

*Victory Through Honour: Reconciling Canadian Intellectual Property Laws and
Kwakwaka'wakw Cultural Property Laws*

by

Vanessa Udy
B.C.L., LL.B., University of McGill, 2008

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Supervisory Committee

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Abstract

Kwakwaka'wakw laws surrounding cultural property and Canadian intellectual property laws often treat art objects differently. How can the divergences between the two legal systems be reconciled? This thesis attempts to answer this question by examining the relationships surrounding the *Victory Through Honour* totem pole that was gifted by Ellen Neel, a Kwakwaka'wakw totem pole carver, to UBC to make right the use of the Thunderbirds name for the university's varsity sports teams. The first chapter of this thesis, explores the notion of reconciliation as defined by the Truth and Reconciliation Commission and locates the gifting of *Victory Through Honour* as one of many gestures of reconciliation regarding the historic wrong against the Kwakwaka'wakw that was the potlatch ban. The second chapter delves deeper into the ceremonial aspect of the transactions surrounding *Victory Through Honour* to articulate various parties' social obligations under Kwakwaka'wakw law. The third chapter sheds light on the differences between the treatment of cultural property under the Kwakwaka'wakw legal order and Canadian intellectual property laws. The fourth chapter inquires whether the Kwakwaka'wakw legal approach to cultural property and Canadian intellectual property law can be reconciled despite their divergences.

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I would like to thank the Lkwungen-speaking peoples on whose traditional territory the University of Victoria stands and the majority of the research for this thesis was conducted. I am also grateful to the Kwakwaka'wakw whose teachings on cultural property have informed this thesis. I have learned much from living and working on Vancouver Island about my relationship to these peoples and the land which we now share and am inspired by them to work to nurture and improve those relationships. I would like to thank John Borrows and Carolyn Butler-Palmer for their guidance and for encouraging my interest in exploring the work of Ellen Neel, the first known female totem pole carver and a pioneer in bridging the gap between Canadian and Indigenous laws. I am glad to have spent this time away from practice as a lawyer in proximity of these and other sharp minds. Finally, a heartfelt thanks to my friends on both coasts, as well as my parents and extended family, for their support and encouragement.



Fig. 1 – *Victory Through Honour* or *The Four Tests of Tsi-Kumi* (photo taken by Vanessa Udy)

Introduction

It is the summer of 2017 and the Bill Reid Gallery in Vancouver is hosting an exhibit entitled *Xi Xanya Dzam*. The exhibit highlights the talent of some of British Columbia's Indigenous artists who work with a variety of mediums and techniques, including painting, carving, engraving, weaving and beading. *Xi xanya dzam* is a Kwak'waka expression meaning "those who are amazing at making things", describing the incredibly talented and gifted people who create works of art.¹

I am excited to attend the exhibit, not only to ogle the beautiful items on display, but also in hopes of meeting the artist in residence, Ellena Neel, who is of Kwakwaka'wakw and Nuu-chah-nulth ancestry. Sure enough, I find her pacing around the main floor of the gallery, where she has set up her workshop for the summer. Though she is diminutive in stature, she is difficult to miss with her shock of pink hair.

I circulate the main floor, taking in the exhibit as I work up the courage to approach her. When I finally do, she graciously answers my questions about her current work, a blue plastic Rubbermaid bin that she is decorating with a beaver crest. In the old days, she explains to me, her people carried their things in bentwood boxes every time they moved. In a way, the plastic bin is the contemporary equivalent of a bentwood box. It's been with her through many moves and has served multiple functions. Not only has she used it to carry things, she has flipped it over and used it as a chair and a coffee table. So, she has decided to paint a crest on it, much like you would do with a bentwood box.

In pushing the boundaries of traditional West-coast Indigenous forms of art by using new techniques and materials, Ellena is following in the footsteps of her family. Much of her family is

¹ Bill Reid Gallery, "Past Exhibitions", online: <<http://www.billreidgallery.ca/Exhibition/PastExhibitions.php>> (accessed December 30, 2017).

xi xanya dzam: most notably, she is the great-granddaughter of Ellen Neel, the first known female totem pole carver, and Ellena's namesake.²

Much like her great-granddaughter, Ellen was a proponent of modernization of the Kwakwaka'wakw art form. In an address presented at a conference on Native Indian affairs at UBC, she cast her art form as a living, evolving one and criticized the notion that only works made using traditional materials and techniques were part of the canon. "When the white man came, he brought with him saws, axes, hatchets, steel chisels and knives – paints in brilliant white, red, green and yellow. There was no question of propriety – as to whether the new tools should be used... rather, they were seized on, avidly, and with startling results!"³ In other words, Ellen argued that the art of the Kwakwaka'wakw was indeed alive and combining the old with the new, tradition with modernity, in a way that showcased the agency of her people in new and connected ways, pushing back on stereotypes of Indigenous art as authentic and ahistorical.

Ellen Neel was a champion of cultural exchange, as evidenced by her willingness to adopt new materials and techniques and her belief in the possibility of cultural hybridization of art. At the same conference, she passionately argued that, "The art is a living symbol of the gaiety, the laughter and the love of colour of my people – a day-to-day reminder that even we had something of glory and honour, before white man came. Our art continues to live, for not only is it part and parcel of us, but can be a powerful factor in combining the best part of Indian culture into the fabric of a truly Canadian art form."⁴

That being said, Ellen distinguished between cultural exchange and cultural appropriation and was a vocal opponent of the latter. She denounced curio dealers for cheapening the art form of carving by selling fake totem poles, which made it harder for artisans such as herself to sell their

² Carolyn Butler Palmer, Lou-Ann Neel & David A. Neel, *Ellen Neel: The First Woman Totem Pole Carver – Gallery Guide* (Victoria: Legacy Art Gallery, 2017).

³ Phil Nuytten, *The Totem Carvers: Charlie James, Ellen Neel, Mungo Martin* (Vancouver: Panorama Publications, 1982) at 50.

⁴ *Ibid.*

art. For Indigenous artists, cultural appropriation wasn't merely a case of hurt feelings – their very survival, both physical and cultural, was at stake. Ellen clearly articulated this when she stated,

In my family, carving was a means of livelihood. My grandfather was Charlie James – the famous 'Yakuglas'. He carved for over forty years. To his stepson, Mungo Martin, he taught the rudiments of this art... and we, his grandchildren, were literally brought up amongst his work. Totems were our daily fare, they bought our food and furnished our clothing.⁵

As this thesis will show, Ellen Neel not only understood cultural appropriation as an economic wrong towards Indigenous people. She also understood it as a breach of Indigenous laws, particularly those of her own community.

The issue of cultural appropriation came to ahead when the UBC student society selected the name "Thunderbirds" for its varsity sports teams in 1934.⁶ The Thunderbird is a creature present in the myths of many coastal peoples along the North-West coast. With "lightning for eyes, thunderous wings, and according to legend, talons strong enough to pluck whales out of the ocean,"⁷ it was thought by the students to be an appropriate symbol of the power and fighting spirit of their teams.

However, Ellen Neel and other Kwakwaka'wakw did not share this sentiment. Ellen was part of a *namima*, an extended kinship group, which shared the Thunderbird crest and the rights and privileges attached to it. The bearers of this crest had never bestowed rights to the name or crest upon UBC or the student union, and unauthorized use of a traditional name or crest is contrary to the laws of the Kwakwaka'wakw.

⁵ *Ibid.*

⁶ Fred Hume, "Thunderbird Scrapbook: Be Thankful, We Were Almost Called the 'Seagulls'", *The Point* (January 12, 1994), online: <<http://archives.library.ubc.ca/athletics/history-of-the-thunderbird-nickname/>>.

⁷ *Ibid.*

The use of the Thunderbirds name was made right at UBC's 1948 Thunderbirds homecoming game, in front of close to 6,000 spectators, when Ellen and Chief William Scow, also a prominent Kwakwaka'wakw figure and president of the Native Brotherhood of British Columbia, dedicated the *Victory Through Honour* pole during the half-time ceremony.⁸ Through ceremony, they sought to gain a certain amount of control over the idea, legend, and symbol of Thunderbird that had been appropriated from their cultures.⁹ The dedication ceremony not only made the varsity team's Thunderbird name "good", but the ceremony was also the moment at which the *Victory Through Honour* pole (see figure 1) was gifted to the university's Alma Mater Society. The pole illustrates the story of a Kwikwasut'inuxw origin story, the Four Tests of Tsi-Kumi. At the top of the pole is perched a colourfully painted Thunderbird, its wings outstretched dramatically as if about to take flight. *Victory Through Honour* stands today before Brock Hall on the UBC campus, where many of the university's administrative services are housed.

This thesis will examine this agreement between the Kwakwaka'wakw and the University of British Columbia's student society regarding the use of the "Thunderbirds" name. This pole is an example of how both Indigenous legal traditions and Canadian laws can co-exist and co-mingle to govern the use of intangible or intellectual property, informing contemporary relationships between Indigenous, non-Indigenous peoples, crests, names and territory.

Normally, under Canadian intellectual property laws, names and crests are not protected from third-party use unless they are registered as trade-marks or official marks, which the Thunderbirds name was not. The UBC student society was therefore free to use the Thunderbirds name in ways that contravened accepted use under Kwakwaka'wakw legal traditions. The Kwakwaka'wakw were able to prevent this, however, through deployment of both Canadian and

⁸ Sheldon Goldfard, "How the Thunderbird's Got Their Name," *Trek Alumni Magazine* (Fall 2015), online: <<http://trekmagazine.alumni.ubc.ca/2015/fall-2015/features/how-the-thunderbird-came-to-ubc/>>.

⁹ Robert Mainville, "Survol de l'état du droit autochtone en matière de protection du patrimoine culturel" (2007) 19:1 *Cahiers de propriété intellectuelle* 183 at 191.

Indigenous laws, including through the strategic recontextualization of the Thunderbird crest through the sharing of stories embedded in the totem pole and creative use of copyright protections. *Victory Through Honour* was in gifted to UBC and formalized in accordance with Kwakwaka'wakw legal traditions to "make right" the use of the Thunderbirds name by the school's sports teams. Neel was one of the first Indigenous artists to proactively use Canadian intellectual property laws to manage her rights in her works, as exemplified by the *Victory Through Honour* pole, in which she registered her copyright.

Although the agreement surrounding the use of the Thunderbirds name achieved a certain degree of reconciliation, it is not perfect. The unwritten character of the agreement and terms implied by Indigenous laws are not always understood by UBC and might be difficult to enforce in a court of law. Moreover, the year 2016 marked the fiftieth anniversary of Neel's death bringing her copyright to an end. At the same time, however, her hereditary rights under Kwakwaka'wakw law live on in her children, grandchildren, and great grandchildren; these rights are not limited to her mortal being. The appropriation of Neel's art also remains a major concern for family members. *Victory Through Honour* can be used to examine the gap between Neel's hereditary rights and those of copyright, and specifically the differences in perceptions of bodies, identities, mortality, and innovation which remain to be reconciled.

The Kwakwaka'wakw concept of cultural property is not to be confused with Western understandings of "intellectual property" with their commercial connotations.¹⁰ Whereas the ability of an individual to alienate her rights to her intellectual property is a cornerstone of intellectual property laws,¹¹ not all cultural property may be alienated or commodified under Kwakwaka'wakw laws.¹² Further, when such property is alienable, it is within the context of a system of exchange

¹⁰ Lyndel V. Prott and Patrick J. O'Keefe, "'Cultural Heritage' or 'Cultural Property'?" in (1992) 1:2 *International Journal of Cultural Property* 307 at 310.

¹¹ Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of Authorship", (1991) *Duke L J* 455 at 473.

¹² Lucy Bell's work sets out basic principles which govern talking sticks, songs, dances, names, crests, and stories, stating who can own them and whether and how they may be transferred: Lucy Mary Christina

that is very different from Western capitalism, the economic system within which intellectual property rights were developed. When looking at Indigenous economies such as the Kwakwaka'wakw one, it is important to understand that wealth is defined differently, not as capital accumulation, but as networks of relationships that connect people and enhance their lives.¹³

Self-location

As Robert Cover has stated, “[n]o law or institution exists apart from the narratives that locate and give it meaning.”¹⁴ Similarly, my own understanding of law and justice are shaped by my own personal story and social location. Growing up, most of my experience of the law was indirect and filtered through the lens of my white, middle-class upbringing. Due to my social position, I have not come into much conflict with the law. For this reason, I have little personal reason to question its fairness or appropriateness.

One of the greater personal challenges I encountered in undertaking this research project has been the questioning and rejection of a rights paradigm in the resolution of social injustices. My commitment to a rights framework was deep-seated and entrenched due to my family history. From an early age, my mother taught me the importance of the struggle against oppression through stories of my Grandma Jackie and her acts of subversion in a society having legally entrenched expectations of women. As a woman, Jackie did not have the right to vote in Québec's provincial elections until 1940. Yet the right to vote did little to assuage the depression and boredom she felt as a stay-at-home mother. In 1972, she had to beg her husband for permission to work outside the home, as in Québec, married women did not have the right to sign contracts without their husband's consent until 1975. There are, of course, issues regarding the type of equality that is presumed in

Bell, *Kwakwaka'wakw Laws and Perspective Regarding Property* (MA Thesis, University of Victoria Faculty of Human and Social Development, 2005) [unpublished].

¹³ Dara Kelly, *Feed the People and You Will Never Go Hungry: Illuminating Coast Salish Economy of Affection* (PhD thesis, University of Auckland Business School, 2017) [unpublished] at 109.

¹⁴ Robert Cover, “Nomos and Narrative” (1983) 97 Harv L Rev 4 at 4.

the liberal construal of feminist ideology.¹⁵ But in telling me Grandma Jackie's stories, my mother planted a seed. That seed flourished into a desire to see people from all walks of life treated with dignity and respect.

In addition to my upbringing, my education, grounded as it was in the teachings of the Enlightenment and liberal pluralism, taught me to believe in "rights" frameworks as the panacea for equality¹⁶ and the solution to inequality. I came to admire international law as a legal order for its focus on human rights and humanitarian work. My bubble was quickly burst, however, when, at the age of 16, I attended a special session at the United Nations on the rights of the child as a youth delegate for the Child Welfare League of Canada. The celebratory mood was dampened by the persistent refusal of the United States to ratify the Convention because of the prohibition it placed on the death penalty for minors. The only other country that did not ratify the Convention was Somalia, which was still emerging from a decade-long civil war. I began to understand that the vision of justice in the United States was based on a deeply conservative and functionalist approach to the law, particularly in respect of the deterrent effect of the capital punishment.¹⁷

I began law school two years later, at the age of 18, where I took classes on international law and European Union law. These classes reinforced my skepticism for the usefulness of the international legal order. My teachers confirmed my belief that pressure to comply with international rights instruments is largely political. In other words, international law lacks teeth. I ceased to view it as a practical tool for countering human rights abuses.

My faith in the Canadian legal order, consisting primarily of positivist, state-made law¹⁸, as a tool for social justice was also beginning to dwindle. Between my classes on the theoretical

¹⁵ Elizabeth Comack, "Theoretical Excursions" in Elizabeth Comack, ed, *Locating Law: Race, class, gender, sexuality connections*, 3rd ed (Halifax: Fernwood Publishing, 2014) 9 at 37.

¹⁶ See generally Wendy Brown & Janet Halley, "Introduction" in Wendy Brown & Janet Halley, eds, *Left Legalism/Left Critique* (Durham, NC: Duke University Press, 2002) 1.

¹⁷ *Supra* note 15 at 19.

¹⁸ Val Napoleon, "Thinking about Indigenous Legal Orders", Research Paper for the National Centre for First Nations Governance (2013), online: <http://fngovernance.org/ncfng_research/val_napoleon.pdf> at 5.

foundations of the law and my volunteer work with low-income clients at the McGill Legal Information Clinic regarding family law and housing issues, I became familiar with the gaps in the law through which women and economically disadvantaged people fall. Clients often called the legal clinic distraught over the difficult situations they found themselves in. Despite the unfairness of these situations, their hardships were often sanctioned under the letter of the law. I came to understand that law and justice do not always overlap.¹⁹ Moreover, I began to understand the practical difficulties some people face in exercising legal rights which can render rights frameworks impotent. I also gained an increased understanding of the interlocking forms of oppression that are generated by a variety of social factors.

When it came time to look for work, I also realized the social justice careers available to law students in legal aid or government did nothing to challenge the systemic issues which poor, disabled or racialized people face. Overwhelmed with hopelessness and caught up in the collective hysteria that grips law graduates competing to find articling positions, I threw up my hands and chose the path of least resistance: corporate law. “I can return to social justice work whenever I want,” I told myself, “I’ll try corporate law for a year and if I don’t like it, I can leave.” I stayed for seven years.

In 2013, during my fourth year of practice, my father and I visited the Legacy of Hope Foundation’s exhibit, 100 Years of Loss, when it travelled to the Montreal Holocaust Memorial Centre. I knew that the human suffering seen on some reserves had its roots in the abuses lived in residential schools. But it is only once I saw the pictures, learned about Canada’s assimilationist policy and read survivor’s stories that I began to appreciate the horrific nature of the treatment survivors endured as the source of the cycle of poverty, violence, addiction and despair. The words of Superintendent-General Duncan Campbell Scott, head of the Department of Indian Affairs from 1913 to 1932, echo Nazi Germany’s “final solution” to the Jewish question: “I want to get rid of

¹⁹ *Supra* note 15 at 13.

the Indian problem ... Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department.”²⁰

I left that exhibit with a profound sadness that stayed with me for several days. It was then that I began to understand the historic treatment of Indigenous people by the Canadian government as genocide.²¹ I felt guilt and shame for my people’s capacity to exact such calculated violence, as well as a longing to make things right.

My law firm encouraged its lawyers to conduct research and publish on their own time. I discovered that Indigenous people were faced with issues such as cultural appropriation, which some were attempting to resolve through recourse to intellectual property laws. When I was asked to write a short article for an intellectual property law journal, I decided to use the opportunity to merge my practice with my social justice interests. My article on Indigenous people and intellectual property opened the door to new opportunities. I was invited to publish further and to speak at conferences. Potential files started to crop up in my e-mail inbox: First Nations were looking for lawyers to assist in filing trade-marks, drafting policies for repatriation of remains and preparing contracts for the exploitation of biological resources. I decided to pursue graduate studies to learn more.

The purpose of this self-location exercise is to identify the values and beliefs I hold, some complementary, some paradoxical, how they are a product of my own lived experience and how

²⁰ Martin J. Cannon, “Race matters: Sexism, Indigenous Sovereignty, and McIvor” (2014) 26(1) CJWL 23 at 28.

²¹ Canada’s Chief Justice and the Truth and Reconciliation Commission have both stated that Canada’s historic assimilation policy constituted a form of cultural genocide: Rt. Hon. Beverley McLachlin, P.C., Chief Justice of Canada, “Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance” (Lecture delivered at the Aga Khan Museum, Toronto, 28 May 2015); Truth and Reconciliation Commission of Canada, *Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2016) at 1 [*TRC Report*]. The treatment of Indigenous people in Canada, the serious bodily and mental harm that was inflicted upon Indigenous children, forcibly taken from the custody of their parents with the intent to destroy a group which the state has racialized as “Indians”, is consistent with the definition of genocide set out in the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 276, art. 2 (entered into force 12 January 1951) [*Geneva Convention*].

they affect my approach to reconciliation. As I mentioned, I am a settler. I am of French and Irish descent on my mother's side and English on my father's. Both sides of my family can trace their occupation of Canadian soil back generations; Jackie takes great pride in the fact that our ancestors arrived with the second wave of French colonizers in *la Nouvelle France*. I understand that my experience and worldview are very different from those of my Indigenous peers and expect to be challenged by them. Being aware and critical of the ontologies on which are founded rights-based approaches to legal problems fosters patience and strengthens my faith that these differences in experience can be bridged to create a new, perhaps better, understanding of each other. The reflexive practice of self-location in this thesis is especially important as I am writing about Indigenous experience, an experience which is not my own. My writing should by no means be treated as authoritative on the topic of Indigenous experience.

This thesis is also my own exercise in restorying, a methodology which I explore in my first chapter. I do so in order to contextualize the knowledge attained through my research project. It is necessarily filtered through the lens of my own experience and worldview. There is no word in Anishinaabemowin for "truth". The closest approximation, "*debwewin*", literally translates as, "what my heart tells me", "a person casting his or her knowledge as far as he or she can" or "the truth as far as I know it".²² There is no "truth" in the absolute; rather, there are many truths. According to an Anishinaabe worldview, the truth is naturally subjective, uncertain and subject to change, but it doesn't make it any less valid. Through my writing, I am not trying to isolate a single, objective discernable truth. Rather, I am presenting a truth as far as I know it.

I have done much thinking over the course of this semester about my location within Indigenous law. How can I become engaged in and with Indigenous laws in an anti-oppressive

²² Bethanie Pascutto, "The Truth, As Far As I Know It", *Ultra Vires* (28 September 2016), online: <<http://ultravires.ca/2016/09/truth-far-know/>>; Robert Everett-Green, "How my neighbourhood looks and sounds in Ojibway", *The Globe and Mail* (April 3, 2015), online: <<http://www.theglobeandmail.com/news/national/how-my-neighbourhood-looks-and-sounds-in-ojibway/article23793202/>>.

manner? I am still answering this question for myself, but the framework envisioned for reconciliation by the Truth and Reconciliation Commission (the “TRC”) is a good start. This framework has forced me to ask whether justice is attainable outside of the conventional international and Canadian legal frameworks with which I am accustomed to working.

My awareness of my position relative to Indigenous peoples causes me to take pause and approach the subject matter of this thesis with caution. I recognize that the disadvantages with which grapple many Indigenous communities are not just the fruit of intentional policies of the Canadian government, but also of the actions of well-meaning individuals who were uncritical of their assumptions. For this reason, I attempt throughout my research to critically engage with my own assumptions. I have done so by examining the specificity of my own relationship with the law and the history of and ideology underlying the theory of intellectual property rights.

Though I have familiarized myself with the anthropological canon on the Kwakwaka’wakw potlatch, I have chosen not to privilege it in my own reading of the potlatch. This body of literature has been widely criticized for its Western, masculinist bias and does not enjoy the support of much of the community as an authoritative source on their traditions. Instead, as much as possible, I have referred to teachings directly from *nogad*, Kwakwaka’wakw elders and knowledgeable people,²³ as expressed in their own words.²⁴ Because these sources are limited, I supplemented these readings with literature from Indigenous authors who are personally familiar with similar traditions in the larger potlatch complex on the North-west coast of British Columbia.

While this thesis holds up the teachings of *nogad*, the reader should be cautioned that the ideas contained herein were not developed in consultation with community members. As such, any misinterpretations of Kwakwaka’wakw laws or culture remain my own. The contents of this thesis

²³ *Supra* note 12 at xi.

