the production and sale of Indigenous cultural expressions with a nuanced understanding of the complexities informing the commodification of Indigenous cultures. It is important to note I am not advocating against Indigenous artists who would like to earn their livelihood by providing products for a popular market. Indigenous artists should be able to benefit from tourists' curiosity and fascination with Indigenous cultures, just like other cultures all over the world. As discussed above, Neel's livelihood depended on her carving and other works that integrated her designs with more mundane items. She printed on silk to make beautiful scarves, clothing, and bags, and even created a line of Royal Albert China sporting her designs. Neel did not think that printing her designs on commonplace objects was a problem; in fact, she saw an opportunity to bring economic prosperity and visibility to Indigenous peoples through the ethical production of these items.

I support Neel's position that Indigenous peoples should be able to supply the obvious demand for these products. What is problematic is the appropriation of cultural expressions for the enrichment of non-Indigenous peoples, and the passive consumption of these items without an understanding of the history of colonial violence in Canada. This last point is complicated, because the appropriation of Indigenous cultural expressions does not become "wrong" the moment a person who is unaware of Canada's colonial history picks up an appropriated object. It would be no less right than if a person who is aware of this history bought the object. The

difficulty here is that it is not necessarily a “moral wrong” on the part of the consumer, though that argument could be made. Rather, what is so problematic about this form of appropriation is that it is occurring in a context where Indigenous peoples, their lands, and cultures have been appropriated by the colonial state for hundreds of years. It is not simply a “rip off” – it is part of a larger pattern of assault on Indigenous peoples.

It must be noted that many consumers of these kitschy souvenirs are simply curious tourists, and they should not be labeled as the sole perpetrators of this injustice. The marriage between capitalism and colonialism should be held accountable for the ongoing violence embodied in these souvenirs. Perhaps in the meantime, public education and authenticating programs should be implemented to inform consumers about the purchases they are making.²⁰¹ In this way, Indigenous artists would be supported, and a broader audience would understand the effects of colonialism on Indigenous peoples.

To counter this last point, however, it must be noted that not all production and sale of Indigenous cultural expressions are considered acceptable. For example, there are certain sacred potlatch masks that are collectively owned by certain families, which signify lineage, family history and “form an important class of inherited privileges.”²⁰² In Coast Salish communities, for example, these expressions of culture cannot be commoditized and sold.²⁰³ Unfortunately, not everyone recognizes these laws. Many private collectors own masks seized during the potlatch

²⁰¹ “Authentic Indigenous” is a branding tool that marks products made and designed by Indigenous artists. The initiative, spearheaded by Coast Salish artist Shain Jackson, draws heavily from trademark law and is concerned with raising awareness, educating the consumer, and empowering Indigenous artists in the art marketplace. The goal is to certify that Indigenous artists have designed the work and are being compensated fairly for it. It is a Vancouver-based initiative run by Indigenous artists and has been in development for twenty-five years. Authentic Indigenous Website, *supra* note 16; David Ball, “Through Certification, Indigenous Artists Take Back Work,” (Vancouver: The Tyee, 2014) [Ball].

²⁰² Brian Thom, “Intangible Property within Coast Salish First Nations Communities” (Ottawa: WIPO North American Workshop on Intellectual Property and Traditional Knowledge, 2003) at 8.

²⁰³ *Ibid.*

ban in the early half of the twentieth century.²⁰⁴ Original owners have tried to negotiate for the return of their masks, but Canadian law does not recognize the masks' original and intended owners.²⁰⁵ Illegal sales of cultural expressions are still occurring. Judith Sayers, a Hupacasath community leader and adjunct law professor at the University of British Columbia, has experienced the disconnect between colonial law and Indigenous laws first hand. Two sacred Hupacasath cedar masks, passed down through matrilineal lines for centuries, have been sold to an unknown collector.²⁰⁶ The masks were owned collectively by the Sayers family under Hupacasath law. Unfortunately, they were sold by a family member who was supposed to keep the masks safe. Since they were willed to that family member, there is no wrongdoing under BC law,²⁰⁷ demonstrating a need for state law to either recognize concepts like collective ownership, or delegate conflict resolution regarding these types of problems to Indigenous nations. In the next section, I will be exploring the latter option.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid* at 13.

²⁰⁶ Judith Lavoie, "Sale of First Nations Masks Sparks Call for Better Legal Protection," *Times Colonist*, January 21, 2013. < <http://www.timescolonist.com/news/local/sale-of-first-nations-masks-sparks-call-for-better-legal-protection-1.53219>.>

²⁰⁷ *Ibid.*

ii. The Third Totem: The Whale House Case



Figure 6. The Wormwood Post – one of four posts from the Whale House.

Photo by A. de Menil.²⁰⁸

To complicate things further, I would like to explore a third manifestation of a totem pole: the totems found within the Whale House in a tiny Tlingit village in southeastern Alaska. What follows is a detailed description of the events leading up to and proceeding the taking of five items from a locked building in the middle of the night in 1984. I then analyze the ensuing tribal court proceedings to illustrate the effective articulation and application of Tlingit law to this matter. I use this tribal court case as both an exploration of the treatment of totem poles in its proper context, and also as a suggested solution to issues of cultural appropriation.

The small Tlingit village of Klukwan on the shores of the Chilkat River is made up of around 170 people.²⁰⁹ The community has a complex social structure (see Figure 7).²¹⁰ There are two moieties – Eagle and Raven. These moieties exist primarily for marriage purposes. Under

²⁰⁸ A. de Menil. <<http://www.ankn.uaf.edu/curriculum/Tlingit/ChilkatIndianVillage/>>

²⁰⁹ *Chilkat Indian Village Tribe v Johnson*, No. 90-01 (Chilkat Tr. Ct., Nov. 3, 1993) [*Chilkat*].

²¹⁰ Figure 7 is not a complete depiction of all the Clans and Houses in Klukwan, as I do not have access to all the information necessary to complete such a diagram. I merely seek to clarify the relationships between the moieties, clans, and houses and their hitsati with regards to the Whale House.