²⁴ One strategy for decolonial research practices identified by Elizabeth Carlson is to draw upon work from Indigenous scholars: Elizabeth Carlson, “Anti-Colonial Methodologies and Practices for Settler Colonial Studies” (2016) *Settler Colonial Studies*, online: <<http://mra-mb.ca/wp-content/uploads/ElizCarlsonAnti-colonial-methodologies-and-practices-for-settler-colonial-studies1-copy.pdf>> at 6.

are not intended as a definitive description of Kwakwaka'wakw laws governing cultural property, but rather as an outsider's perspective. My hope is that this thesis leaves enough room or even opens up space for Kwakwaka'wakw voices. I also acknowledge the potential irony in this thesis: to educate outsiders on Indigenous laws risks unjust appropriation of such knowledge.²⁵ For these reasons, my conclusions remain open to contestation, dialogue and debate. Deep community consultation must occur before implementing any solution to the misappropriation of Kwakwaka'wakw cultural property, including my own prescriptions, in order to keep Indigenous laws under community control.²⁶

With that being said, the purpose of this thesis is to explore how gaps between Indigenous and Canadian legal orders might be bridged. I do so by examining the specific example of Ellen Neel's response to UBC's unauthorized use of the "Thunderbirds" name. In the first chapter of this thesis, I explore the notion of reconciliation as defined by the Truth and Reconciliation Commission (TRC). I locate the gifting of *Victory Through Honour* as one of many gestures of reconciliation regarding the historic wrong against the Kwakwaka'wakw that was the potlatch ban. In the second chapter, I will delve deeper into the ceremonial aspect of the transactions surrounding *Victory Through Honour* to articulate Neel and UBC's social obligations under Kwakwaka'wakw law. In the third chapter, I intend to shed light on the differences between the treatment of cultural property under the Kwakwaka'wakw legal order and Canadian intellectual property laws. In the fourth chapter, I will turn to inquire whether the legal approaches to the Neel's cultural property can be reconciled despite their divergences. This analysis will conclude with thoughts on how the gap between the Canadian law and Kwakwaka'wakw legal traditions may be bridged.

²⁵ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 25.

²⁶ *Ibid.*

Chapter 1 – The Kwakwaka’wakw and Reconciliation

On October 30, 1948, an unusual ceremony took place at the UBC Thunderbirds’ homecoming game. During the halftime break, a Kwakwaka’wakw delegation, led by the first known female totem pole carver, Ellen “Ka’kasolas” Neel, and Chief William Scow, took to the field to present the University of British Columbia with a gift: a painted totem pole, named *Victory Through Honour* or *The Four Tests of Tsi-Kumi*, crested with a mythical thunderbird (Figure 1). In front of a crowd of approximately 6,000 spectators.²⁷ Neel and Scow dedicated the pole to “make good” the use of the Thunderbirds name by the school’s varsity football team.

Until that moment, the team had used the name without the permission of the Kwikwasut’inuxw, a Kwakwaka’wakw tribe who claim Kolus the thunderbird as their ancestor.²⁸ Ellen Neel and her community members had been rankled by such unauthorized use of the crest. Had the same scenario occurred in our time, UBC’s use of the Thunderbirds name prior to the ceremony would probably be referred to as “cultural appropriation” not by reason of an imbalance in power relations, but also because it breached Kwakwaka’wakw laws.

Such a ceremony may not seem out of order in a city which, a mere two years later, would attempt to capitalize on its growing tourist industry and increasingly visible Indigenous art scene by rebranding itself as “Totemland”.²⁹ However, when one considers the historical context in which it occurred, the ceremony takes on new meaning, both as an act of resistance and a gesture of reconciliation. The amount of pomp and fanfare with which *Victory Through Honour* was gifted was surprising at a time when the potlatch, a key institution of the Kwakwaka’wakw legal order, was criminalized under the *Indian Act*.

²⁷ “Art and Crafts”, *The Native Voice* (November 1948) 11.

²⁸ U’mista Cultural Centre, “The Kwakwaka’wakw Tribes”, online: <<http://www.umista.ca/pages/kwakwakawakw-tribes>>.

²⁹ *Supra* note 3 at 47; Neel played an active role in the Totemland campaign, as further investigated in Kimberly Jean Phillips, *Making Meaning in Totemland: Investigating a Vancouver Commission* (MA Thesis, University of British Columbia Department of Fine Arts and Art History, 2000) [unpublished].

This chapter will begin by exploring what is meant by the term “reconciliation” in the aftermath of Canada’s Truth and Reconciliation Commission (TRC). Following that, I will engage with the history of Canada’s treatment of the Kwakwaka’wakw during the potlatch ban, attending to the discourses surrounding the ban, including the myth of Canada as a benevolent peacemaker³⁰ wielding pastoral power³¹. I will challenge this history using the methodology of “restorying”, which posits an alternative narrative, one that locates the potlatch ban in a continuum of violent assault on the legal traditions and economic system of the Kwakwaka’wakw which requires reconciliation. I will end by situating the practice of cultural appropriation as a continuation of the suppression of the potlatch system which needs to change in order for relationships between Canadians and the Kwakwaka’wakw to be repaired.

The Truth and Reconciliation Commission’s Vision: Ceremony and Epistemology

In the wake of the legacy of the Indian Residential School system, the broken relationships between settlers and Indigenous people can only be repaired through the reestablishment of just, respectful relationships. In the TRC Commissioners’ view, reconciliation between settlers and Indigenous peoples is a transformative form of justice, one that requires “awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes and action to change behaviour.”³² The TRC’s conception of reconciliation marks a departure from the Supreme Court’s jurisprudence regarding the harmonization of Aboriginal rights with Crown sovereignty; it is more about repairing damaged social and political relationships.³³ It states that reconciliation involves “[c]oming to terms with events of the past in a manner that overcomes conflict and establishes a

³⁰ See generally Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010).

³¹ Michel Foucault, “Society Must Be Defended” in Colin Gordon, ed., *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, trans by Colin Gordon, Leo Marshall, John Mepham, and Kate Soper (New York: Pantheon Books, 1980) at 25.

³² TRC Report, *supra* note 21 at 6.

³³ Glen Sean Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014) at 107.

respectful and healthy relationship among people, going forward”.³⁴ This can be done by conceptualizing reconciliation as relational, and the relations which it involves as constituted by story and affect.

Not only does the TRC challenge the Canadian law’s established jurisprudence on reconciliation, it throws into question the Western epistemologies settlers take for granted. This new form of reconciliation tests our conceptions of history and temporality, and confronts us with the transformative potential of affect. These challenges, though destabilizing for settlers such as myself, provide fertile ground for the sowing of new options and open up the field of possibilities for relationships between settlers and Indigenous peoples to flourish.

Reconciliation must involve respectful engagement with Indigenous epistemologies, which have historically been disrespected and suppressed by colonial powers. According to Boaventura de Sousa Santos, “Unequal exchanges among cultures have always implied the death of the knowledge of the subordinate culture, hence the death of the social groups that possessed it.”³⁵ This rings particularly true in the Canadian context, where policies of assimilation, including the banning of ceremony, the expropriation of land and the prevention of intergenerational transmission of knowledge by the removal of children from their communities, have resulted in epistemicide, a precondition for genocide.³⁶

The TRC began the hard work of fostering understanding and restoring respect for Indigenous legal orders so that they may one day be viewed as valid and binding. The TRC engages in the exercise of making space so that Indigenous voices, which are typically silenced through Western legal procedures, may be heard. The TRC endeavoured to right the wrongful suppression of Indigenous legal orders by grounding of practices of reconciliation in Indigenous epistemologies,

³⁴ TRC Report, *supra* note 21 at 6.

³⁵ Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Boulder: Paradigm Publishers, 2014) at 92.

³⁶ *Ibid.*; TRC Report, *supra* note 21 at 1.

using Indigenous methodologies. This comes at a time when calls for the resurgence of Indigenous methodologies and the decolonization of methodologies within academia took increased prominence.³⁷ The TRC's privileging of the practices of truth telling and witnessing is an example of this. It recommends measures for the resurgence of previously suppressed Indigenous legal traditions and modes of governance. Even the reframing of the law of reconciliation as relational is inspired by Indigenous worldviews.

The TRC's approach to reconciliation as transformative justice opens up the field of possibilities for settlers and Indigenous people alike. The new oral history produced in TRC proceedings supplements our perception of the present and motivates action for the future. This knowledge should be mobilized in the service of change and action in ways consistent with the Indigenous epistemologies which inspire the TRC.

Reconciliation calls upon us to be mindful of the theoretical underpinnings of settler epistemologies and their differences from Indigenous epistemologies. According to Michel Foucault, the main option for knowledge mobilization recognized by Western epistemologies is the commoditization and commercialization of knowledge to produce economic benefit.³⁸ Such epistemologies rest on the assumption that economic benefit is the source of peace and prosperity.³⁹ Indigenous epistemologies, on the other hand, recognize other options for the mobilization of knowledge. They attribute responsibility to knowledge-holders to use knowledge for the good of all of Creation.⁴⁰ According to this view, settlers engaging in reconciliation as witnesses to the new

³⁷ See for example Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Black Point, N.S.: Fernwood Pub., 2008); Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 2012).

³⁸ *Supra* note 31.

³⁹ Katsi'tsákwas Ellen Gabriel, "Ka'swènh:tha – The Two Row Wampum: Reconciliation Through an Ancient Agreement" in Shelagh Rogers et al, eds, *Reconciliation & The Way Forward: Collected Essays & Personal Reflections* (Ottawa: Aboriginal Healing Foundation, 2014) 101 at 106.

⁴⁰ Kathleen Absolon asserts that Indigenous philosophies require us to "work in earnest for peace to create and maintain a healthy environment": Kathleen E. Absolon, *Kaandossiwin: How We Come to Know* (Halifax: Fernwood Publishing, 2011) at 54-55; According to Taiaiake Alfred, an Indigenous person must honestly look at the situation they are in, assess their relationship to it and then determine what it will take to positively transform the knowledge-holder, the community and their relationship to the land: Taiaiake Alfred,

oral history produced by the TRC have a moral obligation to mobilize their knowledge for positive change.

When it comes to the Kwakwaka'wakw, an understanding of epistemology demands familiarity with the potlatch, a crucial cornerstone of Kwakwaka'wakw legal, political, economic and spiritual life.⁴¹ More specifically, among the Kwakwaka'wakw, a potlatch is an event during which a host group formally invites one or more guest groups to engage in song, dance and feasting, the whole in following elaborate etiquette patterns and tied into the Kwakwaka'wakw system of protocol and rank.⁴² Potlatches are typically held to commemorate an event of importance to the community, such as death, marriage, the naming of children or a pole raising. During the ceremony, the host group displays its traditional privileges (hereditary rights to dances, songs, stories, carvings, etc.) which form the basis of its status and recounts the legend of their origins and the history of their transfer.⁴³ Guests are called upon to witness and validate those claims in exchange for gifts.⁴⁴

Since their involvement with anthropologists in the late 19th century, the Kwakwaka'wakw expressed an unwavering commitment to their ceremonies. These are the people who famously announced to Franz Boas, "It is a strict law that bids us to dance. ... if you are come to forbid us to dance, begone..."⁴⁵ Many Kwakwaka'wakw profess a deep affective attachment to the

"Research as Indigenous Resurgence" (Lecture delivered at the Carleton University, 12 November 2015) online: <https://www.youtube.com/watch?v=myIUkzbiG_o>.

⁴¹ Catherine Bell, Heather Raven & Heather McCuaig, in consultation with Andrea Sanborn, the U'mista Cultural Society & the 'Namgis Nation, "Recovering from Colonization: Perspectives of Community Members on Protection and Repatriation of Kwakwaka'wakw Cultural Heritage" in Catherine Bell & Val Napoleon, eds, *First Nations Cultural Heritage Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) 33 at 46.

⁴² Philip Drucker & Robert F. Heizer, *To Make My Name Good: A Reexamination of the Southern Kwakiutl Potlatch* (Berkeley: University of California Press, 1967) at 141 [Drucker & Heizer]; Wayne Suttles, "Streams of Property, Armor of Wealth: The Traditional Kwakiutl Potlatch" in Aldona Jonaitis, ed, *Chiefly Feasts: The Enduring Kwakiutl Potlatch* (Seattle: University of Washington Press, 1991) 71 at 104 [Suttles].

⁴³ *Supra* note 21 at 8.

⁴⁴ Aldona Jonaitis, "Preface" in Aldona Jonaitis, ed, *Chiefly Feasts: The Enduring Kwakiutl Potlatch* (Seattle: University of Washington Press, 1991), 11 at 11.

⁴⁵ Franz Boas, "The Indians of British Columbia" (1888) 32 *The Popular Science Monthly* at 631.

ceremony. Elders interviewed about the role of the potlatch invariably center emotion in their narratives. Kwakwaka'wakw elder Andrea Cranmer has stated,

all the emotions are present at a potlatch. There's crying. There's happiness and joy because a chief is seeing his family come together to prepare for the potlatch and sees his grandchildren or great-grandchildren dancing ... The potlatch brings a lot of the spirituality, and it brings a lot of the emotional part of who we are. And it's the basis of cultural, the cultural well-being of this community, the potlatch.⁴⁶

In her account of the contemporary potlatch for *Chiefly Feasts*, a book on Kwakwaka'wakw potlatch art, Gloria Cranmer Webster, another Kwakwaka'wakw elder, recounts the words of a survivor of the biggest mass prosecution of potlatch attendants: "When one's heart is glad, he gives away gifts. It was given to us by our Creator, to be our way of doing things, we who are Indians. The potlatch was given to us to be our way of expressing joy. Every people on earth is given something. This was given to us."⁴⁷ She explains that these feelings begin even before the ceremony. These feelings reinforce the bonds of kinship that unify the Kwakwaka'wakw tribes amongst themselves.⁴⁸

Ironically, colonialism initially reinforced the tradition of potlatching. Subsequent to contact between the Kwakwaka'wakw and European newcomers, the institution of the potlatch underwent dramatic changes.⁴⁹ The accession of the Kwakwaka'wakw to the modern cash economy through their participation in wage labour, the dramatic decrease in population, and the physical and political consolidation of formerly loosely organized groups of Kwakwaka'wakw resulted in an increase in potlatching.

⁴⁶ *Supra* note 41 at 52.

⁴⁷ Gloria Cranmer Webster, "The Contemporary Potlatch" in Aldona Jonaitis, ed, *Chiefly Feasts: The Enduring Kwakiutl Potlatch* (Seattle: University of Washington Press, 1991) 227 at 227.

⁴⁸ Douglas Cole & Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990) at 20.

⁴⁹ Tina Loo, "Dan Cranmer's Potlatch: Law as Coercion, Symbol, and Rhetoric in British Columbia, 1884-1951" (1992) 73(2) *Canadian Historical Review* 125 at 138.

The participation of Kwakwaka'wakw men in commercial fishing and canneries⁵⁰ contributed to an increase in wealth among certain members of the community who were not traditionally wealthy. Women also entered the workforce, seeking employment in towns and fishing camps as washerwomen or sex workers.⁵¹ This increase in wealth, together with newfound access to mass produced goods at trading posts, changed the nature and volume of goods given away at potlatches.⁵²

During the 19th century, the Kwakwaka'wakw experienced a drastic decline in population due to epidemics introduced by the newcomers. This decrease in population left many hereditary positions empty, causing uncertainty surrounding the social ranking order and leading to an increase in competition over empty hereditary positions through potlatching.⁵³

The “pacification” of the Indigenous peoples of Canada’s Northwest Coast by patrolling British gunboats may have also contributed to an increase in potlatching. The Kwakwaka'wakw, who had formerly warred against one another, developed stronger kinship bonds between tribes⁵⁴ and began to channel conflict through the potlatch system. Colonial encroachments on land and disease caused groups of Kwakwaka'wakw to move, consolidating into confederacies such as that in Fort Rupert, increasing contact between groups, which in turn led to an increase in potlatching.

In a way, the accession of the Kwakwaka'wakw to a modern cash economy, coupled with the uncertainty of hereditary claims due to population decline and loss of knowledge, democratized the institution of the potlatch.⁵⁵ Potlatches were no longer the sole prerogative of chiefs, peasants had amassed sufficient wealth to redistribute and potlatched to attain higher social status.

⁵⁰ Aldona Jonaitis, “Chiefly Feasts: The Creation of an Exhibition” in Aldona Jonaitis, ed, *Chiefly Feasts: The Enduring Kwakiutl Potlatch* (Seattle: University of Washington Press, 1991) 21 at 39.

⁵¹ Douglas Cole, “The History of the Kwakiutl Potlatch” in Aldona Jonaitis, ed, *Chiefly Feasts: The Enduring Kwakiutl Potlatch* (Seattle: University of Washington Press, 1991) 135 at 136-137.

⁵² *Supra* note 49 at 138.

⁵³ *Supra* note 50; Suttles, *supra* note 42 at 110-113; *supra* note 48 at 64.

⁵⁴ Suttles, *ibid.* at 113; *supra* note 51 at 135.

⁵⁵ *Supra* note 51 at 135.

None of this is to criticize the contemporary potlatch as “inauthentic”. Change has always been a feature in the histories of Indigenous peoples, even prior to contact, as they adapted in response to interactions among cultural groups and their sometimes changing environment. Indigenous peoples should never be viewed as fixed or frozen in time. Rather, my point here is that, in the face of change brought on by the colonial influx into Canada’s West, the Kwakwaka’wakw adapted by reinforcing the social institutions on which their culturally specific epistemologies relied.

Narratives of Pastoral Power and Benevolent Peacemaker

The TRC Report serves as a reminder that the Canadian historical narrative concerning Indigenous peoples is one of pastoral power, to borrow the Foucauldian term.⁵⁶ The settler state promised Indigenous peoples their “salvation”, in both the literal and religious sense: the schools were, in the now infamous words of Duncan Campbell Scott, intended to “kill the Indian” to “save the man”.⁵⁷ Western technological achievements were seen as evidence of the cultural superiority of settlers, particularly those of European descent, and the historical development of cultures was conceived as a linear evolutionary process, European-style “civilization” being the ultimate stage.⁵⁸ These worldviews served to dehumanize Indigenous peoples and devalue their ways of life. The Kwakwaka’wakw in particular were viewed as non-human: “their traditions are like stones holding them down in a state of near bestiality. Weighed down by a culture that is sheer nature, they ‘herd’ together like animals.”⁵⁹

⁵⁶ Michel Foucault, “The Subject and Power” (1982) 8 *Critical Inquiry* 777 at 783.

⁵⁷ Justice Harry S. LaForme, “The Indian School Residential System: From the ashes of disaster grow the roses of success!” in Shelagh Rogers et al, eds, *Reconciliation & The Way Forward: Collected Essays & Personal Reflections* (Ottawa: Aboriginal Healing Foundation, 2014) 53 at 55 citing D.C. Scott “Indian Affairs, 1763-1841” in A. Shortt & A.G. Doughty, eds, *Canada and its Provinces*, vol. 4 (Toronto: University of Edinburgh Press, 1914) at 52.

⁵⁸ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 64-65.

⁵⁹ Christopher Bracken, *The Potlatch Papers: A Colonial Case History* (Chicago: University of Chicago Press, 1997) at 65.

Assimilation into Canadian settler society was viewed as the only option for the survival of Indigenous peoples. Paulette Regan terms this Canada's "peacemaker myth", whereby Canadians view their nation as a historical "'benevolent' peacemaker" and a "'neutral' arbiter of justice" that was tasked with bringing "peace, order and good government" to the West and civilization to savages.⁶⁰ This view of Canadian history is uncritical of the Canadian government's historic reflex to "fix the Indian problem" without consulting those directly affected, a tendency which continues to underlie contemporary relations between Indigenous people and the state.⁶¹ It takes for granted the appropriateness of the paternalistic attitude of the government and the Indian agents' belief that they knew better than Indigenous people what was good for them.⁶² According to this line of thinking, the Indians did not recognize the harm they were doing to themselves, so it became incumbent upon colonial authorities to help usher them out of savagery by criminalizing the practices that marked them as different from the white population.⁶³ The banning of the potlatch was a tool to help achieve this goal and was seen as being for the Indians' own good.

It is sometimes argued that the banning of the potlatch was to appease the religious sensitivities of the dominant society of the time. The practice of ritualized cannibalism within the potlatch system would have indeed offended the public in Victorian times. However, the importance of this consideration is perhaps overstated. The practices of biting spectators' arms and the apparent ingestion of exhumed human remains, which were common prior to contact in the hamatsa dance, one of the Kwakwaka'wakw most sacred winter dances, were greatly modified and replaced with artifice by the 1880s.⁶⁴ In correspondence among government officials at the time, the main reason invoked in favour of the potlatch ban was the integration of the Kwakwaka'wakw

⁶⁰ See generally *supra* note 30.

⁶¹ See *supra* note 30 at 83-84.

⁶² See *supra* note 48 at 179.

⁶³ See *ibid.* at 21.

⁶⁴ See *ibid.* at 19.

into Canada's emerging capitalist economic system by abrogating the legal principles and processes of the Kwakwaka'wakw which were considered incompatible.⁶⁵

In their seminal study of the Kwakwaka'wakw potlatch, *To Make My Name Good*, anthropologists Philip Drucker and Robert F. Heizer ask rhetorically,

[W]hat did he [the Coast Indian] do when he was paid off after his season of industry? Did he spend his hard-won earnings for things regarded as beneficial and progressive by Victorian standards? Did he invest them sagaciously for future benefit? He did not. He blew the works in a 'potlatch'. Missionaries said, and probably correctly, that he let his children shiver in the cold while he gave away blankets by the bale.⁶⁶

Canadians remained perplexed at why the Kwakwaka'wakw chose to invest their hard-earned income in what appeared to them a peculiar and deviant practice. Modernization was not having the intended effect on the Kwakwaka'wakw; instead of shifting their values to save their income for individual needs, the Kwakwaka'wakw chose to use them to reinforce the most important of their social institutions.⁶⁷

The potlatch became synonymous with savagery and depravity,⁶⁸ in direct opposition to the protestant values of industry and sobriety.⁶⁹ Government officials considered the giving away or, in the case of rivalry potlatches, the destruction of valuables and money which happened during the potlatch⁷⁰ to be wasteful and even immoral. Though the Kwakwaka'wakw accumulated wealth, it was not for the same purposes as those dictated by the imperative of wealth accumulation in the dominant capitalist society's view.⁷¹ The Kwakwaka'wakw were known for the energy with which they went about amassing property, but were not considered industrious, for they "squandered" it

⁶⁵ See *Ibid.* at 20, *supra* note 49 at 129.

⁶⁶ Drucker & Heizer, *supra* note 42 at 28.

⁶⁷ *Supra* note 51 at 136.

⁶⁸ *Supra* note 49 at 129.

⁶⁹ *Ibid.* at 143.

⁷⁰ In some potlatches, hosts would destroy property to show their prosperity; the more property destroyed, the more prosperous and high ranking the host was to be found: *supra* note 50 at 39.

⁷¹ Drucker & Heizer, *supra* note 42 at 32; *supra* note 51 at 140.

all by giving it away in potlatches.⁷² Because the potlatch did not fulfill any perceived utility, it did not fit with the liberal enlightenment's idea of proper use of property. According to Locke, the waste of property negates an individual's rights in a share of the common.⁷³ Expenditures are only properly made when they are for oneself.⁷⁴ Potlatches also imposed a loss on the wider Canadian society: they were a burden on the taxpayer, as they added to the cost of assimilating Indigenous peoples.⁷⁵

The policy underlying the potlatch ban was based on the notion that industry was capable of lifting people out of barbarity into civilization.⁷⁶ The potlatch was a roadblock to the government's goal of Indian economic development and social progress,⁷⁷ as it served as a distraction from more "industrious" pursuits.⁷⁸ It kept men out of work for months during the year and children out of the residential schools which would train them to fit into the wage economy as farmhands and manual labour.⁷⁹ The tradition was thought to encourage idleness and retard "civilizing" influences.⁸⁰ In this way, Canadian officials regarded the potlatch as a "worse than useless custom".⁸¹ Banning it was a necessary prerequisite to progress and civilization.⁸² Though Kundoqk Jacquie Green writes about feasting in the context of Haisla governance, her observations likely hold true for the Kwakwaka'wakw experience: "When Native people did not conform to evolving industrial movements that were part of colonial expansion efforts, more stringent laws were developed and imposed to control, regulate, and assimilate them into the Canadian body politic."⁸³

⁷² *Supra* note 51 at 140.