Tlingit law, one must marry only a member of the other moiety. Within these moieties, there are clans. The clans are the most important affiliation for Tlingit people. There are several different clans within the Eagle moiety in Klukwan, but all members of the Raven moiety in Klukwan are part of the Ganexteidi Clan. Within each clan are houses, which usually refer to actual physical structures and the nuclear families that inhabit them. The clans, not houses, claim “clan trust property” and custodial rights over certain expressions of culture or “artifacts,” but artifacts are stored in individual houses. Furthermore, these expressions of culture are of great significance to the Ravens *and* the Eagles of Klukwan. Ownership claims are therefore complex, especially when Western concepts of property and inheritance mix with Tlingit concepts.²¹¹

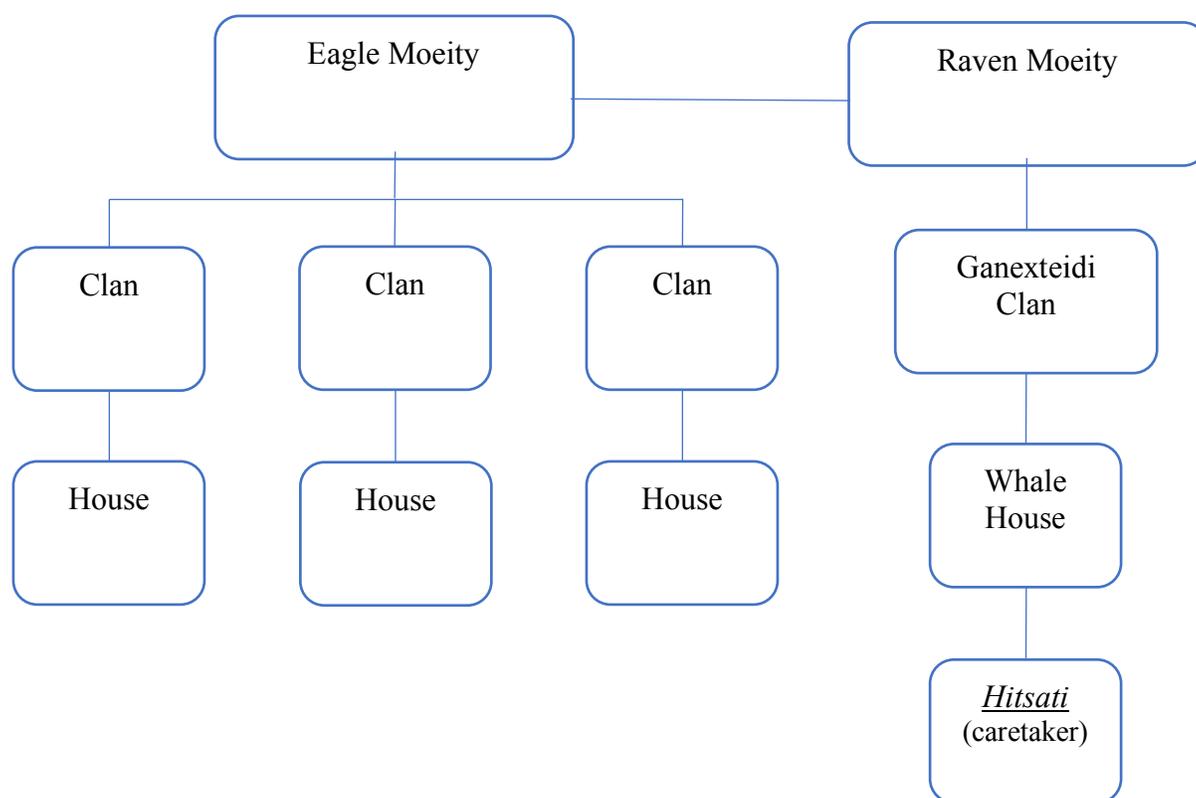


Figure 7. Social Structure of the Tlingit Village of Klukwan.

²¹¹ *Chilkat*, *supra* note 207.

This case concerns the removal of four house posts (often referred to as totems) and a rain screen from the Whale House of the Ganexteidi Clan (hence why they are referred to as the Whale House artifacts). The posts and rain screen were carved by a Tlingit individual called Kadjisdu.axtc around the 1830s. George Emmons was an ethnographic photographer who visited Klukwan in the late 1890s and offered to buy the posts and rain screen. He wrote of the pieces: they are “unquestionably the finest example of native art, either Tlingit or Tsimshian, in Alaska, in boldness of conception – although highly conventionalized in form – in execution of detail, and in arrangement of detail.”²¹² The pieces were priced in the ballpark of several million dollars in the early 1990s.

During the trial, testimony was heard regarding how certain property is confirmed as being clan trust property, which involves presenting it in a ceremony where members of the other moiety (Eagle) are present to witness. Their participation confirms the clan trust status of property like the Whale House artifacts.

The ownership of the Whale House pieces is murky. The Whale House itself had not been inhabited since the mid nineteenth century, when it was a very powerful house. The Whale House posts were commissioned by a community leader in the 1830s to represent the four groups that were being brought together to unify different Ganexteidi houses and constitutionally form the Whale House. The posts tell the stories of the entire clan, not just the Whale House. The house and the posts were dedicated in a ceremony with Eagle members playing a central role, but just as importantly, the Ganexteidi hired members of the Eagle moiety to construct the building. The original structure had actually been destroyed and rebuilt several times, with the posts housed inside it during its varying phases of use, disuse, and construction. The most recent

²¹² *Ibid.*

construction of the Whale House was in 1937, one hundred years after the original construction. This most recent house was built from cement to protect its contents from fires. The reconstruction was financed and facilitated by members of the entire Ganexteidi Clan and was dedicated in a potlatch in which members of the Eagle moiety once again played a pivotal part.²¹³ The Whale House was thus symbolically connected to both moieties in both a historic and more contemporary sense.

Since the creation of the pieces, there have been numerous caretakers, or *hitsati*. Under Tlingit law, the *hitsati* has the obligation to care for the property of the house and clan, and is not allowed to sell or otherwise dispose of clan property. It does not appear as though the caretaker must be from the Whale House – in fact, at the time of the trial, there were only a few surviving Whale House members. At the time of the trial, Joe Hotch was the *hitsati* of the Whale House. He was a member of the Eagle Moiety, the Eagle Clan, and the Bear and Killer Whale houses. His father, Victor Hotch, was a member of the Valley House of the Ganexteidi Clan, and was previously the Whale House caretaker.²¹⁴ To be sure, being a caretaker does not denote ownership. One can already see, through these interweaving threads of moieties, families, and houses, how easily claims of ownership could become ensnarled.