⁷³ *Supra* note 59 at 45.

⁷⁴ *Ibid.* at 45.

⁷⁵ *Ibid.* at 45.

⁷⁶ *Ibid.* at 68.

⁷⁷ *Ibid.*; *supra* note 51 at 140.

⁷⁸ *Supra* note 48 at 15.

⁷⁹ *Ibid.* at 20; *supra* note 59 at 185.

⁸⁰ *Supra* note 48 at 35, 48.

⁸¹ *Ibid.* at 21.

⁸² *Supra* note 49 at 139.

⁸³ Kundoqk Jacquie Green, "Transforming Our Nuuyum: Contemporary Indigenous Leadership and Governance", (2014) 12:1 Indigenous LJ 33 at 47.

The potlatch was therefore banned in 1884. Individuals found to have engaged in potlatching were made subject to arrest, imprisonment and fines and their ceremonial objects to confiscation.⁸⁴ Despite this, the Kwakwa'wakw continued to potlatch. Initially, white settlers were greatly outnumbered by Indigenous people on Vancouver Island. There was insufficient manpower to support Indian agents in enforcement of the new law. Agents in Coast Salish, Nuu-chah-nulth and Kwakwaka'wakw territory all reported potlatching in defiance of the law and expressed frustration at their inability to curtail it.⁸⁵ Convictions were also difficult, if not impossible, to secure, as the law did not define the term "potlatch" nor "tamanawas dances", a flaw which Justice Sir Matthew Begbie criticized in an *obiter dicta* in 1889.⁸⁶ Faced with a lack of support in Parliament and in the judiciary and even among the Indian agents themselves,⁸⁷ the Canadian government thereafter adopted a policy of "moral suasion and restraint"⁸⁸, in the hopes that in leaving the Kwakwaka'wakw alone, the passing of time would alter their habits. This was in keeping with the social Darwinism theories in vogue at the time, according to which human development happened on a scale, with Indigenous peoples being on the primitive end and European society on the advanced end.⁸⁹

"Restorying": Meeting Story With Story

The histories we acknowledge and the discourses surrounding identity matter. They are constitutive, in a sense: they have a way of shaping people's expectations and behaviour and, in this manner, become self-propelling truths. As Thomas King writes, "[t]he truth about stories is,

⁸⁴ Drucker & Heizer, *supra* note 42 at 33.

⁸⁵ *Supra* note 51 at 142.

⁸⁶ *Ibid*; *supra* note 59 at 92-93; *supra* note 48 at 35; *supra* note 49 at 141. The *Indian Act* was amended in 1895 to remedy this flaw.

⁸⁷ *Supra* note 41 at 53.

⁸⁸ *Supra* note 51 at 142.

⁸⁹ *Supra* note 58.

that that's all we are".⁹⁰ But practices of reconciliation can change those stories, changing us in turn.

If colonialism is reinforced through historical narratives, the new historical record produced during TRC proceedings could defuse it by the same token. The TRC's adoption of the Indigenous legal traditions of truth telling and witnessing is an exercise in "restorying"⁹¹ or "meeting story with story",⁹² challenging the dominant narrative with an alternative one. When witnessed, stories of residential school survivors produce a new historical record that highlights the injustices perpetrated in the name of colonialism and throws the official version of history into question. One of the dominant narratives challenged is the notion that the harms of colonialism are located in the past.⁹³ The TRC acknowledges that the overrepresentation of Indigenous youth in the foster care system and of Indigenous people generally in the criminal justice system are the present-day symptoms of the intergenerational suffering caused by colonial policies. These institutionalized forms of discipline continue to dislocate Indigenous people from their families, communities, cultures and land.

In the Canadian context, serious bodily, psychological and spiritual harm was inflicted upon Indigenous children, forcibly taken from the custody of their parents, with the intent to destroy a group which the Canadian settler state has racialized as "Indians" in order to eradicate their existence as a distinguishable social group⁹⁴ and gain access to their lands. This treatment is consistent with the legal standard set out in the *Geneva Convention*.⁹⁵ The TRC disrupts the narratives of pastoral power and benevolent peacemaker by naming this harm for what it is:

⁹⁰ See generally Thomas King, *The Truth About Stories: A Native Narrative* (Toronto: House of Anansi Press, 2003).

⁹¹ See generally *supra* note 30.

⁹² See generally Gordon Christie, "Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty" (2011) 110(2) *The South Atlantic Quarterly* 329.

⁹³ *Supra* note 33 at 121.

⁹⁴ *Supra* note 48 at 22.

⁹⁵ *Geneva Convention*, *supra* note 21.

genocide.⁹⁶ Similarly, the potlatch was banned as a means of eradicating difference. Correspondence between government officials referred to the potlatch being “killed” or “dead”⁹⁷, and gone with it the cultures and modes of governance which are distinctive of the Kwakwaka’wakw.

Truth telling has been one of the cornerstones of the reconciliation process of the TRC. In Indigenous practices of knowledge production, particularly in the constitution of oral histories, the corollary and necessary counterpart of truth telling is witnessing. Witnesses to a historically significant event are asked to be keepers of that history and to share it with others. Great care must be exercised in the retelling of history: a witness must remember all the details and recount them accurately.⁹⁸ Going forward, settlers engaging in reconciliation must honour and retell the history of colonialism and genocide in Canada, despite the pain or discomfort it may cause us.

The stories collected in the truth telling process serve to fill the gaps in settlers’ perception of the past and present and motivate action for the future.⁹⁹ The change in settlers’ perception at their telling is what Boaventura de Sousa Santos speaks of when he calls the past “a power capable of irrupting at a moment of danger”.¹⁰⁰ These stories reframe the past as an “irretrievable loss resulting from human initiatives that had a choice of alternatives, that is, a past of empowering memories, one revived for us by the suffering and oppression caused in the presence of other alternatives that could have avoided them”.¹⁰¹ They act as a source of non-conformity, opening up what Elizabeth Grosz terms “centres of action, zones of indetermination, points where images are capable of mobilizing action”¹⁰² for transformative change in settler-Indigenous relationships.

⁹⁶ TRC Report, *supra* note 21 at 1.

⁹⁷ See for example *supra* note 59 at 191, 213-214.

⁹⁸ *Ibid.* at 24, n° 32.

⁹⁹ Elizabeth Grosz, “Deleuze, Bergson and the Virtual” in *Time Travels: Feminism, Nature, Power* (Durham, NC: Duke University Press, 2005) 93 at 96.

¹⁰⁰ *Supra* note 35 at 75.

¹⁰¹ *Ibid.* at 89.

¹⁰² *Supra* note 99 at 98.

Interiorizing new histories that challenge colonially established ones is a difficult process, but reconciliation demands that we not look away when faced with the impacts of colonialism and settlement on the lives of Indigenous peoples. In the aftermath of World War I, Walter Benjamin wrote, “[t]he current amazement that the things we are experiencing are ‘still’ possible in the twentieth century is not philosophical. This amazement is not the beginning of knowledge – unless it is the knowledge that the view of history which gives rise to it is untenable.”¹⁰³ The problem with astonishment or disbelief in the face of genocide is that it repudiates the everyday violence that precedes it, foreclosing the hard work of identifying, examining and understanding such violence so that we may prevent it. Everyday violence must be understood if we are ever to make sense of “senseless” violence.¹⁰⁴

“If there is a moral risk in overextending the concept of ‘genocide’ into spaces and corners of everyday life, where we might not think to find it (and there it is)” write Nancy Scheper-Hughes and Philippe Bourgois, “an even greater risk lies in failing to sensitize ourselves, in misrecognizing protogenocidal practices and sentiments daily enacted as normative behaviour by ordinary ‘good enough’ citizens.”¹⁰⁵ State violence is made possible through the acquiescence of its citizens, either explicitly through their direct participation in acts of violence, or implicitly, through turning a blind eye. We as a society carry a measure of responsibility for state violence and therefore must be vigilant and learn to recognize the warning signs, the spoken and unspoken discourses which circulate in our midst and serve to bolster violent ideologies of group identity and dehumanize the other.¹⁰⁶

¹⁰³ Walter Benjamin cited in Santos, *supra* note 35 at 88.

¹⁰⁴ Nancy Scheper-Hughes and Philippe Bourgois, “Introduction: Making Sense of Violence” in Nancy Scheper-Hughes and Philippe Bourgois, eds, *Violence in War and Peace* (Malden, MA: Blackwell Publishing, 2004) 1 at 3.

¹⁰⁵ *Ibid.* at 20.

¹⁰⁶ Pierre de Senarclens, “From Group Identity to Ethnic Violence” in Yohan Ariffin, Jean-Marc Coicaud and Vesselin Popovski, eds, *Emotions in International Politics: beyond Mainstream International Relations* (New York: Cambridge University Press, 2016) 299 at 310.

Our engagement with the TRC's oral history is Martin Heidegger's "reciprocative rejoinder" in praxis. In their role as witnesses, settlers are compelled to "invoke a conversation with the past in which the past proposes possibilities for adoption, but in which one makes a rejoinder to this proposal by reciprocating with the proposal of other possibilities as a sort of rebuke to the past, which one now disavows."¹⁰⁷ We share this reciprocative rejoinder not just with our Indigenous contemporaries; Alexander Hirsch suggests we also share this reciprocative rejoinder with the dead,¹⁰⁸ because the temporalities of colonial violence and reconciliation are non-linear.¹⁰⁹ This requires us to challenge our notions of time as linear and recasts our notions of kinship, not just in blood ties but in what Hirsch calls "bonds of intimate alliance" with Indigenous peoples.¹¹⁰

Reconciliation must involve atonement for past harms, which can take the form of an apology. However, it is clear from the process set out by the TRC that reconciliation can no longer be understood as a simple economy of debt and forgiveness, in which a settler apology operates to forgive past harms.¹¹¹ The way forward cannot be entirely discerned through the deductive powers of reason. Genocide generates a debt cannot be forgiven without transformative lamentation by Canadian society as a whole.

The new history constituted in the TRC's proceedings challenges settlers emotionally and highlights the insufficiency of modernist epistemologies grounded in rationality at the expense of affect. The reconciliation process espoused by the TRC, with its emphasis on atonement, reaffirms affect as an important part of the thinking process. To come to terms with genocide means acknowledging ongoing, present-day harm to Indigenous peoples and the incommensurability of settler and Indigenous ways of life. My existence as a settler relies on capitalist development of

¹⁰⁷ Alexander Keller Hirsch, "'Like so Many Antigones:' Survivance and the Afterlife of Indigenous Funerary Remains" (2014) 10 *Law, Culture, & the Humanities* 464 at 486, n 82.

¹⁰⁸ *Ibid.* at 486.

¹⁰⁹ TRC Report, *supra* note 21 at 307; *supra* note 104 at 1.

¹¹⁰ *Supra* note 107 at 480, 482.

¹¹¹ Brenna Bhandar, "'Anxious Reconciliation(s): Unsettling Foundations and Spatializing History" (2004) 22 *Environment and Planning D: Society and Space* at 842 at 835-837.

Indigenous lands at the expense of the peace and wellbeing of Indigenous people who wish to live in accordance with their traditional ways of life. I agree with Scheper-Hughes and Bourgois that the difficulty in this realization is that it “strikes terror in the ontological security of one’s world”.¹¹² Faced with the flash of history in a moment of danger, settlers must take care not to turn away or erase their guilt through defensive moves to innocence.¹¹³ Like the assimilation of new histories, the politics of lamentation call upon us to stay with the trouble. According to the TRC, “Non-Indigenous witnesses must be willing to ‘risk interacting differently with Indigenous people—with vulnerability, humility, and a willingness to stay in the decolonizing struggle of our own discomfort ... [and] to embrace [residential school] stories as powerful teachings—disquieting moments [that] can change our beliefs, attitudes, and actions.’”¹¹⁴ Settlers must lament the everyday structural violence against Indigenous peoples that makes internal peace possible for other Canadians. We are called to gaze upon the destructive nature of our consumerist and capitalocentric ways of life with a renewed capacity for wonder and indignation, turning our outrage into emancipatory energy.¹¹⁵

In the TRC’s framework, atonement includes, though is not limited to, apology, the assignment of responsibility and, most importantly, grief. It is not only Indigenous peoples, though, who must feel grief. Reverend Stan McKay of the United Church, a survivor of the residential school system, testified in front of the TRC, “the perpetrators are wounded and marked by history in ways that are different from the victims, but both groups require healing”.¹¹⁶ Reconciliation requires a double mourning on the part of settlers. Not only must we mourn the loss of life caused

¹¹² Scheper-Hughes & Bourgois, *supra* note 104 at 23.

¹¹³ See generally Robin Di Angelo, “White Fragility” (2011) 3:3 *International Journal of Critical Pedagogy* 54; see also, generally, Eve Tuck & K. Wayne Yang, “Decolonization is not a metaphor” (2012) 1:1 *Decolonization: Indigeneity, Education & Society* 1.

¹¹⁴ TRC Report, *supra* note 21 at 323, citing *supra* note 30 at 13.

¹¹⁵ *Supra* note 35 at 88, 96.

¹¹⁶ TRC Report, *supra* note 21 at 9.

by Canada's assimilationist policies; we must also mourn our own people's capacity for genocidal violence.

Grief can be a difficult emotion to process. Much like resentment, an emotion with which Coulthard deals with at length in his book, *Red Skin, White Masks*,¹¹⁷ grief has negative connotations and is a feeling people are encouraged to purge as quickly as possible. In Anglo-American society, the face of grief has changed much since Victorian times, when mourning practices were marked with emotional excess and indulgence in the display and response to grief.¹¹⁸ Since the 1950s, American etiquette manuals have urged a hardnosed reaction to grief, proscribing pronounced or prolonged signs of distress on the griever's part so as not to alienate or inflict emotional pain on others.¹¹⁹

Guilt is also an important emotion and a necessary component of reconciliation. In the context of post-genocidal reconciliation, the function of collective guilt on the part of people who identify with the perpetrators is to urge reparations, which can be accomplished by the creation or restoration of a just relationship with the harmed group.¹²⁰ However, guilt is an emotion which North American society encourages us to repress for fear of liability. I wish to distinguish the emotion of guilt from exercise in assigning blame in which Canadian courts are engaged, as the conflation of responsibility and remorse limits our ability to cope productively with feelings of guilt.

The problem with the devaluation of grief and guilt, is that it forecloses the transformative potential of affect.¹²¹ The ways in which we grieve today are preventing us from absorbing the teachings of

¹¹⁷ *Supra* note 33 at 110-112.

¹¹⁸ Peter N. Stearns, "Emotion and Change: Where History Comes In" in Yohan Ariffin, Jean-Marc Coicaud and Vesselin Popovski, eds, *Emotions in International Politics: beyond Mainstream International Relations* (New York: Cambridge University Press, 2016) 48 at 52.

¹¹⁹ *Ibid.* at 52-53.

¹²⁰ Anca M. Miron and Nyla R. Branscombe, "Social Categorization, Standards of Justice, and Collective Guilt" in Arie Nadler, Thomas E. Malloy and Jeffrey D. Fisher, eds, *The Social Psychology of Intergroup Reconciliation* (New York: Oxford University Press, 2008) 77 at 80.

¹²¹ *Supra* note 33 at 108, 112.

history. We need a different and more productive way of dealing with grief, one that allows us to recognize in our collective history and experience the preconditions which made genocide possible. Furthermore, our resistance to these emotions forecloses their transformative potential, relegating us to the flatness of rational thought.¹²² William Connolly argues that affect is the magic ingredient that infuses human thought with volatility, impetus and creativity.¹²³ Like memory, emotion fills the gaps in our perception and propels us to action. Though the disciplinary institutions which make up the structural violence affecting Indigenous people are largely state-run, the structure is maintained in place thanks to an apathetic populace.¹²⁴ Emotion is literally vital if we are to prevent further loss of Indigenous life.

Restorying the Potlatch Ban

As of 1913, the Canadian government's approach to the enforcement of the potlatch ban hardened. This change in policy coincided with the accession of Duncan Campbell Scott to the position of Superintendent General of Indian Affairs. Scott turned his attention to the practices which hindered the integration of Indigenous peoples into Canada's mainstream society. Generally, this meant increased emphasis on residential schools as a tool of assimilation. In addition, the First World War had created "an urgent need for conservation" and extravagant expenditures such as those occurring in potlatches were not to be tolerated.¹²⁵

In the Northwest Coast, specifically, this meant renewed vigor in the enforcement of the potlatch ban, which peaked during the 1920s.¹²⁶ As convictions remained difficult to secure, Scott successfully lobbied Parliament to change the Indian Act, modifying the offence from an indictable

¹²² William Connolly, *Neuropoliitics: Thinking, Culture, Speed* (Minneapolis, MN: University of Minnesota Press, 2002) at 64.

¹²³ *Ibid.* at 66, 74.

¹²⁴ *Supra* note 104 at 20.

¹²⁵ *Supra* note 59 at 209; *supra* note 49 at 142.

¹²⁶ *Supra* note 50 at 46; *supra* note 51 at 158.

one to a summary conviction offence, granting power to Indian Agents, acting in their capacity as justice of the peace, to try, convict and sentence offenders.¹²⁷

In 1918-1919, Indian Agent William Halliday enforced the law against Johnnie “Likiosa” Seaweed and Japanese Charlie “Kwosteetsas”, sentencing them to two months of penal servitude at Oakalla Prison Farm in Burnaby, far removed from any Kwakwaka’wakw community.¹²⁸ Halliday laid another four charges in Alert Bay in the winter of 1918-1919. The defense negotiated an agreement with the prosecution pursuant to which the four defendants, Likiosa, Kwosteetsas and seventy-three other people present in the courtroom agreed to cease potlatching in exchange for leniency.¹²⁹ According to the understanding of the Kwakwaka’wakw, the agreement included an unwritten term pursuant to which the government agreed to reconsider the potlatch ban.¹³⁰ The Kwakwaka’wakw were certain that, upon investigation, the government would see the unreasonableness of the law and repeal it. However, this was merely translated into the agreement as permission to the Kwakwaka’wakw to lobby for the repeal of the law.¹³¹

In 1920, eight charges were laid, and each offender was convicted to two months at Oakalla. These were the first sentences served under the law.¹³² Six more convictions and imprisonments followed in the two following winters.¹³³

With an increase in enforcement capacity thanks to the establishment of a federal police presence on the West coast and vast improvements to communications and transportation infrastructures¹³⁴ came the worst blow to the Kwakwaka’wakw resistance to the potlatch law, the arrests and convictions at Dan Cranmer’s 1922 potlatch. A total of 58 informations were laid

¹²⁷ *Supra* note 50 at 159; *supra* note 41 at 53; *supra* note 59 at 209; *supra* note 49 at 143.

¹²⁸ *Supra* note 51 at 159.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.* at 160

¹³³ *Ibid.*

¹³⁴ *Supra* note 48 at 137.

against participants, who were charged with flouting the potlatch laws.¹³⁵ Their offences included “making speeches, dancing, arranging articles to be given away, and carrying gifts to recipients.”¹³⁶ The defense lawyer for 34 of the defendants requested leniency in exchange for an agreement to no longer potlatch, similar to that struck in 1919. The prosecution refused, unconvinced of the good faith of the defendants in upholding such an agreement. They would accept no less than the surrender of all potlatch property by almost all the people from Cape Mudge, Village Island and Alert Bay, to which the defense eventually acquiesced.¹³⁷ Those from Fort Rupert and a few others refused, receiving two-month terms in Oakalla for a first offense and three-month terms for repeat offenders.¹³⁸ In all, 22 Kwakwaka’wakw men and women served sentences at Oakalla.

As a result of the fallout from Dan Cranmer’s potlatch, many individuals sold their masks and coppers for a price considerably lower than their owners thought they were worth in exchange for leniency.¹³⁹ As imprisonment is shameful in Kwakwaka’wakw society,¹⁴⁰ and a jail sentence for a man who was a head of a household would have dealt an economic blow to whole families at the beginning of fishing season,¹⁴¹ many agreed and turned in their ceremonial objects, even though possession of such artefacts was legal.¹⁴² Some artifacts were sold by Halliday to the National Museum of the Native American, while others were contributed to Superintendent General Scott’s private collection.¹⁴³ Most of the ceremonial property so expropriated went to what is now known as the Canadian Museum of History in Gatineau and the Royal Ontario Museum in Toronto.¹⁴⁴

Lasting Harm

¹³⁵ *Ibid.* at 161; *supra* note 49 at 127.

¹³⁶ *Supra* note 41 at 54.

¹³⁷ *Supra* note 49 at 127.

¹³⁸ *Ibid.* at 55; *supra* note 51 at 161.

¹³⁹ *Supra* note 48 at 123.

¹⁴⁰ *Supra* note 50 at 46.

¹⁴¹ *Supra* note 48 at 120.

¹⁴² John Pritchard, cited in *supra* note 41 at 54.

¹⁴³ *Ibid.* at 55.

¹⁴⁴ *Supra* note 50 at 46.

The ban provoked strong expressions of grief among the Kwakwaka'wakw. Indian Agent R.H. Pidcock was told by elders, "they might as well die as give up the Custom"¹⁴⁵. How could they forsake the very traditions that sustained their property, rank and marriage systems,¹⁴⁶ so foundational to their identity as a people? Even prior to the ban in 1882, when faced with mounting pressure from missionaries and the government to abandon their traditional practices, Indian Agent George Blenkinsop wrote that among the Kwakwaka'wakw "[a] general tone of despondency prevails among the elders of the different tribes on account of their being obliged to give up this old custom."¹⁴⁷

The arrests and convictions of members of the community for potlatching have left a mark on the collective memory of the Kwakwaka'wakw. The effect has been compared to that of residential schools: the potlatch ban served as a tool of forced assimilation. Many elders refused to pass on traditions to the young, out of fear for their safety. This has resulted in gaps in cultural knowledge among the Kwakwaka'wakw, impeding the passing on of culture to future generations.¹⁴⁸

The legacy of the potlatch ban, especially following the arrests at Dan Cranmer's potlatch, is one of trauma. Emma Tamin says of her grandfather Amos Dawson's prison term at Oakalla for potlatching,

that was the beginning of the end for my grandfather, 'cause once he came back from Oakalla my grandmother said he was never the same. He just lost his spirit. He couldn't do anything. What he wanted to do when he came home was to have a feast to fix what happened to him 'cause that's what we do when something bad happens: we fix it. ... I guess he just slowly died inside [so] that he lost his spirit. My grandmother said [that] he

¹⁴⁵ Canada, Parliament, Sessional Papers, Annual Report of the Department of Indian Affairs, 1904, No 27, 256; 1905 No 27, 236, cited in *supra* note 51 at 137.

¹⁴⁶ *Ibid.* at 142.

¹⁴⁷ *Supra* note 59 at 70.