Previous attempts to remove the artifacts had been made by anthropologists and art collectors. One of these collectors, Louis Shotridge, was Tlingit himself. His father was a caretaker of the Whale House at the turn of the 19th century. After his father passed away, Louis attempted to claim patrilineal inheritance to the Whale House items (citing American inheritance law), but the community, citing Tlingit law, unanimously rejected that argument. The

²¹³ *Ibid.*

²¹⁴ Boys were raised under a “strict uncle system,” wherein they would move in with the families of their uncles around the ages of 8-12 to learn from them about their laws and clans. “We did what the uncles told us.” *Ibid.*

Gaanaxteidi saw Shotridge as an outsider with no legitimacy to his claims because he belonged to his mother's Kaagwaantaan Clan.²¹⁵

Joe Hotch recalled two other unsuccessful attempts to remove the artifacts from the Whale House in the 1970s. Estelle Johnson, a Tlingit and cousin of Louis Shotridge, attempted to remove the posts and rain screen, encouraged and financed by Michael Johnson (a white art dealer of no relation to Estelle). She had grown up away from Klukwan, but was persuaded to believe by Michael Johnson that she had a hereditary right to own (or sell) the artifacts. As the posts held little meaning for her, she took Michael Johnson's offer to pay her handsomely for her troubles. However, her first attempt to remove the posts was unsuccessful when members from the Klukwan community placed skiffs in front of the door to the Whale House, blocking her way. Michael Johnson then financed a federal court action to determine the "ownership" of the items.²¹⁶ Later that same year, Estelle, once again backed by Michael Johnson, attempted to remove the items again. This time, the village siren sounded, and trees were felled to block the exits of the community. Many members of the community, young and old, acted to protect the items.

In 1976, the village council passed an ordinance prohibiting removal of "artifacts, clan crests, or other Indian art works" without council approval. This ordinance was passed in reaction to conflict over the sale of artifacts of another Gaanaxteidi house in the village – the Frog House. A lawsuit followed the sale of those items, alleging that the sellers did not have the consent of all clan members. A compromise was reached years later, which returned four posts but allowed the art collector to keep the rest. This ordinance is the law the defendants were accused of violating.

²¹⁵ *Ibid*; Marilee Enge, "Who's Laws?," *Anchorage Daily News*, October 4, 1994.

<<http://www.ankn.uaf.edu/curriculum/Tlingit/ChilkatIndianVillage/>>

²¹⁶ *Estelle Johnson v. Chilkat Indian Village, et al.*, 457 F. Supp. 384 [5 Indian L. Rep. F-194] (D. Alaska 1978).

April 22, 1984, Bill Thomas, following orders from his uncle Clarence Hotch, broke into the Whale House in the middle of the night and loaded three moving trucks with four house posts and a rain screen. Bill, helped by two other men, drove the trucks to Haines, Alaska, where Michael Johnson was waiting in his motel room to inspect the items. The pieces were then transported by ferry to Seattle.

When the community realized the items were missing, they contacted the Alaska State Troopers. The items were discovered in a warehouse in Seattle. After months of interviews, investigators concluded that ownership of the items “was so clouded that a crime would be hard to prove.”²¹⁷ “There is no one person who owns it,” said the investigator on the case.²¹⁸

During this time, Michael Johnson received an offer of 2 million dollars for the pieces, a new record (at the time) for a purchase of west coast Indigenous art. The prospective purchaser was a well-known anthropologist and his wife, a philanthropist from New York. They intended to donate the pieces to the American Museum of Natural History after they made the purchase. However, a federal judge ordered an injunction to stop the sale. Since the Alaska State Troopers had suspended their criminal investigation, the Klukwan council filed a civil suit: *Chilkat Indian Village v. Michael R. Johnson*.²¹⁹

Interestingly, the U.S. district court found that it lacked jurisdiction, and the district judge ordered that the case be heard in Klukwan’s tribal court – a remarkable deference of federal law to tribal law. Klukwan did not have a tribal court, however. It had to be created, drawing from Tlingit and Western family and property law. A Klallam lawyer, Judge James Bowen, was

²¹⁷ Colwell, *supra* note 94 at 164.

²¹⁸ *Ibid.*

²¹⁹ *Chilkat*, *supra* note 207.

appointed as judge, after the duly appointed judge and alternate judge recused themselves as they were witnesses at trial.²²⁰

Over four weeks in 1993, an intricate case unfolded. Defendant Michael Johnson refused to participate in the trial, but thirteen other defendants from the community participated. The Tlingit defendants made it clear that they did not represent the defendant Michael Johnson.²²¹ Johnson's refusal to attend is interesting – would that have been allowed in the district court? Johnson's absence illustrates his determination to ignore the existence of Tlingit law, or could be interpreted as an attempt to undermine its authority. Regardless of his disrespectful attitude, Tlingit law prevailed.

Over the course of the trial, many community members and expert witnesses gave testimony. Rules of evidence were relaxed for this case, as is standard in tribal courts. The only rule of evidence at this trial was relevancy. The case is rich with details of Tlingit law: family trees, the role of *hitsatis*, and matriarchal family obligations were described in great detail. For example, Joe Hotch, who was called to the stand three times during the trial, began his testimony by explaining the significance of the Tlingit regalia he was wearing at the time. He also identified his own lineage and his connection to the Whale House.²²² Through these explanations, Hotch was establishing his own authoritative legitimacy to provide information about these items of great significance.