¹⁴⁸ *Supra* note 41 at 58-59.

still put his suit on every Sunday and went to church, like he was afraid not to. He went to church every Sunday, but he was not the same. My grandmother said he just lost everything, like he had no will to live anymore. So, and I wonder, you know – God, you know – I wonder why was this happening to our people? I can't fathom what they went through because it must have really, really hurt him, and I think his pride was cut in half or whatever ...¹⁴⁹

Some members of the community held potlatches in protest, but Dawson never potlatched again. She asks, "I wonder why my grandfather ... wasn't strong enough to fight them. But I guess maybe he was hurt so bad that he didn't want to fight anymore."¹⁵⁰ Agent Halliday wrote to Scott, "I firmly believe in my own mind, that the potlatch has been killed as they are all afraid to go on any further with it realizing that they are fighting a losing game."¹⁵¹ The trauma of arrests, compounded with that experienced by many in residential schools, even extended to members of the community who had not been sent to prison. Children were taught to fear not only police men, but all white people, generally.¹⁵²

Participants in interviews conducted by Catherine Bell, Heather Raven and Heather McCuaig also spoke of the shame suffered by the community, seeing their noble women reduced to hard labour, having their hair cut, being undressed and hosed off in prison.¹⁵³

In addition to the emotional pain the potlatch ban caused many Kwakwaka'wakw, suppression of this key institution became the source of economic turmoil for these communities. Having literally banned all forms of traditional Indigenous economy,¹⁵⁴ the potlatch ban also led to the breakdown of affinal bonds within communities which had been constructed through the assumption of debt within the potlatch system. Lenders became embittered at the failure of their

¹⁴⁹ *Ibid.* at 56-57.

¹⁵⁰ *Ibid.* at 57.

¹⁵¹ *Supra* note 59 at 213-214.

¹⁵² John Pritchart, cited in *supra* note 41 at 58.

¹⁵³ *Ibid.* at 57; *supra* note 48 at 122.

¹⁵⁴ *Supra* note 59 at 119.

debtors to repay their debts. Similarly, debtors became embittered by the reminders of their debts which they saw within the potlatch system. Younger people observing this unhappiness began to believe that the potlatch was the source of discontent.¹⁵⁵

Anthropologists attempted to raise this issue to the public. George Dawson, a self-styled ethnographer, visited the Kwakwaka'wakw while working on the Geological Survey of Canada in 1885. He remarked that the Kwakwaka'wakw "have become (sic) in a word 'demoralized'." Abandonment of their traditions had not lifted them out of economic hardship.¹⁵⁶ A report was prepared for the Canadian Government in 1920, canvassing the expert opinions of leading anthropologists, including Franz Boas, on the topic.¹⁵⁷ All were opposed to the potlatch ban, in part as it would depress the Kwakwaka'wakw economy. Though the intended effect of the ban had been to encourage economic development, ironically, it would have the opposite effect. Blankets and coppers exchanged through the potlatch system, formerly symbols of wealth, were devalued, depressing the traditional Kwakwaka'wakw economy and reducing relatively affluent Kwakwaka'wakw to poverty.¹⁵⁸ Much like he did with a report on health conditions in residential schools, Scott suppressed this anthropological report on the potlatch.¹⁵⁹

Diversity of Experience

The narrative shared in this chapter is not intended to reduce the Kwakwaka'wakw to a simple role of victimhood. Their engagement with Canadian law has been rich and multifaceted; it cannot be reduced to a single role. During the potlatch ban, the Kwakwaka'wakw retained agency, which in some cases was expressed through resistance to the law, and in other cases through support of it.

¹⁵⁵ *Supra* note 48 at 164.

¹⁵⁶ *Supra* note 59 at 65.

¹⁵⁷ *Ibid.* at 223.

¹⁵⁸ *Supra* note 48 at 130-131; *supra* note 49 at 144.

¹⁵⁹ *Supra* note 59 at 223.

Despite the pain and trauma caused by the potlatch ban, the Kwakwaka'wakw resisted, concocting clever schemes to circumvent the law. The potlatch was taken underground and large traditional potlatches continued to take place in remote locations.¹⁶⁰ Anecdotal evidence shows that some groups took to potlatching in December, with the hopes that potlatch gifts and feasting might be confused with regular Christmas-time gifts and dinners.¹⁶¹ Moreover, the gifting and feasting aspects of the ceremony were decoupled to aid potlatchers in escaping detection.¹⁶² In the winter of 1926-1927, a Kwakwaka'wakw chief was observed visiting each house in Alert Bay to distribute gifts to attendants in advance of the potlatch.¹⁶³ In 1933, Charlie Nowell donated 900 sacks of flour to the community of Fort Rupert, explaining the gesture to police as an act of Christian charity.¹⁶⁴ This distribution of gifts outside of potlatch proceedings rendered the subsequent gathering less conspicuous or recognizable as a potlatch, in order to avoid detection and gathering of evidence for prosecution. Sometimes potlatches were also held piecemeal, travelling to visit different groups at different times. In other cases, privileges would be displayed during public dance performances held to raise money for charitable causes, followed by private house-to-house visits to formally state claims connected to the privileges displayed.¹⁶⁵

These strategies appear to have been successful. Following 1927, only a single prosecution was brought against a Kwakwaka'wakw person in connection with potlatching.¹⁶⁶ This caused much frustration within the Department of Indian Affairs, which made one last attempt to legislate the potlatch and stamp it out. In 1936, Agent Murray S. Todd, Halliday's successor, introduced a bill to amend the Indian Act to allow an Indian agent or an RCMP officer to "seize any excess goods that they reasonably could believe to be intended for potlatch purposes."¹⁶⁷ The amendment

¹⁶⁰ *Supra* note 48 at 73.

¹⁶¹ Drucker & Heizer, *supra* note 42 at 47-49.

¹⁶² *Supra* note 59 at 228; *supra* note 49 at 157.

¹⁶³ Drucker & Heizer, *supra* note 42 at 47-49.

¹⁶⁴ *Supra* note 51 at 161.

¹⁶⁵ See *supra* note 41 at 55.

¹⁶⁶ *Supra* note 51 at 165.

¹⁶⁷ *Ibid.*

failed, as popular sentiment remained sympathetic to the plight of the Kwakwaka'wakw: it was attacked as “unreasonable, unjust, and un-British”¹⁶⁸ in the House of Commons and was inconsistent with the Federal government’s renewed financial support of Indigenous carving. Following this failure, the Department ceased enforcement efforts,¹⁶⁹ though the restrictions remained on the books until 1951.¹⁷⁰

Despite being relieved from the pressure of law enforcement, the already weakened practice of potlatching began to wane in the 1920s due to other factors. The system had become reliant on wealth from wage labour, and was therefore susceptible to the impacts of major changes in the fishing industry, including advances in competitor’s technology and a reduction in the price of fish, as well as the effects of the Great Depression.¹⁷¹

In addition, the effects of Christian evangelization, particularly through residential schools, which harshly denigrated Indigenous traditions, was beginning to show its mark.¹⁷² There were even pressures from within the community which contributed to its decrease in importance. Some individuals from Alert Bay supported the ban as a way to evade the repayment of debts incurred through potlatching.¹⁷³ Others opposed the potlatch as a way to express disagreement with leadership¹⁷⁴ and the institution’s facilitation of the forced marriage of young girls.¹⁷⁵

Challenges to the Contemporary Potlatch

Though potlatches are no longer as frequent, lavish or lengthy as they were in the late 19th and early 20th centuries,¹⁷⁶ the institution has been experiencing a revival since the 1950s. The first

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ Though the provision prohibiting the practice of potlatching was deleted in the 1951 revisions to the Indian Act, it was never formally repealed, meaning that it technically remains in force: *supra* note 47 at 227.

¹⁷¹ *Supra* note 51 at 165.

¹⁷² *Ibid.* at 166; *supra* note 47 at 227.

¹⁷³ *Supra* note 49 at 161.

¹⁷⁴ *Ibid.* at 162.

¹⁷⁵ *Ibid.* at 163.

¹⁷⁶ *Supra* note 47 at 229.

public potlatch following the deletion of the potlatch ban from the *Indian Act* was held by Mungo Martin in 1953 in Coast Salish territory.¹⁷⁷ Today, potlatches are held yearly, mostly in Alert Bay, for the same purposes which they were traditionally held, including naming.¹⁷⁸

Though the potlatch ban was deleted from the *Indian Act* in the revised version of 1951, the potlatch continues to be threatened in different ways. One of the great contemporary challenges is that of cultural appropriation. Cultural appropriation could be considered a contemporary form of disrespect in Indigenous peoples' ongoing battle for respect. It may seem innocuous: its proponents often justify the practice as a form of cultural appreciation. However, cultural appropriation is often seen in Indigenous communities as a continuation of colonial policies of expropriation and attacks on the integrity of Indigenous legal systems, having negative impacts on the health, wellbeing and capacity for economic self-sustenance of Indigenous peoples which cannot be ignored, these effects being similar to the outcomes of residential schools.

What distinguishes cultural appropriation from other forms of cultural exchange is the unauthorized 'borrowing' of expressions, artistic styles, symbolism, myths or know-how from a dominated culture by a member of the dominant culture.¹⁷⁹ Cultural appropriation dispossesses people of their identity. Due to the denigration of their values and the omnipresence of the dominant culture in education and media (which, in Canada, reflect a mostly urban, non-Indigenous lifestyle¹⁸⁰), members of a dominated culture will eschew their own culture in favour of the dominant culture.

In its final report, the Royal Commission on Aboriginal Peoples (RCAP) linked cultural appropriation to mental health issues. The inappropriate use of Indigenous culture has destroyed

¹⁷⁷ *Ibid.* at 227.

¹⁷⁸ *Ibid.* at 227-229.

¹⁷⁹ Jean-François Gaudreault-Desbiens, "La critique autochtone de l'appropriation culturelle comme défi à la conception occidentale de la propriété intellectuelle : Le cas de l'appropriation artistique" (1999) 11:2 C.P.I. 401 at 402.

¹⁸⁰ Royal Commission on Aboriginal Peoples, Report, *Volume 3 Gathering Strength*, 1996 at 547.

its sacredness and twisted its meaning, weakening it in the eyes of all.¹⁸¹ Indigenous youth suffer from low self-esteem due to a negative view of their own culture, supported by a belief in negative stereotypes, which are reinforced by cultural appropriation.¹⁸² This negative view of their own culture may be reinforced by lack of awareness. It was reported in the study led by Catherine Bell that many Kwakwaka'wakw youth are unaware of their own legal traditions. The RCAP identified culture stress as a major factor driving Indigenous youth to self-destructive behaviour and suicide.¹⁸³

Colonialism has limited opportunities for economic development of Indigenous peoples. The residential school system did so by forcing Indigenous people into the role of farmhand or trained manual labour.¹⁸⁴ The potlatch ban closed off possibilities of economic development through traditional means by outright banning Indigenous economies. Similarly, cultural appropriation threatens Indigenous peoples' economic self-sustenance through traditional means. Ellen Neel was particularly critical of this dimension of cultural appropriation. For Neel, carving ensured her family's survival. She had said, "In my family, carving was a means of livelihood. ... Totems were our daily fare, they bought our food and furnished our clothing."¹⁸⁵ She decried curio dealers who cheapened her art form by selling counterfeit pieces, making it more difficult to turn a profit from her art.

Finally, as law is created through engagement,¹⁸⁶ a lack thereof or a disregard for the law could weaken it. "A lack of serious and sustained engagement will cause law to lose its legality and legitimacy."¹⁸⁷ Cultural appropriation, with its sometimes wilful ignorance of Indigenous

¹⁸¹ *Ibid.* at 558.

¹⁸² *Supra* note 179 at 405.

¹⁸³ *Supra* note 180 at 547.

¹⁸⁴ *Supra* note 48 at 20; *supra* note 59 at 185.

¹⁸⁵ *Supra* note 3.

¹⁸⁶ Jutta Brunnée & Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, UK: Cambridge University Press, 2011) at 355.

¹⁸⁷ Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725 at 740.

laws which govern an appropriated symbol or practice constitutes such a lack of engagement with Indigenous law. Though the case of the UBC Thunderbirds may seem innocuous, the flouting by a large institution of Kwakwaka'wakw laws concerning the use of names and crests could have affected the legitimacy others, including the Kwakwaka'wakw themselves, accorded to the potlatch system.

Conclusion

This chapter has built on the truth-telling methodology articulated by the TRC. In the wake of historical wrongs such as the potlatch ban, Canadian society must re-examine its assumptions about its history and relationships with First Nations peoples, including the Kwakwaka'wakw. This involves calling into question Canada's reputation as a benevolent peacemaker making decisions in the best interests of a supposedly underdeveloped and infantile Indigenous population. In the case of the Kwakwaka'wakw, the late 19th century and the first half of the 20th century were marked by an experience of active suppression of their governance and legal system, the potlatch, by the Canadian state. This experience has had a lasting negative impact on the Kwakwaka'wakw. As evidenced by the emotional stories told by elders of the hardship experienced by their parents and grandparents during the ban, the resulting trauma is intergenerational and remains to be healed.

Though some of the confiscated ceremonial objects have been returned since the 1980s, much remains to be done to heal the relationship between the Kwakwaka'wakw and Canadians. All of the elders interviewed by Catherine Bell identified the potlatch ban as a historical wrong for which the federal government should apologize.¹⁸⁸ Also the Kwakwaka'wakw legal system, including the potlatch, is in need of restoration. This includes protecting it from outside influences which erode its legitimacy, including the practice of cultural appropriation.

¹⁸⁸ *Supra* note 41 at 81.

Chapter 2 – A Relational Account of *Victory Through Honour*

Ellen Neel's connection to the *Victory Through Honour* pole is a deep, ancestral one.¹⁸⁹ The legend represented by the pole is the Kwikwasut'inuxw origin story of the five tests of Tsikumayi (also known as Tsi-Kumi, among other alternative spellings), the magician of the red cedar bark from whom the Kwikwasut'inuxw are said to be descended. According to some versions of the oral tradition, Tsikumayi is the thunderbird Kolus' earthly human form after having removed his mask. He is also considered the ancestor of Neel's *namima*, a type of extended kinship group in the Kwakwaka'wakw legal tradition. According to the story depicted by the pole, Tsikumayi proved himself to the mystic Khanekelaq and the creatures of the ocean's depths through supernatural feats. In recognition of his status, Tsikumayi was gifted a totem pole bearing the very same crests depicted on *Victory Through Honour*.

The story of the pole is not mine to tell. I prefer to relay the following account of the legend, as it was printed in a newsletter by the U'mista Cultural Centre, whose mandate is to ensure the survival of all aspects of the cultural heritage of the Kwakwaka'wakw¹⁹⁰:

Tsikumayi was the great magician of the Red Cedar Bark when Khanekelaq, a great mystic character, came to visit Metap on Viner Sound. At that time Khanekelaq cut off Tsikumayi's head, but the head and body came together again.

Tsikumayi was then pushed into a box and thrown into the fire. Again he came to life. At last a heavy weight was fastened to his feet and he was thrown into the sea. He sank down, down to the domain of Konigwis the great lord of the wealth of the deep, where he saw all about him the people and things of the ocean's depths. The earthly visitor was recognized as Tsikumayi and was shown the great mystic cradle dance and was given the choice of all

¹⁸⁹ Crests are representative of a historic bond between the Kwakwaka'wakw and ancestral spiritual beings: *supra* note 12 at 85. Similarly, stories connect the Kwakwaka'wakw to their ancestors: *supra* note 41 at 56.

¹⁹⁰ U'Mista Cultural Centre, "About Us", online: <<https://www.umista.ca/pages/about-us>>.

things for himself and his heirs. Tsikumayi was also told to take the totem pole he saw there and commemorate his great future Yawkwas with it. On this pole were the denizens of the deep – Nannis the great monster ocean grizzly bear; Maukinuk, a powerful man; Waakees the frog; Kuuma the bull head. When Tsikumayi came to the surface again with outstretched arms – as is done in the Red Cedar dances – Khanekelaq was there waiting for him. The great mystic one recognized Tsikumayi as immortal and presented him with the frog and its power for his dance. This Tsikumayi cast out from him at Metap in order to show his supernatural attainments. There a monster stone shaped in the form of a frog marks the spot. Kolus, the great spiritual thunder bird which was the ancestor of Tsikumayi adorns the top of the totem pole.

I present the foregoing story to the reader not as a precursor to an analysis of the law within the story or the meaning behind the pole, though there is value in such an endeavour.¹⁹¹ In this chapter, I draw on the posthumous work of British anthropologist Alfred Gell, which articulates a relational theory of art. In analyzing art, what matters to Gell is the social interactions and relationships which surround the art object.¹⁹² There are therefore parallels to be drawn between Gell's theory of art and agency and Indigenous theories of law. In examining the totem poles through the lens of Gell's work, I also hope to draw conclusions on their implications for the legal relationships which bind Canadians and Indigenous peoples.

¹⁹¹ The University of Victoria's Indigenous Law Research Unit has developed a case brief and synthesis methodology to draw stories out of law, which might be congruent with the search for meaning behind such stories: see Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015-2016) 1:1 Lakehead LJ 16; see also Rebecca Johnson & Lori Groft, "Learning Indigenous Law: Reflections on Working with Western Inuit Stories" (2017) 2:2 Lakehead LJ 117.

¹⁹² See generally Alfred Gell, *Art and Agency: An Anthropological Theory* (Oxford: Oxford University Press, 1998).

Alfred Gell's Relational Theory of Art

In ascribing the term “art objects” to the carved memorial poles more commonly known as “totem poles”, I do not mean to essentialize totem poles or reduce them either to their aesthetic appearance or a Western institutional definition of art. In fact, Gell states that his theory “cannot afford to have as its primary theoretical term a category or taxon of objects which are ‘exclusively’ art objects because the whole tendency of this theory ... is to explore a domain in which ‘objects’ merge with ‘people’ by virtue of the existence of social relations between persons and things, and persons and persons *via* things.”¹⁹³ In treating *Victory Through Honour* as a “work of art”, I do not intend on reducing it to any one function, technical term, or definition. I do so rather to use it as a starting point to understand the nexus of legal relationships in which it is embedded.

Alfred Gell’s theory is not merely one about aesthetics. An aesthetic appreciation is internal to the viewer. Art objects, on the other hand, are much more than just their aesthetics; they are produced and circulated in the external world. Underlying and sustaining such production and circulation are certain social processes such as exchange, spirituality, politics, and law.¹⁹⁴ My understanding of totem poles is a polyvalent one, according to which each of these processes underlies *Victory Through Honour*.

Though this chapter opened with the oral history depicted in the pole, I wish to move beyond an approach that searches for meaning in that story and consider the agency of the different parties involved in the transactions surrounding the pole during the 1948 ceremony. By “agency”, I refer to each party’s intentional actions which either have an impact on the material world around them or on the thoughts and intentions of other parties.¹⁹⁵ For instance, in Neel’s case, agency might refer to the actions of Neel as an artist and the impact of those actions on her audience, which

¹⁹³ *Ibid.* at 12.

¹⁹⁴ *Ibid.* at 3.

¹⁹⁵ *Ibid.* at 16.

include UBC and the crowd in attendance at the dedication ceremony. This methodology is informed by Gell's eschewal of linguistics analogies and his resistance to treating art objects as texts.¹⁹⁶ He refuses to talk about art in terms of symbols, shifting the focus from "meaning" to "doing". Gell's theory leads one to ask, what does art "do" in a social context? The emphasis of the inquiry becomes placed on agency, intention, causation, result, and transformation. Art is "a system of action, intended to change the world rather than encode symbolic propositions about it."¹⁹⁷ Gell is preoccupied with the art object's role as mediator in the social process, the latter being the intended object of my study. In summary, this anthropological approach to Ellen Neel's art involves the theoretical study of "social relations in the vicinity of objects mediating social agency".¹⁹⁸

Coincidentally, Gell's theory draws on the works of Marcel Mauss on exchange theory, a theory which has been highly influential in anthropologists' reading of the Kwakwaka'wakw potlatch. According to Mauss, gifts are treated as extensions of persons. Similarly, in Gell's theory, art objects do duty as persons, or at least appear to do so.¹⁹⁹ Accordingly, *Victory Through Honour* is, in a sense, an extension of Neel's own person, and is put out into the world to do work on her behalf. The pole is therefore an index from which we may infer Neel's social agency, or as Gell expresses it, a "congealed residue of performance and agency in object-form"²⁰⁰. The art object vehiculates the artist's agency, provoking a reaction from the audience.²⁰¹

Neel is of course the most obvious agent present in the life of *Victory Through Honour*. She produced the pole and put it out into the world, presumably vehiculating a message or idea through this art object. However, the agency of the artist is not the only thing we can abduct from an art object. When one looks at art using Gell's theory, "what is seen is the visible knot which ties

¹⁹⁶ *Ibid.* at 6.

¹⁹⁷ *Ibid.* at 6.

¹⁹⁸ *Ibid.* at 7.

¹⁹⁹ *Ibid.* at 9.

²⁰⁰ *Ibid.* at 68.

²⁰¹ *Ibid.* at 14.

together an invisible skein of relations, fanning out into social space and social time. ... [the art object] objectif[ies] a whole series of relations in a single visible form.”²⁰² The art object is ‘caused’ by the artist, so it is an index of its maker’s agency.²⁰³ But this originating act is not the only transaction in an art object’s life, nor is the artist the only important agent. *Victory Through Honour* was and continues to be experienced by an audience, who in turn exercise their own agency:

[R]ecipiency as spectatorship conceals a form of agency. ‘Seeing’ is a form of agency in psychological theories of perception which emphasize the way in which perception ‘goes beyond the information given’. According to such theories, the mind of the perceiver actively ‘constructs’ the perceptual image of the thing perceived. Semiotic/interpretative theories of art give prominence to the fact that what a person sees in a picture, or, even more, gleans from an utterance or text, is a function of their previous experience, their mindset, their culture, etc. ... [M]any members of the contemporary art public ... attribute creativity to themselves as spectators, who can ‘make something’ out of the raw material presented to them in the art gallery...²⁰⁴

The agency of the artist, in this case Ellen Neel, and of the index, or *Victory Through Honour*, therefore do not negate the agency of the audience or recipient.

Further, the pole also relates to the things which it represents, for Gell’s purposes called a “prototype”. When it comes to *Victory Through Honour*, such prototypes are not just animals and other beings from the natural world (such as Tsikumayi and the animals on the pole) and supernatural world (such as Kolus), they are characters, each with their own story and each bearing a relationship with place.

²⁰² *Ibid.* at 62.

²⁰³ *Ibid.* at 24.

²⁰⁴ *Ibid.* at 34.

The agency of nature shows through the carving of totem poles. The cedar from which the poles are carved at times contains imperfections, such as knots in the wood. Similarly to the Western art doctrine of “truth to materials”, which is “the idea that it behoves the artist ... to make from his materials what ‘they’ want, rather than what he wants”²⁰⁵, totem pole carvers work around those imperfections, finding ways of incorporating them into their art. Cedar dictates the shape it takes.

Art does not simply encourage an aesthetic response, it can provoke an affective one as well. Gell mentions in respect of abstract patterned art, “[d]ecorative patterns applied to artefacts attach people to things, and to the social projects those things entail.”²⁰⁶ This statement should not be read as being limited to abstract art. This is indeed the effect that *Victory Through Honour* is intended to have on its audience. Neel intended not only that the audience become attached to the pole and its physical appearance, but to the project of reconciliation in which it invites us to take part. This is possibly due to the sheer magnitude of detail in *Victory Through Honour*, which has the effect of slowing perception down, so that the pole is never fully possessed by its viewer, it is always in the process of being possessed. Like reconciliation, the pole itself is “unfinished business”: it “sets up a biographical relation – an unfinished exchange – between the decorated index and the recipient.”²⁰⁷

Gell draws a parallel between ‘representation’ through depiction and ‘representation’ as an ambassador:

An ambassador is a spatio-temporally detached fragment of his nation, who travels abroad and with whom foreigners can speak, ‘as if’ they were speaking to his national government.

Although ambassadors are real persons, they are also ‘fictions’, like pictures, and their

²⁰⁵ *Ibid.* at 30.

²⁰⁶ *Ibid.* at 74.