Many community members testified that the Whale House items played a pivotal role in the community's fabric. Like Hotch, community elders called to the stand began their testimony by making statements in Tlingit. They also provided information about their families, locating themselves within the community's complicated network of houses and clans. Multiple elders

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

testified that under Tlingit law, no individual was allowed to sell the artifacts, because they represent the history of the entire Gaanaxteidi clan, not just the Whale House. Furthermore, many testimonies described how the artifacts played a central role in ceremonies in the community. Tlingit and Thunderbird clan member David Katzeek, who is regarded within the community as having tribal law expertise, explained:

When you're selling an artifact...you're not only getting rid of a piece of wood... you're getting rid of the music, the song, the dance, and the good, the bad, and the ugly...The worm dish story of a young woman nursing a worm as a pet which became a threat to the entire community... is right up here in the 21st century. If the problem was not resolved it would have ended in the destruction of not just the clan that was involved, but the entire community.... A similar thing 2,000 years later is happening. ... This is why we need to keep these things here; this is why we sing the song, and this is why we need them for our ceremonial parties. That's the significance of the artifacts.²²³

The story about the worm that David Katzeek recounted is actually depicted on one of the house posts in the Whale House (Figure 6). Presumably, he told the story to remind his community how they had once been divided, mirroring their current division – only this time, the conflict was about the actual material that taught the original lesson. Thus, the Whale House items were identified as being crucial to the survival of the entire community as a whole. A Gaanaxteidi clan member analogized the items to the American flag, asking, “Where are you without it?” The above testimonies indicate that the items are deeply ingrained in community identity, to the point where it could be likened, somewhat crudely, to patriotism. More

²²³ *Chilkat*, *supra* note 207. Here, community member David Katzeek is drawing on a Tlingit oral story to bolster his assertions about Tlingit law. This method of identifying and articulating Indigenous law through oral stories has been adapted by Hadley Friedland and Val Napoleon in their case brief methodology. For more, see Hadley Friedland and Val Napoleon in their article “Gathering the Threads: Developing A Methodology For Researching and Rebuilding Indigenous Legal Traditions,”(2015-2016) 1:1 Lakehead Law Journal [Hadley and Napoleon].

productively, the Whale House items could be analogized as a constitutional document – they confirm the unity of the bodies they govern and play a central role in important decision-making processes.

On the subject of how the items were regulated by Tlingit law, testimonies overwhelmingly demonstrated that the removal of the Whale House items violated Tlingit law and that the proper restitution would be return of the items to Klukwan. One elder was able to identify the “rightful heirs” to the Whale House (none of which included any of the defendants). She stipulated that even if those heirs were identified, it was the Gaanaxteidi Clan as a unit that held the authority to make decisions about the custody of the items. A noted Tlingit scholar, Andrew Hope III, gave testimony that the items in the Whale House included stories and songs, cannot be owned by one individual. Rosita Worl, a well-known Tlingit social anthropologist, testified that objects such as the posts cannot be sold, unless for a reason such as restitution for a crime, the entire clan decides to do so. She stated that the participants in such a decision would include all adult men and “high-ranking” women.²²⁴ She also stated that the penalty under Tlingit law for selling items such as these would be death. Worl furthermore noted that nephews are not bound to automatically follow directions from uncles, but should rather use their own judgement.

Judge Bowen found that the Whale House items belonged to the entire Gaanaxteidi clan.²²⁵ Alongside the preponderance of evidence that Johnson and the thirteen family members did not hold any rights to sell the items, Judge Bowen held that the historical resistance to the sale of the items could be considered testimony in itself of the significance of the items to the community. He determined that the Whale House building should be fixed and updated, and the

²²⁴ *Chilkat*, *supra* note 207. This delineation between male and female authority reflects an imperfect balance of power in this particular community, as is reflected in most places in our world. I acknowledge that while Tlingit law may be useful for many applications, there is still work that needs to be done to dismantle patriarchal systems of oppression, both within Indigenous communities and in our society more broadly.

²²⁵ *Ibid.*

items be brought back to Klukwan.²²⁶ A few weeks later, a large ceremony was held to reinstall the posts and the rain screen in the Whale House.²²⁷ So ended the great saga of the Whale House items.

Unlike the BC Ferries totem and Neel's White Spot totem, the totems in the Whale House case do not need to be mined for meaning. Their meaning is evident in the rich court testimony, describing how these posts embody Tlingit law in action – laws emanate from their creation, use, and ownership. The posts themselves may not be written law, but they certainly are a part of Tlingit law – they represent it and are governed by it. It is striking to compare these totems to the two pieces I analyzed above. These totems come with their own meaning, which is crucially rooted to a specific place and people. When we look at the two other totems next to the posts from the Whale House, it is clear that the commercialization of these meaningful objects has resulted in cultural degradation. These totems, and by extension, all totems, have meaning on land that is lost when they are deterritorialized.

It is not a stark contrast between what is right and what is wrong, however. Commercializations of these expressions of culture has been facilitated by both Indigenous peoples and non-Indigenous people. As I have mentioned, this examination is not calling for a halt to all commodification of Indigenous cultures. Indigenous cultures and their expressions are not delicate relics that should be put away in a cabinet – quite the opposite. Indigenous cultures and laws are robust and have withstood attempted annihilation.²²⁸

The instinct for cultural fetishizing demonstrated by the generations of art collectors (and the exorbitant prices of the posts) in this case gets at the root of the problem: there is not much

²²⁶ *Ibid.*

²²⁷ Marilee Enge, "Clan's Artifacts Returned, Klukwan Celebrates End of Legal Battle," *Anchorage Daily News*, October 4, 1994. < <http://www.ankn.uaf.edu/curriculum/Tlingit/WhaleHouse/part5.html>.> [Enge].

²²⁸ Hadley and Napoleon, *supra* note 221 at 17-18.

acknowledgement that these posts have any meaning beyond aesthetic. Indigenous expressions of culture are considered exotic, collectible, but not powerful. When asked, years later, whether he would have done anything differently, the art collector Michael Johnson expressed that he wished he had tried to remove the items from the Whale House ten years earlier, claiming he would have been successful then. The only reflection he had on his behaviour was that the ordeal had left him “financially ruined.”²²⁹ He had no thought to spare for the harm he had inflicted. Perhaps these art collectors acknowledge a part of these pieces’ significance in terms of cultural or spiritual history, but they do not acknowledge their meaningfulness to Tlingit laws. Therefore, they erase the significance and even the existence of Indigenous laws. This is a persistent problem – a colonial myth – that Indigenous laws and governance do not exist.²³⁰

Usually, Indigenous laws and governance systems are subsumed under colonial laws and structures. This is due to centuries of oppression of Indigenous systems of governance. Even when Indigenous law is admitted to exist, for example in *Tsilhqot’in Nation v. British Columbia* – it is subsumed under colonial law.²³¹ For example, colonial law bends the rules of evidence to allow oral testimony in court. In doing so, courts believe they are enabling the “reconciliation” of Indigenous legal orders and colonial law. However, that oral testimony does not represent Indigenous law, or the enmeshing of Indigenous and colonial law. That oral testimony simply becomes a mechanization of colonial law. Perhaps that battle is won, but ultimately, colonialism wins the war.