²⁰⁷ *Ibid.* at 81.

embassies are fictional mini-states within the state; just as pictures show us landscapes and personages who are ‘not really there’.²⁰⁸

Like the ambassador, the totem pole at the center of this thesis is grounded in place, as a representative from one nation to another, serving as reminders of Canada’s relationships with its First Nations.

Victory Through Honour as an Expression of Belonging

According to an account of family histories given by Ellen Neel’s eldest daughter, Cora “Kwa xa’latl” Beddows, to Carolyn Butler-Palmer, ownership rights to the Four Tests of Tsikumayi legends and the poles were a part of the dowry of Sara Nina “Neg’ega” Finlay, Ellen Neel’s maternal grandmother.²⁰⁹ Lou-ann “Ikw’wega” Neel, Cora’s niece and Ellen’s granddaughter elaborated further to Dr. Butler-Palmer, the family has “ownership over the poles that were made to go with this story; however, other families also have rights to this legend. It is a shared right within the *namima*.”²¹⁰

The family views the totem pole, and associated crests and stories, as intrinsically bound together. This is consistent with the wholistic and relational understanding of cultural property which emerged from in a study led by Catherine Bell and conducted in consultation with Andrea Sanborn, the U’mista Cultural Society & the ‘Namgis Nation. The Kwakwaka’wakw Elders interviewed for the study took the term to mean a very wide variety of things. Their use of the term did not distinguish between the tangible and intangible, but was used rather in a wholistic fashion. Elder Andrea Sanborn’s explained to Bell’s research team:

[M]y whole existence as Andrea is cultural property. It’s who I am. It’s all the traditions of the Kwakwaka’wakw that belong to me and belong to our people. It’s the language, the

²⁰⁸ *Ibid.* at 98.

²⁰⁹ Carolyn Butler-Palmer & Vanessa Udy, “A Case Study of Ellen Neel: Indigenous Rights and Copyrights” 43:1 RACAR [forthcoming in 2018].

²¹⁰ *Ibid.*

Kwak'wala language and, most importantly, our values we have as a people, *maya'xala*, which means respect or treating someone good or something good. It's protecting all our songs and dances and history. It's protecting our land because all the land base comes out of our creation stories in this area. That's cultural property. So those are the things. It's family passing on family values and the history of each family and all the treasures they own culturally.²¹¹

The implication of this wholistic understanding of cultural property is that the agency of the parties involved in the exchange at the 1948 ceremony is abducted not only through the totem pole, but through the other cultural property tied to the pole, including the Thunderbirds name, crest and related stories. Even though this bundle of cultural property includes objects which are neither art nor tangible objects, this matters little for the purposes of the application of Gell's theory, as he foresaw that his relational analysis could apply to any type of object, including even cars,²¹² though he chose to limit his scope of inquiry to objects bearing aesthetic characteristics which tend to be labelled as "art" by Western institutions such as museums and galleries.

The Neel family's understanding of ownership of their cultural property is also relational. It is closely tied to their identity as a family and anchors them in time and place to Metap (also called Meetup) on Gilford Island.²¹³ This is illustrative of the Kwakwaka'wakw understanding of their relationship to cultural property as one of belonging. Here, I borrow the term "owning as belonging" coined by Canadian anthropologist Brian Noble. This term is to be understood mainly in contrast to "owning as property", where property is commodified.²¹⁴ Though totem poles are

²¹¹ *Supra* note 41 at 39-40.

²¹² *Supra* note 192 at 18.

²¹³ "Traditional Kwakwaka'wakw territory extends from Comox to the north end of Vancouver Island and the adjacent mainland inlets from Smith Inlet south to Toba Inlet.": *supra* note 41 at 35.

²¹⁴ Brian Noble, "Owning as Belonging/Owning as Property: The Crisis of Power and Respect in First Nations Heritage Transactions with Canada" in Catherine Bell & Val Napoleon, eds, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) 465.

subject to exchange, the transaction is not one of transfer of a commodity on the free market in exchange for capital accumulation. Instead, totem poles are raised in the context of transactions of exchange meant to reinforce social ties between people, their natural environment and the spiritual and sacred.²¹⁵

Some of the attributes of the “owning as belonging” relationship resemble the rights of a property owner: they include the right to restrict third party access and the right to be associated with the object. Other elements of the relationship more closely resemble the principle of guardianship.²¹⁶ Owners and users of cultural property also have responsibilities in relation thereto. Rights may be given to use cultural property, but this permission may create new and ongoing responsibilities for the owner, the transferor, their family, a group within the community, or the community as a whole.²¹⁷ These responsibilities can include maintaining the integrity of the cultural property, giving proper acknowledgement or using it in the appropriate context, to give but a few examples.²¹⁸

The Potlatching Functions of the 1948 Ceremony

In light of the Kwakwaka'wakw understanding of cultural property as being tied to belonging, what was the purpose of the 1948 naming ceremony, other than reiterating the Thunderbirds name as the property of a *namima*? To understand what Neel was attempting to achieve, one must look to the potlatching traditions of the Kwakwaka'wakw, which govern transfers of cultural property, including names. Though it was not officially named a potlatch and it is unclear from written resources whether witnesses were feasted or received gifts, the ceremony was a formal affair. Certain ceremonial elements which are present in potlatching were

²¹⁵ *Supra* note 13 at 252.

²¹⁶ Robert K. Paterson, “Canadian and International Traditional Knowledge and Cultural Expression Systems” (2017) 29 IPJ 191 at 269.

²¹⁷ Catherine Bell & Caeleigh Shier, “Control of information originating from Aboriginal communities: Legal and ethical contexts” (2011) 31:2 *Études Inuit Studies* 35 at 41.

²¹⁸ *Ibid.*

on display at the event: Chief Scow came dressed in full regalia carrying a talking stick; lengthy speeches were made; and guests of honour were identified and seated accordingly.²¹⁹ Neel's goals in conducting the ceremony therefore may have been inspired by the potlatch. It appears she may have intended to forge relationships bearing reciprocal obligations with UBC, the Student Council, and the witnesses present.

Much of the literature on the potlatch places it at the center of Kwakwaka'wakw legal, political, economic and spiritual life.²²⁰ It is an institution through which laws, values, rights, and responsibilities in relation to cultural property of the Kwakwaka'wakw find their expression.²²¹ Laws regarding the ownership and use of cultural property are embedded within this ceremonial context.²²² It is the forum for displaying the cultural property found in a family's "box of treasures" and for disputing ownership claims.²²³

Anthropology literature is mostly concerned with the role of the potlatch in the construction of social standing, which was traditionally of great importance in the highly stratified Kwakwaka'wakw society. Homer G. Barnett proffered that the potlatch "had as its purpose the identification of an individual as a member of a certain social unit and the defining of his social position within that unit"²²⁴, a thesis supported by the subsequent work of Drucker and Heizer.²²⁵ The importance of rank, however, has changed over time. With the changes to the ranking system in the late 1800s, which are described in the first chapter of this thesis, rank took on a different significance. Today, though rank is still considered in deciding the value of gifts and the order in which they are given²²⁶, its importance has diminished in other ways. One notable change is that

²¹⁹ *Supra* note 27.

²²⁰ See *supra* note 41 at 46.

²²¹ *Ibid.* at 34.

²²² *Supra* note 12 at 97.

²²³ *Ibid.* at 96.

²²⁴ Drucker & Heizer, *supra* note 42 at 8.

²²⁵ *Ibid.* at 136.

²²⁶ *Supra* note 47 at 246.

seating arrangements have been democratized and people are no longer seated according to rank.²²⁷ Attendance is also now open to the whole community, whereas guest lists used to be restricted to those having received traditional names.²²⁸ Rank should not, however, be confused with political authority.²²⁹ Lucy Bell, a Kwakwaka'wakw scholar, warns of this: "It strikes me that despite having a ranking system that we don't live our lives in a hierarchical manner. As I have mentioned before our ranking system helps to determine who speaks first or who is served food first; it does not dictate a hierarchy of leaders and subjects."²³⁰

Rather than viewing the potlatch as a hierarchical system of title and social standing, Indigenous Elders and authors, including Coast Salish business scholar Dara Kelly, propose an alternative reading of the potlatch. Kelly emphasizes the role of the potlatch in structuring affinal relationships and kinship behaviour forms. In other words, the purpose of the potlatch in this way of thinking is relational and fosters a sense of belonging.²³¹ Chiefs holds potlatches to maintain ties with other *namimas* through the distribution of property.²³² Recipients of names and other privileges are introduced to identify their role in the wider community and form reciprocal obligations with other community members.²³³ Relationships of belonging are expressed through song, dance, stories and names, in which individual and community identities are grounded, and validated by the practice of witnessing.²³⁴ It is through ceremony that *Victory Through Honour* and other associated cultural property find their full expression as a node through which relationships of belonging are produced.

²²⁷ *Ibid.* at 232.

²²⁸ *Ibid.* at 232.

²²⁹ Alan D. McMillan & Eldon Yellowhorn, *First Peoples in Canada*, 3rd ed (Vancouver: Douglas & McIntyre, 2004) at 216.

²³⁰ *Supra* note 12 at 60.

²³¹ *Supra* note 41 at 60.

²³² Suttles, *supra* note 42 at 88.

²³³ *Supra* note 13 at 273-275.

²³⁴ *Supra* note 41 at 64.

One of the ways people foster a sense of belonging in the wider community in the potlatch system is through the tradition of naming. In many Indigenous cultures of the Pacific Northwest, in order to obtain the right to use a name, one must have had it bestowed upon them through ceremony, usually during a feast or potlatch.²³⁵ The Kwakwaka'wakw were no exception to this practice.²³⁶ Potlatching was in fact a prerequisite for the community to recognize the assumption of a name by an individual. According to Drucker and Heizer, “[a]n Indian might be entitled by birth to a noble name, a name that defined his position in native society as one entitled to honour and respect. Yet he could never use that name or any of the accompanying privileges unless he gave a potlatch at which he testified publicly to his hereditary right to assume it.”²³⁷ Traditional names were therefore unrecognized by the larger community unless validated and communicated to members through a potlatch. However, once the ceremony took place, transactions which occurred during the potlatch were considered to be legally binding. Elder Andrea Sanborn reported to Catherine Bell, “[a]nything that is conducted, any ceremonies that are conducted and information given to the people, that is the law. If, if a song is being identified as being passed down from a chief to his son, or from whomever, and it’s done in a potlatch ceremony, that’s the law.”²³⁸ The potlatch therefore served a role in legitimizing cultural property transactions, as the 1948 ceremony may have done for the bestowal of the name “Thunderbirds” onto UBC’s varsity sports teams.

Reciprocal Obligations of Neel and UBC

Because this sense of belonging has obligations of reciprocity attached to it, the agency expressed through the transfer of cultural property flowed not only from Ellen Neel as the artist to UBC as the recipient, but also involved the exercise of UBC’s own agency in return. Consequently, in receiving cultural property, UBC was engaged in a form of intersocietal law, that is the forming

²³⁵ See for example *supra* note 13 and *supra* note 83.

²³⁶ Suttles, *supra* note 42 at 90.

²³⁷ Drucker & Heizer, *supra* note 42 at 33.

²³⁸ *Supra* note 41 at 51.

of reciprocal relationships and the assumption of responsibilities across legal orders. More specifically, in Kwakwaka'wakw culture, names carry “a range of roles, responsibilities, and obligations, balanced with rights, privileges, and prerogatives.”²³⁹ At the ceremony, a person thus receiving a name must “know the account of the name, understand his or her upcoming responsibility as a name holder, and be responsible and respectful to his or her namesake.”²⁴⁰

Relationships and obligations extend beyond the naming ceremony. They extend far into the past:

[It] allows one's community to make a direct connection between an ancestor who carried the name previously, and the individual who receives the name in the ceremony. Through this connection, the name serves to unleash the potential of individuals, or of the current generations of Coast Salish people, to unfold in relationship with their ancestors. It is also a way in which the ancestors have ongoing roles in the ceremonial life of the community.²⁴¹

Relationships and obligations are also forward-looking. Ultimately, there is an assumption that “you always owe something in exchange for the freedom to be a part of the community and to share in the greater pool of resources (wealth), including having access to knowledge and genealogy.”²⁴² Reciprocal obligations in the potlatch system are thus conceived as reaching both indefinitely into the past and the future.²⁴³

The gifting of the pole to UBC was perhaps a way for Neel to fulfill her own reciprocal obligations towards her ancestors and her family's cultural property. During his interview for Catherine Bell's study, William Wasden Jr. recounted the story of a woman, Elsie, who played a tape of a sacred song that belonged to her family in the Big House in order to inform people of its origin and sacred nature. She said, “this is my mother's song and I would appreciate it if people

²³⁹ *Supra* note 2 at 1.

²⁴⁰ *Supra* note 83 at 50.

²⁴¹ *Supra* note 13 at 272.

²⁴² *Ibid.* at 260.

²⁴³ *Ibid.* at 85.

would stop just getting up and singing it freely.” Wasden viewed this interaction as an attempt on Elsie’s part to fulfil her obligations toward the song.²⁴⁴ In the same way, the gifting of the “Thunderbirds” name may have been an obligation on Neel’s part in order to “make right” the use of the name by UBC’s varsity sports teams.

In exchange for “making good” UBC’s use of the “Thunderbirds” name, there was perhaps an expectation on Neel’s part that UBC would return that generosity, not necessarily to her personally or even to her *namima*, but to a larger community of Indigenous students. Indeed, there were obligations which came with the “Thunderbirds” name, to which Chief William Scow alluded during the ceremony, when he announced, “[t]he totem has been carved for you by our two best tribal carvers. It has a long and an honourable history, a totem of which your teams have every right to be proud. It is yours now. If you follow the precepts accepted with it, you cannot fail”.²⁴⁵ In an interview conducted after the ceremony, Neel elaborated,

[t]o the Native people of the whole province we can give our assurance that your children will be accepted at this school by the Staff and Student Council, eager to smooth their paths with kindness and understanding. We need now only students to take advantage of the opportunity, so that some day our doctors, lawyers, social workers and departmental workers will be fully trained University graduates of our own race.²⁴⁶

As mentioned elsewhere in this thesis, the pole now stands before Brock Hall, which houses administrative services for students. The symbolism of the pole’s placement, read together with Scow and Neel’s pronouncements, could be read as forming an obligation on the part of UBC employees and the Student Council to break down systemic barriers which hamper Indigenous students’ access to higher education.

²⁴⁴ *Ibid.* at 68.

²⁴⁵ *Supra* note 27.

²⁴⁶ *Ibid.* Both Neel and Scow’s quotes are engraved on a commemorative plaque next to the totem pole’s current location, outside Brock Hall, where many of UBC’s administrative services are housed.

As previously mentioned, obligations attaching to a name are intergenerational.²⁴⁷ Though Neel has since passed, and her copyright has expired, the obligations which come attached with the Thunderbirds name and the *Victory Through Honour* pole do not end there; they are owed to future generations as well. There is a sense among the Neel family that UBC has perhaps not lived up to its ongoing obligations. The family has expressed a desire to see a scholarship fund created in Neel's name.²⁴⁸ Another way UBC could fulfil its obligations is in assisting the Kwakwaka'wakw in creating their own higher education institution within their traditional territory. Though not expressly calling upon UBC for help, Elder Andrea Cranmer has highlighted the need for a community-based school where Kwakwaka'wakw adults can reconnect with their traditions:

[W]e need a college. We need a First Nations college that teaches history, that teaches language, that teaches the beliefs and values ... going back to the land ... going on the canoes, going to the rivers, bathing in the rivers. We need a cultural university in this community because we are educating our young people. They get singing. They get dancing. They get Kwak'wala once in a while. They have community members go in and share their story about legends and all those kinds of things. But the adults aren't getting it. The adults don't have the opportunity to learn.²⁴⁹

Such a place-based initiative would build upon the idea that reciprocity isn't just between people, it is embedded within a larger web of interactions between people, place and other elements of creation.²⁵⁰

²⁴⁷ *Supra* note 13 at 263.

²⁴⁸ *Supra* note 209.

²⁴⁹ *Supra* note 41 at 62.

²⁵⁰ *Supra* note 12 at 5.

Reciprocal Obligations of Witnesses

In addition to being the forum in which a relational form of ownership and constitution of obligations unfold, the potlatch also serves an important educational purpose.²⁵¹ Recent literature by Indigenous thinkers places emphasis on the role of the potlatch in knowledge creation.²⁵² According to Haisla scholar Kundoqk Jacquie Green, “Witnessing is a method of gathering and recording historical and statistical knowledge of our people, such as who has passed on to the spirit world, which families have newborns, and who will inherit chieftainship names.”²⁵³ Potlatches are also a way to share and preserve history. They remind participants of family histories behind names and their connections to the land.²⁵⁴

Under the potlatch system, the integrity of this type of cultural property is protected thanks to common knowledge of the attribution of ownership. This knowledge is achieved by the public recital of stories and oral histories, or, as the anthropology literature terms it, the display of privileges, at potlatches.²⁵⁵ Permission is required for the use of such cultural property by third parties and failure to comply with protocols on use and responsibility is considered a disrespectful and wrongful form of appropriation.²⁵⁶

Elders participating in Catherine Bell’s study confirmed the role of the potlatch in the constitution and preservation of knowledge among the Kwakwaka’wakw. According to Vera Newman: “It’s supposed to give an example, a record – the history of each of those dances and the names that go with it – in front of our people because they are there to witness the property that belongs to the family.”²⁵⁷ Elder William Wasden Jr. elaborated:

²⁵¹ *Supra* note 41 at 50.

²⁵² Lee Maracle, *My Conversations With Canadians* (Toronto: BookThug, 2017) [Maracle]; see also *supra* note 83.

²⁵³ *Supra* note 83 at 53.

²⁵⁴ *Supra* note 41 at 49; *supra* note 83 at 55.

²⁵⁵ On the topic of potlatches and feasts as a method of knowledge creation and preservation, see Maracle *supra* note 252; *supra* note 83.

²⁵⁶ Drucker & Heizer, *supra* note 42 at 66.

²⁵⁷ *Supra* note 41 at 40.

[The chiefs are] inviting the people to publicly show them whether it's just through songs, or song and dance, relaying their history through, you know, song and dance. [A]nd that's what it is. And the speaker gets up and tells the history. So what the host is doing is sharing that family's history with the people that have come to witness and, in the end, paying them according ... to what ... their standing is. [Giving them] gifts, so that they will remember that forever ... and ... be able to repeat the story. And that's why the speaker in the Big House is so key, because he is the one who relates the stories of the dances, relates the name that's associated with the dance, [tells] who is assuming the dance and where it comes from. And always, with everything that is done, the speaker is retelling the history that goes along with these specific ceremonies and different activities that are going on.²⁵⁸

By informing guests of previously constituted or new knowledge, potlatching brings witnesses into the fold of reciprocal relationships. The ceremony creates a reciprocal relationship between the host and the guests: in exchange for the receipt of food and gifts, guests are expected to witness and remember the details of the happenings at the ceremony, including the social status associated to names bestowed and privileges displayed.²⁵⁹ The guests and the host are therefore responsible and accountable for the creation, validation and remembering of the historical knowledge constituted during the potlatch.²⁶⁰ Gifts are given so that witnesses will remember and recount the stories told.²⁶¹

The potlatch also serves as an occasion to remind participants of previously constituted knowledge about social relationships, connections to the land and the environment and hold people accountable to their obligations in respect of such knowledge.²⁶² Kwakwaka'wakw laws

²⁵⁸ *Supra* note 41 at 50.

²⁵⁹ Drucker & Heizer, *supra* note 42 at 8.

²⁶⁰ *Supra* note 83 at 53; *supra* note 41 at 49.

²⁶¹ *Supra* note 41 at 50.

²⁶² *Supra* note 83 at 53-55; *supra* note 41 at 46, 49.

surrounding cultural property rely upon common knowledge and respect of ownership and protocol for use. In the Catherine Bell study, Andrea Cranmer revealed the importance of having knowledgeable members of the community present to remind others of protocol surrounding cultural property:

[J]ust 'cause a young person is learning how to sing songs, it doesn't give them the right to be in any public forum to be singing inappropriate[ly] or out of turn, kind of thing. So I believe that older members and wise people and knowledgeable people need to be present during the sharing of these songs so that the beliefs and values go along with what they are doing, and it's not just something cool to do.²⁶³

Witnesses therefore have a dual role: less knowledgeable witnesses have a duty to learn, whereas knowledgeable ones have a duty to guide those who are learning.

With respect to the general public, Ellen Neel might have exercised her agency through the giving of cultural property in two ways: first, by educating the public as to the proper protocol for use of cultural property under Kwakwaka'wakw law; second, by positioning UBC in relation to British Columbia's Indigenous communities and fostering an understanding of that position by others, creating accountability.

During the ceremony, Chief Scow announced to the crowd, "[o]n behalf of Ellen and Edward Neel, and with full consent and approval of our tribal council and our people, I present this Totem to the Alma Mater Society of this University. I give to you also the right to use the name Thunderbird for your teams. This is according to the laws of my people, and is hereby legal for the first time."²⁶⁴ Implicit in this statement is that the use of the Thunderbirds name was not legal prior to the ceremony. Scow was communicating that community consent is necessary to use Kwakwaka'wakw cultural heritage. Seeking permission and acknowledging original entitlements

²⁶³ *Supra* note 41 at 61.

²⁶⁴ *Supra* note 27.

are important to the Kwakwaka'wakw when it comes to outsider use of cultural property. Failure to do so is frowned upon and viewed as wrongful appropriation and disrespectful.²⁶⁵

Further, UBC may have exercised its agency in receiving the pole for the same educational and accountability purposes that Neel did. Statements to the effect that staff and the Student Society would from that time on make UBC a welcoming environment to Indigenous students were made in front of a large public. In his response to Scow's speech, Dave Brousson, then president of the Alma Mater Society, affirmed, "it is my hope that when this totem has been erected in a place of honor in front of our own Brock Hall, that it will be a constant reminder to every person of Native descent at the University, that this institution is peculiarly his. I hope also that it will be a constant reminder to this and future Student Councils to make Native students especially welcome on our campus."²⁶⁶ If those obligations were to be unfulfilled, then Neel and her community could rely on the public to remind UBC of its obligations towards Indigenous students.

Conclusion

A relational account of the *Victory Through Honour* pole allows us to understand how the different parties involved in the 1948 totem dedication ceremony exercised their agency to form reciprocal obligations. In making right the use of the Thunderbirds name, Ellen Neel was likely fulfilling obligations towards her ancestors and her namima by controlling and regulating its use. She was also bringing UBC into the fold of reciprocal relations. In accepting the gift that was the pole, UBC was exercising its own agency and forming new legal relationships which bound it to Neel and the wider Indigenous community. Going forward, UBC would have the obligation to break down systemic barriers and make Indigenous students feel welcome on campus. The crowd in attendance also played an active role in the ceremony. The pole serves them as a reminder of their own obligations to tell the stories which were shared at the ceremony and to hold UBC

²⁶⁵ *Supra* note 41 at 66.

²⁶⁶ *Supra* note 27.

accountable for its obligations towards Indigenous students and to hold outsiders generally accountable for their appropriate use of Indigenous cultural property.

Chapter 3 – Protecting Kwakwaka'wakw Cultural Property Through Intellectual Property Rights

The 1948 ceremony did not conclusively resolve the issue of respectful use of Kwakwaka'wakw cultural property on UBC's campus. Other transgressions were occurring around that time. To give but a few examples, both the student yearbook and a café on campus shared the name "The Totem". The café would occasionally hold festive events dubiously named "potlatches".²⁶⁷ Worse was the student society's plan to use totem poles as goal posts, an undignified pursuit, had it not been for her intervention.²⁶⁸ It would seem that Neel had reason not trust the university to treat the crest with respect.

In the absence of a practicable recourse under her own legal traditions to protect the use of the cultural property she had transferred, Neel turned to the Canadian law to attempt to gain a measure of control over the story and crest depicted in the pole. In 1951, Neel was issued a copyright registration certificate evidencing the vesting of the copyright to the pole in herself and her husband and collaborator, Ted Neel.²⁶⁹

The protections afforded under Canadian intellectual property laws do not map well onto cultural property such as crests and stories, however. Such laws were developed in a cultural context foreign to the Kwakwaka'wakw and serve different goals than do the Kwakwaka'wakw legal traditions governing cultural property. As this chapter will further demonstrate, copyright is an imperfect solution to the concerns of the Neel family, and the Kwakwaka'wakw generally, surrounding cultural property.

²⁶⁷ *Supra* note 209.

²⁶⁸ *Ibid.*

²⁶⁹ Canadian Patent Office, *The Canadian Patent Office and Register of Copyrights and Trade Marks*, (Ottawa: Edmond Cloutier, 1951) Vol. LXXIX, No. 17, April 24, 1951, at x.

In this chapter, I intend to shed light on ways in which intellectual property rights fail to secure control over the treatment of Kwakwaka'wakw cultural property. I will do so by examining the differences between Kwakwaka'wakw laws governing cultural property, as articulated by knowledgeable Kwakwaka'wakw people or *nogad*, including members of Neel's family, and Canadian copyright law and trade-mark law.

Copyright – A Primer

As set out in chapter 2, the Kwakwaka'wakw recognize certain rights of ownership in cultural property with which come attached obligations. Under Kwakwaka'wakw law, Neel and her *namima* communally own the totem pole and the stories and crests depicted therein. From this ownership flows not only a right, but also a responsibility, to restrict third parties' inappropriate use of such cultural property.

Copyright law may help approximate the legal protections which flow from Neel's ownership of the *Victory Through Honour* pole and the crests and stories embedded within it under Kwakwaka'wakw legal traditions. Generally, it provides the author of a literary, dramatic, musical or artistic work the sole right to produce, reproduce, and publish the work.²⁷⁰ The corollary of this exclusive right is the ability to enjoin others from reproducing the work. This entails that, during the term of the copyright, Neel could curtail the use by any person of the image of the pole or replicas thereof without her permission. Further, as the holder of the copyright, Neel would have been entitled to disgorge at least a share of any profits made from the unauthorized use of the image of the pole.

In addition to copyright, an artist also benefits from moral rights, which protect, among other things, the right to integrity of the work. This means that Neel's work was protected from distortion, mutilation or other modifications that would be prejudicial of her honour or

²⁷⁰ *Copyright Act*, R.S.C., 1985, c. C-42, s. 3.1.

reputation.²⁷¹ Presumably, as the carver of *Victory Through Honour*, Neel could have invoked her moral rights to prevent unauthorized and inappropriate use of the pole, for example as a goal post. Copyright and moral rights would have been useful legal tools for Neel in her quest to prevent use of the pole that would have been deemed inappropriate or unauthorized under Kwakwaka'wakw legal traditions.

However, intellectual property laws are also at odds with aspects of Neel's rights under Kwakwaka'wakw law, which she sought to enforce through the 1948 ceremony. Differences between Neel's rights under Canadian law and Kwakwaka'wakw law include the nature of the object benefiting from protection, the people able to invoke protection and the length of protection.

What Does Copyright Protect?

One major divergence between Canadian copyright laws and Kwakwaka'wakw legal traditions concerns the elements of the pole which benefit from protection. Copyright laws only protect the expression of an idea (in this case, the image of the pole in two and three dimensions) and not styles or themes. This is because the latter are neither in fixed form nor an original creation of an artist, having been passed down through generations.²⁷² As a consequence, anybody, including the student union, would be free to appropriate the styles, stories, themes and crests depicted in the pole and use them in a fashion contrary to the customs of the Kwakwaka'wakw. For this reason, many Kwakwaka'wakw view copyright laws as facilitating, rather than preventing, wrongful appropriation of cultural property.²⁷³

²⁷¹ See *Snow v Eaton Centre Ltd*, 70 CPR (2d) 105, [1982] OJ No 3645.

²⁷² Simon Brascoupé & Karin Endemann, "Intellectual Property and Aboriginal People: A working paper" (1999) Minister of Indian Affairs and Northern Development, Working Paper, No R32-204/19991E, online: <<http://publications.gc.ca/collections/Collection/R32-204-1999E.pdf>> [Brascoupé & Endemann] at 10; Robert K. Paterson & Dennis S. Karjala, "Looking beyond intellectual property in resolving protection of the intangible cultural heritage of indigenous peoples" (2003) 11 *Cardozo J. of Intl & Comp. Law* 633 at 640; Rosemary J. Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy", (1993) 6:1 *Canadian Journal of Law & Jurisprudence* 249 at 259.

²⁷³ *Supra* note 189 at 82.

Moreover, the copyright does not concern the use of the “Thunderbirds” name. In fact, in 1972, UBC registered THUNDERBIRDS as a trade-mark,²⁷⁴ which provides it with the exclusive right to market and sell goods and services using that name. This has a few implications for the Neels and other members of the *namima* who share the right to the thunderbird crest under Kwakwaka’wakw legal traditions. The first is that UBC could use the THUNDERBIRDS name to sell products that the Neels might deem inappropriate. For examples of such undesirable products, one need only think of the lawsuit brought by the Navajo Nation against Urban Outfitters in 2012 for trade-mark infringement.²⁷⁵ The American retailer made unauthorized use of Navajo-inspired motifs to sell items including socks, underwear and whiskey flasks. Ultimately, the Navajo were able to put a stop to the sale of such items, as they were the owners of the NAVAJO trade-mark and could prevent third parties from making unauthorized use of the NAVAJO name to sell products including apparel and housewares. But UBC’s ownership of the THUNDERBIRDS trade-mark permits it to do what Urban Outfitters couldn’t. The possibility of inappropriate use of the “Thunderbirds” name is not remote; a second trade-mark registered by UBC in 2009 would allow UBC to produce housewares, including namely shot glasses and which could perhaps be extended to flasks, and apparel, which could in theory be extended to underwear, emblazoned with the THUNDERBIRDS logo.²⁷⁶

The second implication of UBC’s ownership of the THUNDERBIRDS trade-mark flows from the exclusive nature of the rights to use the name. Pursuant to the *Trade-marks Act*, UBC, as the registrant of the THUNDERBIRDS trade-mark, has the exclusive right to use the trade-mark

²⁷⁴ “THUNDERBIRDS”, The University of British Columbia, Canadian registration TMA189322, March 16, 1973, online: <<https://www.ic.gc.ca/app/opic-cipo/trdmrks/srch/viewTrademark?id=0350484&lang=fra&tab=reg>>.

²⁷⁵ See Courtney Doagoo, “Navajo Nation Sues Urban Outfitters Inc.”, IP Osgoode (June 7, 2012), online : <<http://www.iposgoode.ca/2012/06/navajo-nation-sues-urban-outfitters-inc/>>.

²⁷⁶ “UBC THUNDERBIRDS & THUNDERBIRD HEAD DESIGN”, The University of British Columbia, Canadian registration TMA751627, October 29, 2009, online: <<https://www.ic.gc.ca/app/opic-cipo/trdmrks/srch/viewTrademark?id=1214284&lang=fra&tab=reg>>.

throughout Canada in respect of the goods and services for which it was registered.²⁷⁷ Similarly to copyright, the corollary of the positive rights conferred by trade-mark is the ability to prevent others' unauthorized use of the mark. UBC could therefore, in theory, prevent other members of the *namima* from providing services related to sports or goods, including apparel and housewares, under the THUNDERBIRDS name. This could negatively affect people and companies having ties with these traditions by making it difficult for them to establish distinct trade-marks of their own in the future.²⁷⁸ It could limit potential licencing and endorsement opportunities for the Kwakwaka'wakw, if that is an economic avenue they wish to pursue.

Third, as explained above, a trade-mark, much like a copyright, provides its owner with a limited monopoly. UBC has the exclusive right to market and sell certain goods and services using the THUNDERBIRDS trade-mark, and is therefore the only person entitled to profit from such use. UBC has no obligation to account to the Neels, the *namima*, or anyone else for that matter, for profits made from the use of the trade-mark, which may be used as the basis of lucrative product franchising arrangements. All three of the scenarios described above may be in direct contradiction to the laws of the Kwakwaka'wakw.

The treatment of the name, the crests and the poles as distinct is due to intellectual property law's tendency to divorce an idea from its material expression, a concept that is foreign to the Kwakwaka'wakw wholistic understanding of cultural property.²⁷⁹ Intellectual property law is concerned with the legal rights that arise in relation to intellectual activity as distinct from the tangible objects in which knowledge is associated. In other words, IPRs protect the material expression or embodiment of an idea, not the idea itself.²⁸⁰ For example, copyright requires that a protected work exist in a fixed material form. The oral versions of the story in *Victory Through*

²⁷⁷ *Trade-mark Act*, R.S.C., 1985, c. T-13, s. 19.

²⁷⁸ Brascoupé & Endemann, *supra* note 272 at 22.

²⁷⁹ *Supra* note 12 at 75. Bell avoids the use of the term "intellectual property" when describing cultural property, as it is a foreign concept which does not refer to the things which are owned by the Kwakwaka'wakw, such as "crests, songs, dances and the relationship that each has with a story.": *ibid.* at 39.

²⁸⁰ Brascoupé & Endemann, *supra* note 272 at 8, 14.

Honour do not meet the requirement of fixation inherent in intellectual property rights. Though the version of the story printed in the church circular was covered by copyright, that copyright was vested in the author, not in Neel's *namima*. In addition, the copyright would not have prohibited the retelling of the story in different words. As for the crests depicted in the pole, they might have benefited from the protection of copyright, so that exact replicas could not be made by unauthorized third parties. However, Neel's copyright did not restrict third parties from using the creatures that the crests represent in their artwork, provided that the latter are sufficiently distinguishable from Neel's.

What are conceived as different types of property under western law are considered to be interconnected in Kwakwaka'wakw culture.²⁸¹ The Kwakwaka'wakw don't distinguish between tangible and intangible property, neither between personal and real property.²⁸² Different types of cultural property are inseparable from a larger whole. Lucy Bell argues: "you cannot arbitrarily separate the land from its resources or from the stories or songs and corresponding dances that arise from the land or its resources."²⁸³ Unlike the common law, the Kwakwaka'wakw legal tradition does not make divisions between types of property and it connects cultural property with values and spirituality (gifts from the Creator that are meant to be used). Cultural property is seen as part of a whole and bears little meaning when disembedded from context. Cultural property is connected to rights and responsibilities of a certain group or individual.²⁸⁴

Who Benefits From Copyright?

Another discrepancy between Canadian and Kwakwaka'wakw laws concerns the owner of the rights in the totem pole and the other elements embedded therein. Canadian intellectual property

²⁸¹ *Supra* note 12 at 5.

²⁸² *Supra* note 41 at 75.

²⁸³ *Ibid.* at 41-42.

²⁸⁴ *Ibid.*

rights, including copyright and trade-marks, place emphasis on individual ownership.²⁸⁵ For instance, a copyright is vested in an individual and identifiable author. Therefore, under Canadian law, the owner of the copyright in *Victory Through Honour* was Ellen Neel and her husband, not the *namima*. In the case of the trade-mark in the THUNDERBIRDS name, the owner, too, is an individual, this time a corporate one, UBC.

While it would be too simplistic and romantic to assert that all Kwakwaka'wakw cultural property is communally owned, the emphasis in Kwakwaka'wakw legal traditions in this specific case is on communal ownership and control of access to cultural property.²⁸⁶ Under Kwakwaka'wakw law, the thunderbird crest is communally owned by the *namima*.²⁸⁷ Intellectual property rights, such as the Neels' copyright or UBC's trade-mark, are assigned to the individual registrant.²⁸⁸ Though it is feasible that a group of people might come together to hold intellectual property rights through a corporate entity, there are no laws in Canada which recognize a *namima* as having legal personhood. Also, though several natural individuals, for example Ted and Ellen Neel, might jointly own rights in copyright, this can only happen when the joint owners are co-creators or have entered into an agreement providing for such joint ownership, which is not the case for Neel's *namima*. Only Neel and her husband, and not her *namima*, held an enforceable intellectual property right under Canadian law. This illustrates the tension between the communal values inherent in Kwakwaka'wakw legal traditions and the private property logics underlying Canadian intellectual property law, and how the latter may actually sanction practices which would otherwise be prohibited under the former.²⁸⁹

²⁸⁵ *Supra* note 217 at 41.

²⁸⁶ Jo Recht, "Hearing Indigenous Voices, Protecting Indigenous Knowledge" (2009) 16 *International Journal of Cultural Property* 233 at 241; *supra* note 216 at 239.

²⁸⁷ Lou-ann Neel confirms, "It is a shared right within the *namima*. There are currently no Canadian laws that protect or even acknowledge communal / shared rights such as this.": *supra* note 209, n° 21. In fact, communal ownership is a common feature of many Indigenous intellectual property regimes: Joseph Githaiga, "Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge" (1998) 5:2 *Murdoch University Electronic Journal of Law* at para 14.

²⁸⁸ Brascoupé & Endemann, *supra* note 228 at 15.

²⁸⁹ *Supra* note 180 at 554; Rosemary J. Coombe, "First Nations Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International

Temporal Scope of Copyright and Public Domain

A third distinction to be made between the rights extended by Canadian copyright laws and Kwakwaka'wakw legal traditions is that they do not have the same temporal scope. Whereas the rights to use a crest under Kwakwaka'wakw law may, in theory, benefit from a temporally unlimited protection and be passed down through generations, copyright is limited in time. Copyright and moral rights only subsist for a period of fifty years following the death of the artist. In this case, 2017 marks the fiftieth anniversary of Neel's death. Her heirs therefore no longer have recourse under Canadian intellectual property law for the unauthorized use, reproduction or even defacement or destruction of the totem pole.

Now that Neel's copyright has expired, the image of the totem pole is in the public domain. When it comes to cultural property, the Kwakwaka'wakw do not appear to have a concept equivalent to a public domain which may be accessed and used in an unregulated manner. Cultural property usually belongs to a family or group in perpetuity.²⁹⁰

The 1948 naming ceremony pushes back against this idea that the Thunderbirds name is in the public domain by reinscribing it within Kwakwaka'wakw legal traditions as the property of Neel's *namima*. As the discrepancies between intellectual property laws and Kwakwaka'wakw legal traditions described above illustrate, intellectual property laws can create a situation where Indigenous groups are excluded from the management of their cultural property according to their traditions, all while facilitating its appropriation by outsiders. This double move has been likened to the expropriation of Indigenous land by colonial powers. Greg Younging, a scholar at UBC from the Opaskwayak Cree Nation, delivered a paper to the WIPO in 2010 in which he stated, “[j]ust as Indigenous territories were declared as *Terra Nullius* in the colonization process, so too has [traditional knowledge] been treated as *Gnaritas Nullius* (Nobody's Knowledge) by the IPR system

Law” in Catherine Bell & Robert Patterson, eds, *Protection of First Nations' Cultural Heritage: Laws, Policy and Reform* (Vancouver, BC : University of British Columbia Press, 2009) 247 at 252 [Coombe, “First Nations Intangible Cultural Heritage Concerns”]; Brascoupé & Endemann, *supra* note 272 at 11.

²⁹⁰ William Wasden Jr. identifies the family as the unit that controls cultural property: *supra* note 41 at 39.

and consequently flowed into the public domain along with Western knowledge.”²⁹¹ The casting of cultural property as part of the public domain is not accidental; it is an historic position of the Canadian government. Its stated position on folklore is that it forms a part of the public domain and, as such, does not fall under copyright. During a meeting for the revision of the Berne Convention in 1967, the Canadian delegate strongly opposed the international consensus which was forming at the time in favour of extending copyright protection to folklore.²⁹²

Liberalism and Capitalism as Contrasted to Kwakwaka’wakw Worldviews

Ultimately, the conflict between Kwakwaka’wakw legal traditions and Canadian laws arises due to ontological differences between the philosophy underlying intellectual property law and Kwakwaka’wakw worldviews. The values and end goals of each are fundamentally different.

The law of copyright has liberal undercurrents and capitalist motivations.²⁹³ It is designed to incentivize innovation by rewarding individual artists and authors with a special bundle of exclusive economic rights to their original work, which they may sell or license for profit.²⁹⁴ These rights are limited in time; once an IPR expires, its subject matter enters the public domain and becomes available for public use, inspiring future generations of inventors and artists and reenergizing the cycle of creativity.²⁹⁵

²⁹¹ Cited in Andrea Bear Nicholas, “Who owns Indigenous cultural and intellectual property?” Policy Options (June 27, 2017), online: <<http://policyoptions.irpp.org/magazines/june-2017/who-owns-indigenous-cultural-and-intellectual-property/>>. See also Maracle, *supra* note 252.

²⁹² For more on the history of copyright in Canada, see Sara Bannerman, *The Struggle for Canadian Copyright: Imperialism to Internationalism, 1842-1971* (Vancouver: UBC Press, 2013).

²⁹³ For a critique of the liberal framework on which rely responses by international law to issues surrounding the appropriation of local knowledge, see Chidi Oguamanam, “Local Knowledge as Trapped Knowledge - Intellectual Property, Culture, Power and Politics” (2008) 11:1 The Journal of World Intellectual Property 29.

²⁹⁴ Mohsen al Attar, Nicole Aylwin & Rosemary J. Coombe, “Indigenous Cultural Heritage Rights in International Human Rights Law” in Catherine Bell & Robert Patterson, eds, *Protection of First Nations’ Cultural Heritage: Laws, Policy and Reform* (Vancouver, BC : University of British Columbia Press, 2009) 311 at 320; Brascoupe & Endemann, *supra* note 272 at 2, 25.

²⁹⁵ *Supra* note 216 at 236.

Though intellectual property rights do not arise from natural rights,²⁹⁶ it is often claimed that John Locke's labour theory of acquisition can justify intellectual property rights.²⁹⁷ Locke's theory is premised on the assumption that people in a state of nature are self-interested and aim to increase their material standing.²⁹⁸ An individual's labour, according to Locke, generates a *prima facie* claim to the fruits thereof.²⁹⁹ Property rights are justified as an individual's freedom depends on her ability to possess herself and the product of her actions.³⁰⁰ It is usually for this reason that private property is thought to trump all other rights.³⁰¹ So long as exclusive use does not harm other individuals, then the claim should be honoured.³⁰² The policy behind intellectual property law thus concerns itself with the balancing of the rights of private individuals to freedom and the right of other individuals to equal opportunities.³⁰³

This liberal theory of property ownership developed in the 18th century, when commodity capitalism and the free exchange of private property slowly began to crystallize into the dominant economic institution in Western society.³⁰⁴ Liberal theorists consequentially infer that society is best organized through private markets with minimal governmental interference.³⁰⁵ It is within this context that intellectual property rights emerged. They were originally conceived to secure the rights of authors in written works, so they may transfer them to publishing houses.³⁰⁶

²⁹⁶ Adam D. Moore, "A Lockean Theory of Intellectual Property Revisited" (2012) 49 San Diego L Rev 1069 at 1101.

²⁹⁷ See generally *ibid.*; see also Daniel Attas, "Lockean Justifications of Intellectual Property" in Axel Gosseries, Alain Marciano & Alain Strowel, eds, *Intellectual Property and Theories of Justice* (Hampshire, UK: Palgrave Macmillan, 2008) 29 at 52.

²⁹⁸ *Supra* note 296 at 1075.

²⁹⁹ *Ibid.* at 1071.

³⁰⁰ Gabriel Menard, "Copyright, Digital Sharing, and the Liberal Order: Sociolegal Constructions of Intellectual Property in the Era of Mass Digitization" (2016) 19:8 *Information, Communication & Society* 1061 at 1063 [Menard]; *supra* note 11 at 472.

³⁰¹ Menard, *ibid.* at 1063; *supra* note 11 at 472.

³⁰² *Supra* note 296 at 1072.

³⁰³ Menard, *supra* note 300 at 1062-3.

³⁰⁴ *Ibid.* at 1064; *supra* note 11 at 467.

³⁰⁵ Menard, *supra* note 300 at 1063.

³⁰⁶ *Ibid.* at 1064; *supra* note 11 at 471-4.

As contact between Europeans and the Kwakwaka'wakw did not occur until the late 18th century, the potlatch system developed independently from the influences of the Enlightenment, including from liberalism and capitalism. Looking at the readings of the potlatch of Marcel Mauss, Franz Boas and other anthropologists, one might be tempted to think that the same assumptions that liberalism makes regarding the competitiveness of human nature might apply.³⁰⁷ Literature by contemporary Wakashan and Coast Salish scholars is beginning to refute this point, however.³⁰⁸

Instead, generosity is put forth as a core value of the Kwakwaka'wakw potlatch.³⁰⁹ Though potlatching can have a competitive aspect to it, it is not a form of competition motivated by the pursuit of individual self-interest. Rather, the ceremony fosters reciprocal exchange and interdependence, with reciprocity being a core tenet.³¹⁰ In her doctoral thesis, Dara Kelly, who is Coast Salish, states,

In this theory of gifting, obligations to exchange are not necessarily driven by a deficit model of publicly showing more accumulated wealth in order to reveal the relative poverty of the next person, family or community. Instead, demonstration of surplus invites contribution, participation and an opportunity to build affective relations centred on shared resources.³¹¹

Central to Kelly's reading of the potlatch is the idea that the ceremony is a part of an "economy of affection" in which individuals are motivated to make personal investments in reciprocal relations as a means to achieving goals to enhance their lives.³¹² Those goals include future security in times of need when resources become scarce or when a person requires help due to the natural rhythms of life (birth, marriage, death, etc.).³¹³ Poverty is therefore alleviated through investment in

³⁰⁷ *Supra* note 13 at 84.

³⁰⁸ See for example *supra* note 13 and *supra* note 83.

³⁰⁹ *Supra* note 41 at 46.

³¹⁰ *Supra* note 13 at 83.

³¹¹ *Ibid.* at 85.

³¹² *Ibid.* at 86-88.

³¹³ *Ibid.* at 266.

reciprocal relations instead of through capital accumulation.³¹⁴ This is why naming, singing, dancing and gifting are so important in the potlatch: they serve to structure affinal ties of belonging which will reinforce people's willingness to care for each other in times of need.

Framing the questions surrounding *Victory Through Honour* as limited to the realm of intellectual property eclipses the sacred and affinal values which underpin the Kwakwaka'wakw economy and art forms inherent to the potlatch system. Though many Kwakwaka'wakw, including Ellen Neel, have made a living through art within a capitalist economy, they also continued to produce art to express relationships of belonging. Western intellectual property systems were borne of a capitalist understanding of humans as selfish and driven by profit. They fail to recognize other motivations for creativity. In the words of Vandana Shiva,

[intellectual property rights (or IPRs) will] inevitably lead to intellectual and cultural impoverishment by displacing other ways of knowing, other objectives for knowledge creation, and other modes of knowledge sharing . . . Central to the ideology of IPRs is the fallacy that people are creative only if they can make profits and guarantee them through IPR protection. It negates the creativity of those not spurred by the search for profits. It negates the creativity of traditional societies.³¹⁵

As a knowledge protection system, the Kwakwaka'wakw legal order does not typically seek to achieve the same profit goal as Canadian intellectual property laws. It is worth reiterating that the Kwakwaka'wakw conception of ownership is relational and its focus is on the development and preservation of group identity for the benefit of future generations.