The Whale House case provides a rich exploration of what totem poles can represent in their proper context. It is especially important to consider this example of a totem pole, given the

²²⁹ Enge, *supra* note 225.

²³⁰ Hadley and Napoleon, *supra* note 221 at 17; Johnson and Groft, *supra* note 17 at 118; *Canada’s Indigenous Constitution*, *supra* note 17.

²³¹ *Tsilhqot’in*, *supra* note 129.

pervasive trend of decontextualizing totems from their place on land. This case is also an excellent example of how tribal courts enable the articulation and application of Indigenous legal systems. It is also a rare instance of federal courts deferring to tribal law. It is furthermore a triumph of Indigenous law and epistemology over Western conceptions of property and ownership. Beyond a symbolic level, this is a triumph for Indigenous law because it was articulated and applied. This matter was successfully resolved, with all parties (except Michael Johnson) satisfied with the outcome. It took place in a place of “legitimacy” from both a western *and* a Tlingit perspective. The case depicts clear ways of using Indigenous law to resolve conflicts: it reveals clear articulations of Tlingit legal authorities, procedural law, family law, and property law. This case defies anyone who believes Indigenous laws do not exist. Indigenous laws are real, they are powerful, and they are ready to be taken up and applied.

Analyzing the Whale House case accomplishes two things. First, it offers a third manifestation of a totem pole “as art” – it brings complexity and unsettles our conceptions of art. Examining this case has offered me a much richer understanding of certain totem poles without damaging my ability to appreciate their aesthetic value. This case reveals, indisputably, that there is law in art, offering further evidence that Canadian intellectual property law is largely inappropriate for the governance of Indigenous expressions of culture. Second, the Whale House case also provides a potential solution to the problem of appropriated Indigenous cultural expressions, though it is not a perfect fit. There are substantial differences between the physical removal of material objects and the copying of an image from a carving to t-shirts, for example. However, I believe analogizing a material theft to the appropriative use of Indigenous art is useful in articulating the extent of the cultural and legal harm. My application of the laws and procedures in the Whale House case is a “way in” to imagining how these issues can be

understood and addressed appropriately and legitimately. My presentation of the Whale House case is not prescriptive, but rather aspirational. After all, if the perfect tools and analogies to understand and resolve legal problems already existed, there would be no such thing as law reform or legal academia. In applying the Tlingit laws found in the Whale House case to the larger problem of appropriation, I am expanding our ability to imagine what is possible within law.

Chapter V: Conclusion



Figure 8. *The Daddies*, Kent Monkman, 2016

Kent Monkman is an artist from Northern Manitoba of mixed Cree and Irish descent. Figure 8 shows his piece, *The Daddies*. It is based on the famous painting by Robert Harris that depicts the Fathers of Confederation at their 1864 Charlottetown constitutional meeting.²³² In Monkman's painting, Miss Chief Eagle Testickle, whose name is rich with double meaning, is a powerful Indigenous transgendered figure that appears frequently in Monkman's work (and said to be his alter-ego), usually wearing designer heels. Monkman says of her in this painting: "She's trying to get a seat at the table, or she could be a hired entertainer."²³³ As we can see from this piece, Monkman's work often transgresses the expected. He plays with familiar images and

²³² Robert Everett Green, "Kent Monkman: A trickster with a cause crashes Canada's 150th birthday party." *The Globe and Mail*. January 6, 2017. <<https://www.theglobeandmail.com/news/national/canada-150/kent-monkman-shame-and-prejudice/article33515775/>>

²³³ *Ibid.*

styles, adding his own personal brand of satire, mockery, and counter-appropriation to tell a different story.

This painting is a wonderful response to the widespread appropriation of Indigenous art and culture. Miss Chief Eagle Testickle sits upon the stool that features in the original painting, only this time, an Indigenous body is the subject of the colonial gaze. This could mean either that Monkman simply wants to draw attention to how the colonizers have exoticized and objectified Indigenous bodies and culture, or that Miss Chief is demanding the Fathers' attention, and is thereby refusing to be excluded from the story of Canada's founding. Furthermore, she sits on a Hudson's Bay blanket. As many readers will know, Hudson's Bay was a fur trading business that functioned as a de facto "government" in parts of North America in the 17th and 18th centuries. Today, it is a department store that capitalizes on its' roots in Canada's colonial past, selling blankets, socks, mugs, and lawn chairs printed with the iconic Hudson's Bay stripes. Monkman has incorporated the Hudson's Bay blanket into his painting, thereby counter-appropriating the colonizer's cultural signifier, and flipping the usual operation of cultural appropriation on its head. The Hudson's Bay blanket draws attention to the way Indigenous bodies and culture have been commoditized through image production and consumer culture.²³⁴

The painting also disrupts the paternalistic relationship Canada has maintained with Indigenous peoples. By naming the painting *The Daddies*, Monkman mocks the pompousness of the "Fathers of Confederation." The sexual overtones also undermine the significance of what Canada celebrated last year – it's "150th anniversary." Using role reversal and counter-appropriation, Monkman exposes an iconic painting and a seminal moment as problematic. This painting offers resistance to the idea that Indigenous peoples and their cultures or artistic

²³⁴ Bick, Michael. *Adapting the Language of Postcolonial Subjectivity: Mimicry and the Subversive Art of Kent Monkman*. (Salem State University, 2014). Master's thesis.

expressions are resources to be governed by Canadian law. Monkman offers a counter-narrative to the story of appropriation and cultural erasure.

By paying attention to the multiple functionalities of Indigenous expressions of culture, this analysis uncovers how Canadian law acts as the sieve through which colonial violence seeps and evades capture. By looking at specific objects that resist appropriation, however, this examination contributes a richer understanding of how Indigenous cultures resist colonial violence and are not simply victimized. The three examples I gave in the introduction of this thesis – the painting, the parka, and the running medals – all depict colonial erasures of Indigenous artists. Kent Monkman, on the other hand, forces his way into the Canadian art scene through his depiction of his alter-ego. He demands to be seen, refuses to be discounted, and rejects appropriation of his culture through counter-appropriation. Like the Whale House totems, his art represents a reshuffling of the status quo, and a repatriation of Indigenous culture.