³¹⁴ *Ibid.* at 99.

³¹⁵ Erin M. Genia, "The Landscape and Language of Indigenous Cultural Rights" (2012) 44 *Ariz. St. L.J.* 653 at 669-670, citing Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (New York: South End Press, 1997).

Conclusion

Though many people believe that intellectual property would be a natural instrument to turn to for the protection of Indigenous art from cultural appropriation, a closer analysis of copyright shows that it is ill-suited for such a purpose. Cultural appropriation is generally found to occur when it violates Indigenous legal principles concerning the use of cultural property. Those laws are very different from intellectual property laws. The scope of their protection differs from that of intellectual property in that they seek to protect ideas, whereas intellectual property laws seek to protect only the material expression of those ideas; rights which flow from property relations are often communally held whereas that is not the case in intellectual property law, which privileges individual ownership; and rights and responsibilities under indigenous laws surrounding cultural property are often perpetual, whereas intellectual property rights are limited in time, in the case of copyright to the lifetime of the author plus 50 years. These differences are due to diverging and at times conflicting worldviews of the societies from which each legal system has emerged. Whereas intellectual property systems emerged from liberal and capitalist ideologies which privilege individual freedom premised on ownership, Kwakwaka'wakw laws surrounding cultural property are influenced by an understanding of the individual as part of a larger community with and as in a reciprocal relationship with that community.

Chapter 4 – Weaving legal systems together

As hinted at in the previous chapters of this thesis, Ellen Neel was engaged in the work of creating intersocietal law. She strategically deployed legal processes from the Kwakwaka'wakw legal order (potlatching) and the Canadian one (copyrighting) to protect her family's cultural property, including *Victory Through Honour*, from appropriation. She did so all while engaging with actors within and across those legal orders, such as hereditary chiefs, university officials and the federal government.

In the first chapter of this thesis, it was explained that reconciliation must involve atonement for past harms, which can take the form of an apology. However, it is clear from the process set out by the TRC that reconciliation can no longer be understood as a simple economy of debt and forgiveness, in which a settler apology operates to forgive past harms.³¹⁶ Going forward, a new, more just relationship must be formed and maintained by Indigenous people and settlers. This new relationship should be informed by treaty relationships. This implies that not only must Indigenous peoples and settlers learn new ways of relating to each other, but they must also reimagine how their legal orders might interact, a reimagining that Neel was pioneering.

In this chapter, I will begin by canvassing the Supreme Court's conception of reconciliation, meaning the way in which Indigenous and Canadian laws interact to articulate section 35 Aboriginal rights. I will then look beyond section 35, exploring the theories proposed by Indigenous thinkers which can inform an understanding of how Kwakwaka'wakw laws and Canadian laws might further respectfully interact.

Jurisprudence on Reconciliation

Reconciliation is at the heart of Aboriginal rights and title jurisprudence. The first mention of the term “reconciliation” by the Supreme Court of Canada was in *R v. Van der Peet*. In his

³¹⁶ Brenna Bhandar, “Anxious Reconciliation(s): Unsettling Foundations and Spatializing History” (2004) 22 *Environment and Planning D: Society and Space* at 835-837.

discussion of the purpose of s. 35(1) of the Constitution Act, 1982, Lamer CJC (as he then was) found “what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.”³¹⁷ The fact that people had occupied the continent and governed themselves by their own laws prior to and following the assertion of sovereignty by the Crown has consequences for the way in which Indigenous peoples’ laws and the newcomers’ laws interact. According to the Supreme Court, when it comes to defining the substance of Aboriginal rights, Indigenous perspectives must be taken into account, provided that they are presented in terms cognizable under the common law. Justice Lamer later restated this, adding, “[t]rue reconciliation will, equally, place weight on each.”³¹⁸ The Canadian law of reconciliation is thereby conceptualized as the “process by which things are brought ‘to agreement, concord, or harmony; the fact of being made consistent or compatible.’”³¹⁹

This might initially read as a move to inclusiveness of Indigenous peoples’ perspectives in jurisprudence. The Court shows a willingness to even the playing field for parties whose relationships have been marked by an imbalance in power. It frames the problem as one of harmonization of two different and sometimes conflicting legal orders.

Despite these inclusive appearances, the Supreme Court’s conception of reconciliation reinforces and entrenches colonial hierarchies. There is a double move at play, here. First, the common law claims Indigenous laws as its own, assimilating them and distorting them in the process to fit its conception of what constitutes “law”. In the same move, courts reject Indigenous laws, refusing to recognize them as law or apply them when they do not fit the common law mould. This is because the harmonization which reconciliation offers runs like a one-way street: we do not ask ourselves whether common law concepts of rights or property are cognizable within an

³¹⁷ *R v Van der Peet*, [1996] 2 S.C.R. 672 at para 31.

³¹⁸ *Ibid.* at para 50.

³¹⁹ For a critique of this form of reconciliation, see *supra* note 33.

Indigenous law framework; it is Indigenous people who bear the heavy and expensive burden of translating and explaining themselves in a manner that does not exert undue pressure on what is to them a foreign justice system.³²⁰ Though the parties to these cases devote significant resources to present evidence of Indigenous legal traditions concerning land ownership, the markers of Aboriginal title are distinctly inspired by the common law's rules concerning ownership of real property.

Indigenous voices are silenced from Canadian law in a variety of manners. As Marianna Valverde rightly points out in her article on the epistemology of Canadian sovereignty, much discretion is left to judges in determining how Indigenous legal traditions inform a “reconciled” version of the common law and in weighing Indigenous legal traditions and oral history.³²¹ Judges are ill equipped to grapple with the comparative exercise this demands and therefore fall back on familiar notions of common law at the expense of unfamiliar Indigenous legal traditions. This is despite seeking guidance from cases which caution that, “[t]here is a tendency, at times operating unconsciously, to render that [native] title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.”³²²

The Court's failure to deal with the power imbalances between Indigenous peoples and the Canadian government becomes especially evident at the procedural level. In addition to shouldering the financial and evidentiary burden of proving Aboriginal title or rights, Indigenous peoples must contend with judicial bewilderment and dismissiveness of the oral histories they submit as evidence.

³²⁰ Antonia Mills, “Problems of Establishing Authority in Testifying on Behalf of the Witsuwit'en” (1996) 19 PoLAR 39 at 39.

³²¹ Mariana Valverde, “The Crown in a Multicultural Age: The Changing Epistemology of (Post)colonial Sovereignty (2012) 21(1) *Social & Legal Studies* 3 at 13-15.

³²² *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at 402-403.

The Court has repeatedly stated a preference for negotiated agreement between the parties, qualifying it as the most conducive way to achieving reconciliation. However, it never addresses the power imbalance between the parties once they are at the negotiating table. For example, in some cases, First Nations rely on loans made by the government to even afford their seat at said table. In these situations, it is difficult to see how the parties may be viewed on an equal footing when one has such disproportionate financial leverage. There exists anecdotal evidence that the Crown threatens to call these loans when dissatisfied with the trajectory these negotiations take.³²³

The Court's stated preference for a negotiated resolution is also undermined by its position on the consultation process, which is triggered when the Crown contemplates conduct that has a potential adverse impact on potential or established Aboriginal or treaty rights.³²⁴ Though the Crown must engage in a consultation process with Indigenous peoples whose rights or title may be adversely affected by its projected course of action if those effects are severe enough, it is under no obligation to strike an agreement with them, nor is it obliged to secure consent.

Moreover, regardless of the outcome of the consultation process, the Crown may infringe a treaty or Aboriginal right if it is justified in doing so. This opens the door to an extremely broad range of legislative objectives which may justify infringement. Such objectives might include virtually any activity that promotes the interests of an advanced capitalist settler society.³²⁵ Chief Justice Lamer himself stated in *R v. Delgamuukw* that

the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign

³²³ See Russ Diabo, "The Tsilhqot'in Decision and Canada's First Nations Termination Policies", *The New Socialist* (January 13, 2015), online: < <http://newsocialist.org/the-tsilhqot-in-decision-and-canada-s-first-nations-termination-policies/>>.

³²⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para 35.

³²⁵ *Supra* note 316 at 842; *supra* note 319 at 124.

populations to support those aims, are the kind of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.³²⁶

In his commentary on *R v. Gladstone*, Kent McNeil underscores the irony of this approach to reconciliation. It allows Aboriginal rights to be overridden “on broad policy grounds relating to economic and regional fairness, and even to support the economic interests of particular groups such as commercial fishers whose historic use of the fishery may well have been a violation of Aboriginal rights all along.”³²⁷ John Borrows argues that, as a result of this jurisprudence, Indigenous peoples are expected to accept colonization and development of their lands by other peoples and their own ultimate demise or absorption into the body politic as a *fait accompli*.³²⁸

The result of this approach is the subjugation of Indigenous people and their legal traditions to the common law. The colonial violence of this approach forces Indigenous legal principles into the mould of a predominately Western legal system, distorting them beyond recognition.³²⁹ Whereas the Court benignly positions reconciliation as a body of jurisprudence having as its goal the harmonization of Indigenous and Canadian legal orders, it in fact serves to assimilate Indigenous law into the common law framework and purge it of its difference where it does not conform to common law notions of rights and property. It does this the whole while ignoring power imbalances and reinforcing them.

The Supreme Court’s version of reconciliation depends on an understanding and implementation of Indigenous law within a common law framework. But, in the case of the Kwakwaka’wakw, the relational viewpoint which frames their legal order cannot truly be fully understood (and consequently reconciliation cannot be achieved) unless culturally specific legal

³²⁶ *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010 at para 165.

³²⁷ Kent McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?” (1997) 8 *Constitutional Forum* 33 at 39.

³²⁸ John Borrows, “Sovereignty’s Alchemy: an analysis of *Delgamuukw v. British Columbia*” (1999) 37(3) *Osgoode Hall Law Journal* 537 at 548 cited in *supra* note 111 at 833; TRC Report, *supra* note 21 at 240.

³²⁹ John Andrew Faris, “African Customary Law and Common Law in South Africa: Reconciling Contending Legal Systems” (2015) 10 *International Journal of African Renaissance Studies* 171 at 181.

principles, such as belonging, and processes, such as the potlatch, are taken into account. These are constitutive components of legal relationships in the Kwakwaka'wakw legal order. In his 1995 book, *Strange Multiplicity*, James Tully explains, social justice movements, including those advocating on behalf of Indigenous peoples, argue that

basic laws and institutions of modern societies and their authoritative traditions of interpretation, are unjust in so far as they thwart the forms of self-government appropriate to the recognition of cultural diversity. The sovereignty of the people is in some way denied and suppressed, rather than affirmed and expressed, in the existing constitutional forms, thereby rendering unfair the daily politics that the constitution enframes.³³⁰

Following this line of argument, discounting the importance of culturally specific legal principles and processes not familiar to the common law would be unjust.

In the interest of upholding Canadian law as just, legal principles and processes specific to an Indigenous group in question must be taken into account and their integrity upheld when reconciling Indigenous and Canadian legal orders. This understanding of reconciliation appears to be reflected in Neel's approach to reconciling legal orders. Instead of attempting to articulate her relationship with her family's cultural property solely through the Western legal discourse of intellectual property rights, Neel continued to articulate that relationship using the language of her own legal tradition in addition to the language prescribed by the Canadian state.

Reconciliation as Relational

Recent critiques levelled at the jurisprudence discussed above call for a more relational view of reconciliation. As explored in chapter 1 of this thesis, the TRC itself adopted such an approach during its proceedings.

³³⁰ *Supra* note 58 at 5.

The question remains: how should the relationship between Indigenous and Canadian legal orders be understood in order to move reconciliation forward? I agree with the Supreme Court that reconciliation involves a form of intersocietal law.³³¹ However, instead of holding up formal equality between the two as a panacea, I would espouse a more equitable approach, one that is attentive to context and seeks to truly understand Indigenous law on its own terms. Here, metaphors are helpful to illustrate the interaction between Indigenous law and Canadian law. In this section, I will draw on the imagery contained in the *Reconciliation Pole* carved by Haida master carver and hereditary chief James Hart (*Idansuu*) (see fig. 2). The pole commemorates the legacy of the residential schools and was raised on the UBC campus in front of the Faculty of Forestry on April 1, 2017.

³³¹ *Supra* note 317 at 42 citing Brian Slattery, "The Legal Basis of Aboriginal Title", in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992), at pp. 120-21; John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 155 at 156.



Fig. 2 – *Reconciliation Pole* detail (photo taken by Vanessa Udy)

Treaty Relationships

One of the possibilities for future relations, envisioned in the TRC Report and in the *Reconciliation Pole*, is the reaffirmation of the original treaties concluded by settlers and Indigenous peoples.³³² In the case of the *Reconciliation Pole*, this is illustrated by two boats. The metaphor is a familiar one in Haudenosaunee territory, where I am from. It is also depicted in Gus

³³² TRC Report, *supra* note 21 at 249.

Wen Tah (also known as Ka'swènh:tha), the Two Row Wampum Treaty, entered into between the Dutch and the Iroquois confederacy in 1613, acceded to by the British in 1664 and, eventually, Canada.³³³ The wampum belt is a sacred, spiritual trust for present and future generations to uphold.³³⁴ The Gus Wen Tah is comprised of three rows of white wampum beads and two rows of purple beads. The white beads represent purity and land. The purple beads signify peace, friendship and respect. Like the carvings on the *Reconciliation Pole*, they also symbolize two vessels, an Iroquois birchbark canoe and a European ship.³³⁵ The two travel the river of life together, never touching, never interfering in the other's affairs. Each allows the other to move forward and grow.

Mohawk artist and activist Katsi'tsákwas Ellen Gabriel proposes Gus Wen Tah as “an instrument of reconciliation for contemporary times if openness, honesty, respect, and genuine concern for present and future generations is a foundational priority.”³³⁶ Drawing on the teachings of the *Reconciliation Pole* and of Gus Wen Tah, relationships between settlers and Indigenous peoples must be inspired by a return to the partnerships originally envisioned in Canada's treaties with Indigenous peoples. The fact that this metaphor appears in a Haida memorial pole could be taken to mean that the same is true even in the case of relationships between Canadian and Indigenous peoples (such as the Haida or the Kwakwaka'wakw) where no treaties are in place: we must embrace Indigenous peoples' right to self-determination and self-governance.³³⁷

In the case of Gus Wen Tah, the bond between treaty peoples is strengthened by the Silver Covenant Chain, a dispute resolution clause of sorts which provides for time and space for practices of reconciliation and relationship-building to take place. The covenant demands that treaty peoples meet once a year to address any hurt committed by the other or deterioration in the relationship.

³³³ See generally *supra* note 39.

³³⁴ *Ibid.* at 102.

³³⁵ *Ibid.* at 102-103.

³³⁶ *Ibid.* at 101.

³³⁷ TRC Report, *supra* note 21 at 241, 249.

The parties are expected to discuss in good faith in accordance with Kaianera'kó:wa, the Great Law of Peace, the pillars of which are strength, respect and love.³³⁸

The Chilkat Blanket



Fig. 3 – Chilkat blanket, weaver unknown, circa late 1800s (photo taken by Vanessa Udy)

When it comes to reconciling the Kwakwaka'wakw legal order and Canadian intellectual property laws, the Chilkat blanket provides a useful metaphor to illustrate how we may envision their interaction differently than one of assimilation into the common law. The Chilkat blanket is another symbol which crests the *Reconciliation Pole*: right below the two ships, a chief and his

³³⁸ *Supra* note 39 at 102.

family are huddled, wrapped in such a blanket (see Figure 2). In theorizing the relationship between traditional Haida laws and Canadian ones, Terri-Lynn Williams-Davidson proposes we look to the Chilkat blanket to understand the reconciliation of legal orders. A Chilkat blanket is a type of woven robe bearing intricate formline designs depicting crests and oral histories (see Figure 3). Such blankets are a part of the traditions of several Northwest Coast Indigenous peoples,³³⁹ including certain members of the Kwakwaka'wakw.³⁴⁰ As a metaphor for the interaction of legal orders, the blanket could be taken to indicate the passage of a person through one world to another. According to traditional Kwakwaka'wakw protocol, Chilkat blankets were closely associated with the winter dance ceremonials, marking the transition from the profane to the sacred³⁴¹ and the abidance of the Kwakwaka'wakw by a distinct code of conduct. Bearing the wearer's crests, Chilkat blankets are also emblems of belonging in accordance with Kwakwaka'wakw legal traditions concerning such cultural property.³⁴²

Williams-Davidson explains that these robes are made from three panels braided together at the joiners. The braiding is done so that, on the patterned side, the joiner appears seamless. The joiner is almost invisible but for the nubby protrusions on the reverse side of the blanket. Williams-Davidson concludes:

“[t]hese borders are a tangible representation of weaving together paths of co-existence. Rather than two parallel lines that do not touch and which might have worked for early treaties in other areas of North America, this metaphor demonstrates that it is possible for two legal traditions to co-exist in a manner that permits each nation's laws, traditions and languages to continue intact, but yet for two nations to interact sufficiently

³³⁹ Susan C. Douglass, *Kwakiutl Chilkat Blankets* (MA thesis, University of Victoria, Department of Anthropology and Sociology, 1973) [unpublished] at 51.

³⁴⁰ Lucy Bell explains how the right to weave and wear the Chilkat blanket was passed down to her through her ancestor, Anislaga (Mary Ebbets), a Tlingit woman: *supra* note 12 at 25.

³⁴¹ *Supra* note 339 at 50, 53-54.

³⁴² *Ibid.* at 6.

for co-existence. Our challenge is to find the ways for these two legal traditions to interlock to create lasting strength for respectful co-existence.”³⁴³

Williams-Davidson critiques interpretations of the Gus Wen Tah that conceive of the two legal systems to be hermetically sealed off from each other. However, a reading of the Gus Wen Tah which turns attention to the white beads on the belt, and not just the purple ones symbolizing the boats, could support a conception of the respectful interaction of laws.

Gus Wen Tah includes “All Our Relations”: people, the land, plants and animals, who are represented by the white wampum beads.³⁴⁴ It recognizes that relationships are not just between humans, but also encompass our relations with the natural world.³⁴⁵ From an Indigenous perspective, reconciliation must not only involve the restoration of relationships between people. It must also restore relationships linking all of Creation. Settler colonialism ignores the wellbeing of land, water and our environment as evidenced by our destructive extractive and agricultural practices and our single-minded obsession with development.³⁴⁶ Reconciliation will be for naught if we continue to destroy the earth on which we rely for survival. Reconciliation therefore requires that settlers take a more active stance on environmental justice and rekindle respectful relationships with the land.

Borrows’ reading of Gus Wen Tah supports this broader, relational understanding of the belt. After sharing that the three white rows of the belt represent sharing and interdependence,³⁴⁷ he states,

These white rows, referred to as the bed of the agreement, stand for peace, friendship and respect. When these principles are read together with those depicted in the purple rows, it

³⁴³ Terri-Lynn (gid7ahl-Gudsllaay) Williams-Davidson, “Weaving Together our Future: The Interaction of Haida Laws to achieve respectful co-existence” (paper delivered at a CLE BC conference, Indigenous Legal Orders and the Common Law in Vancouver, November 16, 2012) at 6.2.9.

³⁴⁴ *Supra* note 39 at 106-107.

³⁴⁵ TRC Report, *supra* note 21 at 18.

³⁴⁶ Eve Tuck & Marcia McKenzie, “Relational Validity and the ‘Where’ of Inquiry: Place and Land in Qualitative Research” (2015) 21:7 *Qualitative Inquiry* 633 at 635.

³⁴⁷ *Supra* note 25 at 149.

becomes clear that ideas of citizenship must also be rooted in notions of mutuality and interconnectedness. The ecology of contemporary politics teaches us that the rivers on which we sail our ships of state share the same waters.³⁴⁸

Comparably, the interaction of legal orders depicted in *Gus Wen Tah* is one that unifies and connects instead of creating a hierarchy of laws. The three white rows could therefore be read as making space for the gifts of both legal traditions, allowing them to apply at the same time and occupy the same space.

Respect – *Maya'xala*

If we imagine the Canadian and Kwakwaka'wakw legal orders as two separate panels on a Chilkat robe, then the interface between the two is the braid at the joiner. The result of a weaving project is as much the product of the materials chosen as it is of the skill and care brought to the project by the weaver. Kwakwaka'wakw scholar Lucy Bell explains that, in weaving, it is important to keep “good energy and thoughts, to keep the bad outside of the weaving environment”, as such will be reflected in the end product.³⁴⁹ The metaphorical strands of the Chilkat blanket, representative of the Canadian and Kwakwaka'wakw legal orders, must also be brought together in a good way. I suggest that the way to bring such good thoughts and energy to the project of reconciling legal orders is by centering the value of respect, in the sense of deference and abidance by the laws of each Canada and the Kwakwaka'wakw and productive engagement with difference.³⁵⁰

There exists a burgeoning literature calling for respect in the interaction between the common law and Indigenous legal orders. Far from being superficial appeals to justice, these calls for respect demand engagement with core principles that underlie both the common law and the

³⁴⁸ *Ibid.*

³⁴⁹ *Supra* note 12 at 26.

³⁵⁰ *Supra* note 214 at 468; see also Collins Dictionary, “Respect”, online: <<https://www.collinsdictionary.com/dictionary/english/respect>>.

Kwakwaka'wakw legal order. Respect is a value that is as endemic to the common law as it is to certain Indigenous legal orders, including the Kwakwaka'wakw legal order.

Through a review of constitutional law cases on gender, religion and Aboriginal rights cases, Lindsay Borrows, an Anishinaabe scholar, shows that Canadian judges are at times called upon to exercise humility, which includes respect. In each case, judges are asked to step outside their comfort zone and consider the facts and the law from the point of view of a woman, a devoutly religious person or an Indigenous person. "Humility[,] she explains, "is not about viewing oneself as being above or below another. It is instead seeing all life as equally deserving of respect."³⁵¹ Accordingly, the value of respect should be a value underpinning Canada's Aboriginal law.

According to the Honourable Lance Finch, former Chief Justice of the British Columbia Court of Appeal, respect involves making space for both Canadian and Indigenous legal orders within Canada's legal landscape.³⁵² Lindsay Borrows points out that space can be taken up, just as it can be given away.³⁵³ In a legally plural landscape, the common law must show respect for Indigenous legal traditions by making space for their existence and applicability. Extending this logic to reconciliation, I would argue that, in practising the value of respect, lawyers and judges should make space for Indigenous law and consider it on its own terms, instead of attempting to modify it to fit into a common law framework.

Finch C.J. also argued that Canada's legal landscape includes an Indigenous legal landscape in which settlers circulate just as much as Indigenous peoples. Reconciliation is therefore also about understanding settler's place within Indigenous legal orders.³⁵⁴ It is about creating an Indigenous citizenship which follows the principles set out in the *Reconciliation Pole* and the

³⁵¹ Lindsay Borrows, "*Dabaadendiziwin: Practices of Humility in a Multi-Juridical Legal Landscape*" (2016) 33 Windsor Y B Access Just 149-165 at 157.

³⁵² The Honourable Lance Finch, Chief Justice of British Columbia, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper presented at the Indigenous Legal Orders Continuing Legal Education conference, Vancouver, B.C., November 15-16, 2012) at 2.1.2

³⁵³ *Supra* note 351 at 157.

³⁵⁴ *Supra* note 352 at 2.1.9.

associated symbols of the Gus Wen Tah and the Chilkat blanket. One of the features of such a kind of citizenship is that it is inclusive of non-Indigenous people.³⁵⁵ This would allow the laws of Indigenous legal traditions to apply to outsiders.