In this thesis, I examined three totems to disrupt our understanding of totem poles sold in the marketplace and broaden our understanding of totems as manifestations of Indigenous laws. I considered the ways colonial power continues to appropriate Indigenous culture to illuminate a complicated and multi-layered landscape. I explored Canadian intellectual property law, colonial policies of cultural erasure, strategies of legalism, and ongoing commodification of Indigenous culture to examine how Indigenous art and cultural expressions tell a different story than one of dispossession and domination. Despite the threat of cultural appropriation, I believe Indigenous cultural expressions are able to respond with resistance, gendered defiance, humour, and satire.

My thesis broadens the frame of the issue of appropriation and makes connections between disciplinary fields. Scholars tend to look at the issue of appropriation of Indigenous art from disciplinary boxes: a narrow, intellectual property frame, or an artistic frame, or a

philosophical frame. Using a multi-disciplinary approach, I have attempted to capture a more inclusive picture to consider different meanings totems have that must be taken into account when examining cultural appropriation. We cannot simply approach these issues from either a legal, artistic, or philosophical lens, because totems have many different significances: they are part of legal orders, they make claims to land, they tell stories, they are constitutional, and they convey family histories, among many other functions. My work ensures that we do take into account this full picture, not just the applicable black letter law.

Examining the three treatments of totems revealed the many different functions and meanings of these expressions of culture. While their commoditization may be disheartening, there are many instances of totems manifesting their meaning in context. Scholar Aaron Glass writes, "...what is most interesting, is that in many places on the coast, Indigenous people are reclaiming the totem pole to serve the function it was meant to serve, as markers of family ancestry and claims to the land. All these other forms are circulating globally and in cyberspace, but totem poles are thriving on the coast to do the work of advertising native claims. In a way that sort of counters the spread of these vapid and de-cultured poles in other contexts."²³⁵

Discussions about cultural appropriation can quickly turn into highly theoretical or morally charged arguments. I have tried to complicate and bring dimension to what is often flattened by theoretical discourse by rooting my analysis in real life examples. As we have seen, Indigenous art can be harmfully commodified by capitalism and colonialism, but Indigenous artists like Ellen Neel can also make use of capitalism to create their own livelihoods and provide for their families. My analysis does not provide a clear-cut prescription about "what should be done" to solve these problems, or what is right and what is wrong. But by using tangible

²³⁵ Heather Ramsay, "Totem Poles: Myth or Fact?" The Tyee, March 31, 2011.
<<https://thetyee.ca/Books/2011/03/31/TotemPoles/>>

examples, I have hopefully allowed readers to gain some insight into this multi-layered and extremely complicated legal landscape, and offered some difficult questions to grapple with the next time they walk by a souvenir shop.

Bibliography

Legislation

Berne Convention for the Protection of Literary and Artistic Works (Geneva, 1979).

Copyright Act, R.S. C., 1985, ch. C-42.

Constitution Act, 1982, Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

U.S. Copyright Act, 17 U.S.C. 101-810.

Jurisprudence

Bulun Bulun v. R & T Textiles [1998] ALR 157.

Canadian Admiral Corporation Ltd. v. Rediffusion Inc., [1954] Ex. CR 382, 20 CPR 75.

Chilkat Indian Village Tribe v Johnson (1993) No. 90-01 (Chilkat Tr. Ct., Nov. 3, 1993).

Delgamuukw v British Columbia [1997] 3 S.C.R. 1010.

Estelle Johnson v. Chilkat Indian Village, et al., 457 F. Supp. 384 [5 Indian L. Rep. F-194] (D. Alaska 1978).

Ktunaxa Nation v. British Columbia (Forests, Lands, and Natural Resources) [2017] SCC 54.

Queneesh Studios Inc. v. Queneesh Developments Inc. (1996) 67 CPR (3d) 452 (BCSC).

R v Sparrow [1990] 1 S.C.R. 1075

R v Van der Peet [1996] 2 S.C.R. 507.

Snow v The Eaton Centre Ltd. [1982] 70 C.P.R. (2d) 105.

Théberge v Galerie D'Art du Petit Champlain Inc. [2002] 2 S.C.R. 336.

Tsilhqot'in Nation v British Columbia [2014] 2 S.C.R. 256.

Secondary Materials

Alfred, Taiaike. “‘Sovereignty’ – An Inappropriate Concept” *Peace, Power, and Righteousness*, 2e (Oxford University Press, 2009).

Bagelman, Jen and Mike Simpson. “Decolonizing Urban Political Ecologies: The Production of Nature in Settler Colonial Cities” (2017) 0:0 *Annals of the American Association of Geographers* 1.

Bain, Don & Brian Thom. *Aboriginal Intangible Property in Canada: An Ethnographic Review* (Ottawa: Industry Canada, 2004).

Bang, Megan, et al. “Muskrat Theories, Tobacco in the Streets, and Living Chicago as Indigenous Land.” (2014) 20.:1 *Environmental Education Research* 1.

Battiste, Marie & James Youngblood Henderson. *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing Ltd., 2000).

Bell, Catherine. “Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform” *Protection of First Nations Cultural Heritage: Laws, Policy and Reform* (Vancouver: UBC Press, 2009).

Bentley, Jerry H. ‘The Task of World History’ John H. Bentley, ed., *The Oxford Handbook of World History* (Oxford: OUP, 2011).

Bick, Michael. *Adapting the Language of Postcolonial Subjectivity: Mimicry and the Subversive Art of Kent Monkman*. Salem State University, 2014. Master’s thesis.

Borrows, John. *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

Borrows, John. “Unextinguished: Rights and the *Indian Act*” (unpublished paper, written at the Faculty of Law, University of Victoria, 2015).

Borrows, John & Leonard Rotman. *Aboriginal Legal Issues: Cases, Materials, and Commentary* (Markham: LexisNexis Canada Inc., 2012).

Brascoupé, Simon & Karin Endemann. *Intellectual Property and Aboriginal People: A Working Paper*, eds. Jock Langford & Michael Cassidy (Ottawa: Department of Indian and Northern Affairs Canada, 1999).

Brown, Wendy & Janet Halley, “Introduction” in *Left Legalism: Left Critique* (Duke University Press, 2002).

Bruno Latour, *Reassembling the Social – An Introduction to Actor Network Theory* (Oxford: Oxford University Press, 2005).

Butler-Palmer, Carolyn, Lou-Ann Neel & David A. Neel, “Ellen Neel: The First Woman Totem Pole Carver – Gallery Guide” (Victoria: Legacy Art Gallery, 2017).

Chilisa, Bagele. *Indigenous Research Methodologies* (SAGE Publications Inc., 2012).

- Christie, Gordon. "Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty" (2011) 110:2 *The South Atlantic Quarterly* 329.
- Colwell, Chip. *Plundered Skulls and Stolen Spirits: Inside the Fight to Reclaim Native America's Culture* (University of Chicago Press, 2017).
- Coombe, Rosemary, Mohsen al atar Ahmed and Nicole Aylwin. "Indigenous Cultural Heritage Rights in International Human Rights Law" in Catherine Bell and Robert Paterson, eds., *Protection of First Nations' Cultural Heritage: Laws, Policy and Reform* (Vancouver: University of British Columbia Press, 2009) 311.
- Coombe, Rosemary. "First Nations' Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law," in Catherine Bell & Robert Paterson, eds., *Protection of First Nations' Cultural Heritage: Laws, Policy and Reform* (Vancouver: University of British Columbia Press, 2009) 247.
- Corntassel, Jeff. "Living in a Longer Now: Moving Beyond the State Centric System" in Waziyatawin & Michael Yellow Bird, eds, *For Indigenous Minds Only: A Decolonization Handbook* (Santa Fe, NM: School of Advanced Research Press, 2012).
- Corntassel, Jeff. "Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse" (2008) 33 *Alternatives* 105.
- Corntassel, Jeff & Cheryl Bryce, "Practicing Sustainable Self-Determination: Indigenous Approaches to Cultural Restoration and Revival," (2012) 18:11 *Brown Journal of World Affairs* 151.
- Deloria, Philip J. *Playing Indian* (New Haven: Yale University Press, 1998).
- Dumont, Etienne. ed., *Bentham's Theory of Legislation* (London: Oxford University Press, 1914)
- Elliott Sr., Dave. *Saltwater People*. Saanich: School District 63, 1983.
- Eko, Lyombe. *New Media, Old Regimes: Case Studies in Comparative Communication Law and Policy* (Maryland: Lexington Books, 2012).
- Fleming, Walter C. *The Complete Idiot's Guide to Native American History* (New York: Alpha Books, 2003).
- Friedland, Hadley and Val Napoleon. "Gathering the Threads: Developing A Methodology For Researching and Rebuilding Indigenous Legal Traditions,"(2015-2016) 1:1 *Lakehead Law Journal*.
- Glenn, H. Patrick. "The State as Legal Tradition" (2013) 2:4 *Cambridge Journal of International and Comparative Law* 704.

Haraway, Donna. "Staying with the Trouble: Anthropocene, Capitalocene, Cthulucene" in Jason W. Moore, ed, *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism* (Oakland: PM Press, 2016).

Howell, Robert G. & Roch Ripley. "The Interconnection of Intellectual Property and Cultural Rights (Traditional Knowledge)" *Protection of First Nations Cultural Heritage: Laws, Policy and Reform* (Vancouver: UBC Press, 2009) 230.

Industry Canada. *Intellectual Property Policy: Traditional Knowledge*. (Ottawa: Parliament of Canada, 2011).

Johnson, Rebecca. "Justice and the Colonial Collision: Reflections on Stories of Intercultural Encounter in Law, Literature, Culture and Film" (2012) 9 *No Foundations: an Interdisciplinary Journal of Law and Justice* 68.

Johnson, Rebecca & Lori Groft. "Learning Indigenous Law: Reflections on Working with Indigenous Stories" (2017) 2:2 *Lakehead Law Journal* 117.

Jonaitis, Aldona. *Art of the Northern Tlingit* (University of Washington Press, 1986).

Jonaitis, Aldona & Aaron Glass. *The Totem Pole: An Intercultural History* (Seattle: University of Washington Press, 2010).

Karjala, Dennis & Robert Paterson. "Looking Beyond Intellectual Property In Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples" (2001) 11 *Cardozo Journal of International and Comparative Rights* 633.

Legrand, Pierre. "On the Singularity of Law" (2006) 47 *Harvard International Law Journal* 517.

Lorde, Audre. "The Master's Tools Will Never Dismantle the Master's House" *Sister Outsider: Essays and Speeches* (Berkeley: Crossing Press, 1984).

Mack, Johnny. *Thickening Totems, Thinning Imperialism* (LLM thesis, University of Victoria, 2009).

Mansell, Wade et al., *A Critical Introduction to Law*, 3e (London: Cavendish Publishing Ltd., 2004).

Matthes, Erich Hatala. "Cultural Appropriation Without Cultural Essentialism?" (2016) 42:2 *Social Theory and Practice* 343.

M'Gonigle, Michael. "Logics as Law: Rethinking Social Regulation in a Full Planet, That Is, Green(ing) Legal Theory in the Animacene" (Faculty of Law, University of Victoria, 2016) [unpublished].

- Nadasdy, Paul. *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon* (Vancouver: UBC Press, 2003).
- Napoleon, Val. "Looking Beyond the Law: Questions about Indigenous Peoples' Tangible and Intangible Property" in Catherine Bell & Robert Paterson, eds., *Protection of First Nations' Cultural Heritage: Laws, Policy and Reform* (Vancouver: UBC Press, 2009).
- Nicholas, George et al. *Intellectual Property Issues in Cultural Heritage: Theory, Practice, Policy, and Ethics* (Vancouver: Simon Fraser University, 2007).
- Noble, Brian. "Poomaksin: Skinnipiikani-Nitsiitapii Law, Transfers, and Making Relatives: Practices and Principles for Cultural Protection, Repatriation, Redress and Heritage Law Making with Canada," *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) 260.
- Paterson, Robert, K. "Domestic and International Traditional Knowledge and Cultural Knowledge Systems" (Ottawa: Industry Canada, 2015).
- Patton, Paul. *Deleuze and the Political* (London: Routledge, 2000).
- Penn, Briony. "Restoring Camas and Culture to Lekwungen and Victoria: An Interview with Cheryl Bryce" (2006) *Focus Magazine*.
- Report of the Royal Commission on Aboriginal Peoples: Looking Forward and Looking Back*, Vol. 1, Ottawa: Supply and Services Canada, 1996.
- Riley, Angela K. and Kirsten A. Carpenter, "Owning Red: A Theory of Indian (Cultural) Appropriation" (2016) 94 *Texas Law Review* 859.
- Simeone, Tonina. *Indigenous Traditional Knowledge and Intellectual Property Rights* (Ottawa: Political and Social Affairs Division, Parliament of Canada, 2004).
- Simpson, Leanne. "Anticolonial Strategies for the Recovery and Maintenance of Indigenous Knowledge" (2004) 28:3 *American Indian Quarterly* 373.
- Smith, Linda Tuhiwai. *Decolonizing Methodologies: Research and Indigenous Peoples*. 2nd ed. (University of Otago Press, 2012).
- Sundara Rajan, Mira T. *Intellectual Property and Aboriginal Peoples: Conflict or Compromise?* (Vancouver: The Scow Institute, 2008).
- Thom, Brian. "Intangible Property within Coast Salish First Nations Communities." (Ottawa: WIPO North American Workshop on Intellectual Property and Traditional Knowledge, 2003).
- Truth and Reconciliation Commission of Canada. "Calls to Action" (Winnipeg: Truth and Reconciliation Commission of Canada, 2012).