Respect is also a central value in many Indigenous legal traditions, including among potlatching peoples.³⁵⁶ In the Kwak'wala language, *maya'xala*, or respect, is not a term that is reserved to interactions among humans; it refers to a value that guides Kwakwaka'wakw behaviour in their relationships with cultural property and the natural world. Loosely translated, *maya'xala* means respect for all living beings, human, animals or plants, for things and for oneself.³⁵⁷ The Kwakwaka'wakw view cultural property as something inherently worthy of respect – family treasures are sometimes referred to as *mayaxa*, which in this context means precious and valuable property that demands respect.³⁵⁸ The ways in which laws interact must be informed by Kwakwaka'wakw citizenship principles which include other elements of creation, even creations of an artist, as kin.

Sui Generis Legislation

Canada is reaching a turning point in its relationship with Indigenous legal orders. The Federal government has committed to implementing the *United Nations Declaration on the Rights of Indigenous Peoples*³⁵⁹, which provides at Article 5 that, “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions,

³⁵⁵ *Supra* note 25 at 149.

³⁵⁶ Lawyer Susana Quail identifies respect as a core value communicated through Haida stories and proposes it as a governing norm for the interface between Haida law and the common law: Susanna Quail, “Yah’Guudang: The Principle of Respect in the Haida Legal Tradition” (2014) 47 UBC L Rev 673. For an example of the value of respect in Anishinaabe legal traditions, see *supra* note 351.

³⁵⁷ Irene Isaac, *Understanding Traditional Ecological Knowledge Through Kwakwaka'wakw Story* (MA thesis, University of Victoria Department of Curriculum and Instruction, 2000) [unpublished] at 4; Donna Cranmer, *Kwakwaka'wakw Dzaxwan: The Development and Evaluation of a Cross-cultural Oolichan Fisheries Curriculum* (Masters of Education thesis, University of Victoria Department of Curriculum and Instruction, 2009) [unpublished].

³⁵⁸ *Supra* note 12 at 41.

³⁵⁹ *United Nations Declaration on the Rights of Indigenous Peoples* (2007), online: <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.” Article 31 provides that, “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards...” Also of relevance is Article 34, according to which, “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.” In addition to international pressure to recognize the relevance and applicability of Indigenous legal orders, there is also pressure from within the country for such recognition. The TRC has called upon the Federal government to recognize and implement “Aboriginal justice systems”.³⁶⁰ Further, there is judicial precedent for the recognition of the applicability of Indigenous laws within Canada.³⁶¹ In particular, courts now must look to Indigenous laws to inform their decisions on Aboriginal rights and title under s. 35 of the Constitution.³⁶² John Borrows has persuasively argued that this line of jurisprudence has set the stage for the reception of Indigenous laws into the common law.³⁶³

Given their divergences, the question remains how Canadian and Kwakwaka'wakw laws surrounding cultural property will interact once the latter is recognized. Returning to the Chilkat robe metaphor, let us recall that one of the strands of the joinder braid is Canadian law. How can Canadian law be respectfully braided with Kwakwaka'wakw laws surrounding cultural property? One respectful weaving technique could be through positive enactment by the state of legislation

³⁶⁰ See Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2016), online: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf> call to action #42.

³⁶¹ *Connolly v Woolrich* (1867), 17 R.J.R.Q. 75 (Que. Ct. Q.B.).

³⁶² *R v Van der Peet*, *supra* note 317; *Delgamuukw v British Columbia*, *supra* note 326.

³⁶³ See *supra* note 25.

that mirrors or recognizes Kwakwaka'wakw laws.³⁶⁴ “*Sui generis*”, a Latin term meaning “forming a kind by itself; unique, literally of its own particular kind”,³⁶⁵ is the term commonly used to describe regimes designed to protect traditional knowledge and traditional cultural expressions outside of conventional intellectual property law systems.³⁶⁶ Most international instruments that call for the protection of traditional knowledge and traditional cultural expressions contemplate the adoption of *sui generis* laws by signatory states.³⁶⁷

Though laws can be reconciled and harmonized through the adoption of legislation which provides for the recognition of Indigenous law by the Canadian state and the enforcement of such laws within Canadian courts, there exist several disadvantages to this approach. One difficulty in integrating Indigenous law into binding state law is Anthony Taubman’s “paradox to globalise diversity”, which begs the question: “How can an international instrument consider the countless customs and customary law of indigenous peoples with regard to their cultural heritage?”³⁶⁸ Given the diversity of Indigenous legal traditions within Canada, the question retains its relevance in the Canadian context. National legislation must resist the urge to adopt a general, pan-Indigenous solution to the problem. *Sui generis* legislation must be carefully tailored to address the concerns of a specific people in a given place. The solutions I suggest in this paper bear that in mind and are

³⁶⁴ See *supra* note 343 and John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 45 [J. Borrows, *Freedom and Indigenous Constitutionalism*].

³⁶⁵ *Funk and Wagnall's Standard College Dictionary* (Toronto: Fitzhenry and Whiteside, 1978) at 1339, cited in *supra* note 25 at 9.

³⁶⁶ *Supra* note 216 at 209. It is one of the main strategies considered in the literature on the topic of protecting traditional knowledge and traditional cultural expressions. See for example, *supra* note 287; Robert G. Howell and Roch Ripley “The Interconnection of Intellectual Property and Cultural Property (Traditional Knowledge)” in James A.R. Nafziger, ed, *Cultural Heritage Law* (Cheltenham, UK: Edward Elgar Publishing, 2012) 223 at 236-238; Coombe, “First Nations Intangible Cultural Heritage Concerns”, *supra* note 30 at 262-271.

³⁶⁷ For example, Article 12(1) of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* (2010) states that, in the context of adopting national laws, states must consider “‘indigenous and local communities’ customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources”. Canada is not a party to the Nagoya Protocol, but is a party to the related Convention on Biological Diversity.

³⁶⁸ Karolina Kuprecht, *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond* (Lucerne, Switzerland: Springer, 2013) at 165.

made with the intention to further solutions to legal problems identified by the Kwakwaka'wakw by drawing on their own legal traditions. Though these solutions might be transposable to culturally similar communities, they may not be relevant to communities whose legal traditions do not include potlatching.

Second, incorporating Kwakwaka'wakw laws into national laws risks the misinterpretation of customs by settler legislators and courts.³⁶⁹ It is therefore important that the legislative drafting process and the creation of new institutions with decision-making power engage local knowledge keepers, including Elders, in a meaningful way. Disputes in the Kwakwaka'wakw big house, where the potlatch and other gatherings take place, are resolved by *nogad* (knowledgeable people, usually elders) who have knowledge of *nuyem* (Kwakwaka'wakw stories).³⁷⁰ These people are identifiable by the community and should be consulted in coming to a solution.³⁷¹

Third, there is the risk of flattening Kwakwaka'wakw law by nailing down norms, beliefs, and societal orders that ought to be able to smoothly develop and evolve within their traditional and lived contexts.³⁷² To reduce Kwakwaka'wakw law to writing strips it of dynamism and fluidity by confining it to a singular context. Separated from the land, law becomes voided of its spatial relationships that people on the land maintain amongst themselves. Leanne Simpson similarly argues that when traditional knowledge is reduced to writing, its interpretation becomes locked “in a cognitive box delineated by the structure of a language that evolved to communicate the worldview of the colonizers”.³⁷³ This could perhaps be avoided if interpretation and enforcement is left in the hands of the Kwakwaka'wakw. Also, should Kwakwaka'wakw laws be recognized by

³⁶⁹ *Supra* note 368 at 168.

³⁷⁰ *Supra* note 12 at 104-105.

³⁷¹ *Supra* note 25 at 13.

³⁷² *Supra* note 12 at 104-105.

³⁷³ Leanne Simpson, “Anticolonial Strategies for the Recovery and Maintenance of Indigenous Knowledge” (2004) 28:3 *American Indian Quarterly* 373 at 380.

Canadian legislation, it would be important not to codify them too heavily so as to leave the community with flexibility in interpreting and applying their own legal traditions.³⁷⁴

On one hand, there is resistance within the Kwakwaka'wakw community to *sui generis* laws. Such laws are solutions imposed from outside Indigenous legal orders and risk having little resonance within structures of Indigenous governance. In discussing laws surrounding Kwakwaka'wakw cultural property, Lucy Bell reflects on calls for *sui generis* laws to protect cultural property and expresses her hesitance with respect to Canadian laws as a solution to unauthorized appropriation. She feels that Kwakwaka'wakw law is best suited to address infringement.³⁷⁵ None of the Elders she interviewed thought state law could offer protection to cultural property.³⁷⁶ Bell's uncle Peter Knox reasoned that outsiders don't understand where cultural property comes from, how it functions in a Kwakwaka'wakw person's everyday life, so a *sui generis* law developed by those same outsiders can't be of help.³⁷⁷ Likewise, participants in Catherine Bell's study preferred to look to traditional values, beliefs and principles taught by elders to find the tools to protect cultural property.³⁷⁸

On the other hand, not all Kwakwaka'wakw are opposed to the idea of a *sui generis* law to protect cultural property. Employees and board members of the U'mista Cultural Centre called for the reinforcement of existing laws to protect material culture.³⁷⁹ A participant in Catherine Bell's study, Elder Ethel Alfred, said, "we want laws in place by the government so that people will not disturb our things that are sacred to our people."³⁸⁰ A common sentiment among other participants was that outside laws need to respect Kwakwaka'wakw concepts of belonging and ways of life.

³⁷⁴ *Supra* note 25 at 15.

³⁷⁵ *Ibid.* at 2-3, 10.

³⁷⁶ *Ibid.* at 22.

³⁷⁷ *Ibid.* at 86.

³⁷⁸ *Supra* note 41 at 80.

³⁷⁹ *Ibid.* at 81.

³⁸⁰ *Ibid.* at 82.

Examples of *sui generis* laws from other jurisdictions envisage the creation of new institutions based on Western ones, including clearing houses and public registries.³⁸¹ It is questionable whether this is necessary or desirable, when the already existing institution of the potlatch has been deployed with success as a response to these issues within the community. Perhaps legislation should focus instead on recognizing the potlatch system's jurisdiction over outsiders. Certain members of the community, including Lou-ann Neel, feel the potlatch system is an appropriate forum for outsiders wanting to acquire permission to use Kwakwaka'wakw cultural property.³⁸²

Parallel Recognition Spaces

Such legislation could be inspired by Anthropologist Brian Noble's suggestion for what he calls "parallel recognition spaces". These involve a strong translegal reciprocity between Canadian and Indigenous legal systems, one which works to resolve conflict without the need for one system to trump the other. "In this concept of paralleling," he explains, "each and every Western legal action, definition, or differentiation is set against the alternative culturally based rights or legal practice of a First Nation".³⁸³ Disputes would be adjudicated simultaneously in Canadian courts and in their Indigenous counterparts, each formally recognizing and respecting the authority of the other's laws.³⁸⁴

Parallel recognition spaces would be consistent with how schools and businesses are beginning to deal with the issue. Best practices, though not considered legally binding, counsel persons wishing to use Indigenous art for commercial, civic or educational purposes to consult and

³⁸¹ For an excellent survey of such new institutions, see *supra* note 216.

³⁸² Lou-ann Neel & Dianne Biin, "By Design: The Protection of Intellectual and Creative Rights" (Conference delivered at the UBCIC Protection Knowledge-Traditional Resources Rights in the New Millennium Conference, February 2000) at 5.

³⁸³ *Supra* note 216 at 479.

³⁸⁴ *Ibid.* at 481.

form relationships with local Indigenous groups.³⁸⁵ Presumably, consultation involving the incorporation of linear form art in a logo, for example, would lead Northwest Coast Indigenous groups to explore their legal traditions surrounding use of such art. When Indigenous groups communicate those laws to outsiders, especially outsiders who then agree to abide by those rules, all parties might be said to be engaging in the building of the types of reciprocal relationships in which Indigenous laws unfold. It is an oft-stated and well accepted precept that law is constituted and maintained through continued engagement.³⁸⁶

This approach resists the tendency to treat conflicts between Indigenous and common law points of view as a contest where one must emerge paramount.³⁸⁷ Though it is unclear how extreme divergences between or lack of equivalent concepts within Canadian and Indigenous laws would be resolved, this should not necessarily be viewed as a fatal flaw to this approach. A multiplicity of opinion with respect to a problem can foster democratic debate and spur new and innovative solutions.³⁸⁸

Though this thesis has been concerned with the differences between Canadian law and Kwakwaka'wakw law, they should not be overstated. Sometimes Indigenous perspectives will differ from those of the common law, but John Borrows observes that there are more points in common than differences between the legal systems and that we can learn to live with the differences. In discussing the *sui generis* nature of Aboriginal rights, Borrows states, “The *sui generis* doctrine expresses the confidence that there are sufficient similarities between the groups to enable them to live with their differences. Under this doctrine, points of agreement can be

³⁸⁵ Intellectual Property Issues in Cultural Heritage Project, *Think Before You appropriate: Things to Know and Questions to Ask in Order to Avoid Misappropriating Indigenous Cultural Heritage* (Vancouver: Simon Fraser University, 2015); Angela R. Riley & Kristen A. Carpenter, “Owning Red: A Theory of Indian (Cultural) Appropriation (2016) 94 Tex L Rev 859 at 926-7.

³⁸⁶ *Supra* note 186; Johnson & Groft, *supra* note 191 at 118; *supra* note 187 at 740.

³⁸⁷ *Supra* note 25 at 4.

³⁸⁸ See Robert Rubinson, “The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse” (1996) 101:1 Dickinson L Rev 3; Robert M. Cover, “The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation” (1981) 22 William & Mary Law Review 639.

highlighted, and issues of difference can be preserved to facilitate more productive and peaceful relations.”³⁸⁹

An appropriate *sui generis* law would be crafted together with the Kwakwaka’wakw, bearing these criticisms in mind, all while recognizing Kwakwaka’wakw laws and their implementation through the institution of the potlatch. This is not to say that there can be no intellectual property rights in cultural property. Rather, in addition to intellectual property rights, cultural property can and should be subject to other legal rules, ones which derive from a Kwakwaka’wakw understanding of owning as belonging and which promote public education concerning Kwakwaka’wakw cultural property.

Conclusion

In summary, in the wake of the potlatch ban, there is not only a need to revive Kwakwaka’wakw legal traditions, but to determine how such laws must relate to Canadian laws. A legitimate solution to the question of how the two legal orders will relate going forward will ground itself in the tradition of the original treaty relationships between Indigenous peoples and newcomers. Such treaty relationships, commemorated for example in Gus Wen Tah, must respect the integrity and independence of each legal order. However, they must also take into account the ways in which such laws will interact and interlace, like the braided joiners in a Chilkat blanket. The notion of parallel recognition spaces reflects well this approach to treaties, as it involves a robust and respectful engagement with both legal traditions, without privileging one over the other. It is this kind of relationship that must be taken into account if the Canadian government decides to adopt *sui generis* laws regarding the protection of Kwakwaka’wakw cultural property, and such laws must be carefully crafted in consultation with Kwakwaka’wakw *nogad*.

³⁸⁹ *Supra* note 25 at 10.

Conclusion

It is a chilly but clear December day on Cormorant Island. I was supposed to be on Swanson Island to show solidarity with the Musgamagw Dzawada'enuxw, a group of Kwakwaka'wakw protesting open net fish farms in their traditional territory. My research on reconciliation and Kwakwaka'wakw law had instilled in me a desire to form right relationships and to uphold my end of reciprocal relations with the people from whom I've learned so much over the course of a year. But instead I am stranded in Alert Bay, watching a team of volunteers attempt to salvage what they can from the boat that was supposed to be me ride to Swanson, the *Sea Pride*. One of the two on-board bilge pumps must have failed, and the old fishing boat is now submerged in about six feet of water in the marina, noticeably keeling over to the starboard side.

I watch from a dock in the marina as the volunteers try to straighten the boat to get any holes in the hull above water level. A long, thick rope runs from the stern, securing it to a large cedar log on the beach; another runs from the bow to a pickup truck. The volunteers are attempting to right the *Sea Pride* by tugging at it with the truck. I watch as they do so unsuccessfully, causing the boat to lurch from starboard to port and back again. One of the volunteers, April, is jokingly thinking up new names for the ship: *Sea Shame*; *Sunken Pride*; *Quocksinker*. Jason, whose care the boat was in when it sank, seems unamused.

Jason, a settler who grew up in the area, is concerned. The *Sea Pride* belongs to a hereditary chief. The whole debacle is attracting the attention of the community, and villagers come and go throughout the day, stopping to lend a hand, offer advice, or sing a prayer. His reputation is at stake. What's more, though he is not technically at fault, he is claiming responsibility. He expresses a desire to make things right with the *Sea Pride*'s owner. It seems to me that Jason is abiding by a code of conduct informed by Kwakwaka'wakw legal traditions.

From my vantage point on the dock, to the south, I can see the glistening snowy peaks of the Vancouver Island Ranges across the placid waters of the bay. To the north, beyond the spectacle

that is the *Sea Pride*, I see the pebble beach, a couple of totem poles and the U'mista Cultural Centre. U'mista is built like a big house, and on its white façade is a thunderbird, wings outstretched, gripping a killer whale in its claws. The Centre houses many cultural treasures, including a totem pole carved by Charlie James (Yakuglas), Ellen Neel's grandfather, telling the very same story recounted in *Victory Through Honour*. Today, some, but not all, of the artifacts that were confiscated during the potlatch ban have been returned to two museums built to house them, U'mista in Alert Bay and the Nuyumbalees Cultural Centre (formerly the Kwagiulth Museum) at Cape Mudge.³⁹⁰ The Royal Museum of BC now has a policy allowing for the loan of ceremonial gear remaining in its possession for the purposes of potlatching.³⁹¹ The Kwakwaka'wakw are tirelessly negotiating the return of their cultural property, which they view as taken hostage. The word *u'mista* hints at this perception: it is the Kwak'wala word for the return of people taken captive during raids.³⁹²

The first chapter questions the conventional historical narrative of Canada's relationship to Indigenous peoples by bearing witness to alternative historical narratives offered by Kwakwaka'wakw elders and Canadian academics. These narratives restory Canadian history by positioning the potlatch ban as part of a broader genocidal project, thus subverting the old conception of Canada as a benevolent peacemaker or a paternalistic authority which made decisions in the best interests of Indigenous peoples, who were wards of the state. Through the *Indian Act*, colonial authorities criminalized and suppressed the Kwakwaka'wakw traditional governance and legal system throughout the late 19th century and the first half of the 20th century. The Kwakwaka'wakw characterize the impact of this experience as negative and intergenerational.

The work done by U'mista shows that reconciliation is underway. But the process is by no means over yet. As shown in the first chapter of this thesis, the potlatch ban was a historic wrong

³⁹⁰ *Supra* note 50 at 46.

³⁹¹ *Supra* note 47 at 240.

³⁹² U'Mista Cultural Society, "The Meaning of 'U'mista'", online: <<http://archive.umista.ca/>>.

that aimed to eradicate cultural difference by forcing the Kwakwaka'wakw and other Indigenous peoples who potlatch to model their behaviour on that of white settler society. One of the consequences of the ban is the precarity of the Kwakwaka'wakw legal system, a consequence which is compounded today through acts of cultural appropriation. Acts of reconciliation with the Kwakwaka'wakw must include supporting the restoring of the Kwakwaka'wakw legal system. The Canadian government has yet to apologize the potlatch ban, but even such an apology would only constitute a first step of many for reconciliation to occur. And with the concept of reconciliation as relational, involving renewed, respectful relations between settlers and Indigenous peoples, relationships which must be tended to and nurtured in an ongoing fashion, one wonders if one can really speak of an end to the process. It is better to view it as a permanent process, one that involves both parties pushing the boundaries of reciprocity together, forever.³⁹³

Ellen Neel's gifting of the *Victory Through Honour* pole was such a gesture of reconciliation. During the 1948 totem dedication ceremony, all parties agreed to renewed relations and assumed reciprocal obligations towards each other. The second chapter gave a relational account of the *Victory Through Honour* pole, exploring how Ellen Neel and UBC exercised their agency to form those reciprocal obligations. Ellen Neel exercised agency in calling upon the traditions of the Kwakwaka'wakw legal order to bestow the rights to the Thunderbirds name upon UBC. In accepting Neel's gifts, UBC exercised agency by agreeing to take steps to make Indigenous students feel welcome. The witnesses in attendance also might exercise agency, fulfilling their obligations under Kwakwaka'wakw law, which are several. Witnesses are to share the stories of the ceremony. They must also hold UBC accountable for its obligations towards Indigenous students and hold outsiders accountable for their use of Indigenous cultural property.

To bolster her own ability to hold outsiders accountable for the use of *Victory Through Honour*, Ellen Neel also made use of the Canadian legal order by copyrighting the pole. However,

³⁹³ See *supra* note 13 at 85.

as the third chapter of this thesis has shown, copyright has limited use for the protection of cultural property against uses which would be contrary under Kwakwaka'wakw law. Intellectual property laws alone are not up to the task of countering cultural appropriation, a form of misuse of cultural property. They do not account for the non-commercial purposes to which Kwakwaka'wakw cultural property is intended. These divergences between the two legal orders are owed to the distinct and at times conflicting philosophies in which each is grounded. The tensions between Western worldviews, including liberalism's investment in individual property ownership and capitalism's imperatives of wealth accumulation and efficient expenditures, and the wholistic, relational and reciprocal worldview of the Kwakwaka'wakw are laid bare in this chapter. This isn't to say, however, that the two legal orders cannot coexist in harmony.

In the fourth chapter, I argue that reconciliation requires not only the resurgence of the Kwakwaka'wakw legal order, but that we determine how it relates to the Canadian legal order and *vice versa*. Ellen Neel was involved in this type of intersocietal legal work when she used legal processes from both legal orders, being potlatching from the Kwakwaka'wakw legal order and copyright laws from the Canadian legal order, to strengthen her position in relation to *Victory Through Honour*. Renewed relationships between the two legal traditions should model themselves after the original treaty relationships between First Nations and newcomers. The *Reconciliation Pole*, the Gus Wen Tah wampum belt and the Chilkat blanket provide useful metaphors to understand what those treaty relationships may look like. Each legal order must respect the integrity and independence of the other, all while showing respect for the other when both legal systems meet and interweave. According to this approach, neither legal order takes precedence over the other. Instead, they are engaged with in parallel recognition spaces, areas of strong translegal reciprocity which make space for legal relations to unfold under each system. If Canada is to adopt any kind of law protecting Indigenous traditional knowledge and expressions of culture in connection with its commitments under international legal instruments, such legislation should respect the institutions and rules already established by the Kwakwaka'wakw in the field. As the

crew unsinking the *Sea Pride* shows, some settlers are willing and have already begun to engage in such parallel spaces of recognition. Jason understands his place in the world as a settler subject to Canadian laws as well as a person beholden to certain reciprocal obligations which have been formed through his belonging in the Alert Bay community and his relationship to others.

The *Sea Pride* remains the *Sunken Pride* for the duration of my stay in Alert Bay. Like intellectual property laws are to the problem of cultural appropriation, the vessel is ill suited for the purpose it is needed. On the last day of my visit, a couple of activists from the Dzawada'enuxw First Nation offer to take me out to visit the Swanson fish farm occupation on their boat. Gladly, I climb onboard. As we leave the harbour, I look back at the U'Mista Cultural Centre disappearing in the distance and think to myself how true the teachings of the Gus Wen Tah are: we navigate these shared waters together better in two vessels than in one.

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