Tuck, Eve & Marcia McKenzie. "Relational Validity and the 'Where' of Inquiry" (2015) 21:7 *Qualitative Inquiry* 633.

Tuck, Eve and Wayne K. Yang. "Decolonization is Not a Metaphor" (2012) 1:1 *Decolonization: Indigeniety, Education and Society* 1.

United Nations. *The United Nations Declaration on the Right of Indigenous Peoples* (New York: United Nations, 2008).

Valverde, Mariana. "Specters of Foucault in Law and Society Scholarship" (2010) 6 *Annual Review of Law and Social Science* 45.

Valverde, Mariana. "The Crown in a Multicultural Age: The Changing Epistemology of (Post)colonial Sovereignty" (2012) 21:1 *Social & Legal Studies* 3.

Van Gompel, Stef. *Formalities in Copyright Law: An Analysis of their History, Rationales, and Possible Future* (Maryland: Aspen Publishers, Inc., 2011).

Vaver, David. *Copyright Law* (Toronto: Irwin Law, 2001).

World Intellectual Property Organization. *Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore: A Guide for Countries In Transition*. (Geneva: WIPO, 2013).

Young, James O. *Cultural Appropriation in the Arts* (Blackwell Publishing, 2008).

Zlotkin, Norman. "From Time Immemorial: The Recognition of Aboriginal Customary Law in Canada" *Protection of First Nations Cultural Heritage: Laws, Policy and Reform* (Vancouver: UBC Press, 2009) 343.

Other Materials

Authentic Indigenous. Vancouver, 2016. <<http://www.authenticindigenous.com/>>.

Ball, David. "Through Certification, Indigenous Artists Take Back Work" Vancouver: *The Tyee*, 2014. <<https://thetyee.ca/Presents/2014/06/16/Indigenous-Artists-Take-Back-Work>>

Coleman, Sue. <http://www.suecoleman.ca/Originals.htm>.

Enge, Mariee. "Clan's Artifacts Returned, Klukwan Celebrates End of Legal Battle" *Anchorage Daily News* October 4, 1994.
<<http://www.ankn.uaf.edu/curriculum/Tlingit/WhaleHouse/part4.html>>

Enge, Marilee. "Who's Laws?," *Anchorage Daily News* October 4, 1994.,
<http://www.ankn.uaf.edu/curriculum/Tlingit/WhaleHouse/part5.html>>

Gehl, Lynn. "Ally Bill of Responsibilities." Web. <http://www.lynngehl.com/uploads/5/0/0/4/5004954/ally_bill_of_responsibilities_poster.pdf>

Green, Robert Everett. "Kent Monkman: A trickster with a cause crashes Canada's 150th birthday party." *The Globe and Mail*. January 6, 2017. <<https://www.theglobeandmail.com/news/national/canada-150/kent-monkman-shame-and-prejudice/article33515775/>>

Keene, Adrienne. <http://nativeappropriations.com/>

Haraway, Donna. "SF: String Figures, Multispecies Muddles, Staying with the Trouble." Presentation delivered at the University of Alberta, Edmonton, AB, March 24, 2014. <<https://www.youtube.com/watch?v=Z1uTVnhIHS8>>

Lavoie, Judith. "Sale of First Nations Masks Sparks Call for Better Legal Protection," *Times Colonist*, January 21, 2013. <<http://www.timescolonist.com/news/local/sale-of-first-nations-masks-sparks-call-for-better-legal-protection-1.53219>>

Mair, Amy. "The Rise of Aboriginal Tourism in BC," *BC Business*, July 3, 2012, <<https://www.bcbusiness.ca/the-rise-of-aboriginal-tourism-in-bc>>.

Newman, Cary. "An Open Letter to Sue Coleman from Members of the Indigenous Community," December, 2017. <<https://www.facebook.com/carey.newman.7>>

Nunavut Family Outraged After Fashion Label Copies Sacred Inuit Design," CBC News. November 25, 2015. <http://www.cbc.ca/radio/asithappens/as-it-happens-wednesday-edition-1.3336554/nunavut-family-outraged-after-fashion-label-copies-sacred-inuit-design-1.3336560>.

Oxford Reference website, "Palm Tree Justice." <<http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100302992>>.

"Potlatch", *The Canadian Encyclopedia*. February 7, 2006. <http://www.thecanadianencyclopedia.ca/en/article/potlatch/>.

Ramsay, Heather. "Totem Poles: Myth or Fact?" The Tyee, March 31, 2011. <<https://thetyee.ca/Books/2011/03/31/TotemPoles/>>

Schmunk, Rhianna. "B.C. Race Pulls 'First-Nations-Inspired' Medal After Appropriation Backlash," CBC News, October 10, 2017. <<http://www.cbc.ca/news/canada/british-columbia/running-festival-medal-appropriation-1.4346686>>

Sterritt, Angela. "Non-Indigenous BC Artist Defends Work Despite Calls for Authenticity," *CBC News*, October 25, 2017. <<http://www.cbc.ca/news/canada/british-columbia/indigenous-art-knock-offs-at-a-crisis-say-artists-1.4369639>>

WIPO. *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (Geneva: WIPO, 2001) <http://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf>.

World Trade Organization. *Overview: The TRIPS Agreement*. <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm>