

Thickening Totems and Thinning Imperialism

by

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LL.B, University of Victoria, 2007

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Supervisory Committee

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Abstract

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This thesis analyzes the relationship between the legal traditions of indigenous peoples and the Canadian State. I posit that the current relationship is aptly characterized as imperial. The imperial dynamics of this relationship perpetuate imbalances of power between the two traditions. This situation of power imbalance produces two effects that are of concern here. First, it enframes the development of indigenous legal traditions within the liberal state, domesticating indigenous norms to accord with liberal norms. Second, it disencumbers indigenous peoples ancestral territories from indigenous authority that would inhibit Canadian and global market penetration. I rely on theoretical literature in the fields of legal pluralism and postcolonialism to develop this argument. A deep conception of legal pluralism allows us, as researchers, to think of state law as developed by a single legal tradition that co-exists with indigenous legal traditions. Postcolonial theory aids us in analyzing the particular manner in which power works in situations of colonialism and imperialism to privilege certain legal orders over others. I suggest that indigenous life is not fully enclosed by imperialism, and that as indigenous peoples we should engage those non-imperial sites and practices deeply to thicken our capacity to live freely. I suggest indigenous practices of totemism represent one such site.

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Acknowledgments

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Klecko, klecko.

Dedication

For my father Keets'kee'supp. May your thunder live on in this story.

Chapter One: Introduction

for some time now, my community has been creating totems. Certain aspects of this totemic tradition have been celebrated by the Canadian mainstream in recent years. This tradition was far reaching in our communities, as we totemized many objects, including blankets, shawls and curtains. The most famous, of course, is the totem pole which has become an icon of pacific northwest culture, indigenous and otherwise. The oldest of these poles still in existence can be seen in the museums, which have salvaged them from their home territories and preserved them in lifeless curatorial conditions behind glass where they can be observed by all Canadians for many generations to come. We see other contemporary totems through cities in British Columbia, standing within major hotels, parks, and outside the provincial parliament buildings. These totems have been appropriated and stand now displaying what Canada claims to be its pre-colonial roots. Like most acts of appropriation, the processes of drawing particular products from an other's world and into one's own perceptual field tends to produce radical alterations in meaning. From within this skewed interpretive context, these totems loose much of their constitutive power. They are hailed, or interpolated into a new conceptual field where they are understood primarily as fine works of art, rather than powerful and constitutive authorities. My goal primary goal with this thesis is to have us, as indigenous people, turn to our totems and engage them in a deeper manner, so as to thicken their constitutive significance for our people. In this thesis, this ameliorative aspect is admittedly under theorized because my focus here are primarily diagnostic. My analysis assesses the relationship between state law and indigenous law. However, I feel that it is important to gesture toward a way out of relations that I diagnose as profoundly imperial.

The concept of imperialism refers to those structural and discursive mechanisms that enable one entity to impose its views and agenda upon and perhaps exploit an other forcefully through the formal or informal exertions of power. My belief is that imperial forces have worked to enframe the authority of our totemic traditions within a story of western constitutionalism. Rather than engaging our own totems as a source of normatively and imaginative inspiration as we move forward into the future, we are told that we must look to western constitutionalism for answers. My ideas in this thesis draw on legal pluralist theory to deconstructing the comprehensive space occupied by western constitutionalism by developing an understanding of legal authority as dispersed between multiple communities, in an overlapping manner. Legal pluralists have ardently kept legal scholars aware of the fact that ‘law’ is not the exclusive domain of the state. The notion that legislative authority is vested solely in the state is an ideological supposition, and some legal pluralists encourage us to destabilize this privilege by conceiving of non-state legal orders as autonomous, or at least semi-autonomous jurisgenerative communities.

Postcolonial theorists remind us that relations of domination and control can be maintained between autonomous agents through informal or formal means of interaction. Thus, we may conceive of indigenous legal traditions as separate from the legal order of the state, but we must also acknowledge that the two orders interact with each other. I turn to a body of postcolonial literature to argue that the two legal orders interact in a field of power that allows state law to control the development of the indigenous legal

order and thus continue to exploit indigenous peoples and homelands. To demonstrate this point, I assess my community's interaction with the state through treaty negotiations. Treaty was presented to my community as means of recognizing our independent jurisdiction and freeing us from the internally colonial relations of the Indian Act. My argument is that the freedom that comes to us through treaty is a highly constrained freedom that ensures imperial relations are maintained. I come from the Toquaht tribe, whose ancestral homelands are on the west-coast of what is now called Vancouver Island, in the heart of Nuuchahnulth territory. We belong to the Maa-nulth Treaty group who, in 2007, approved the Maa-nulth Treaty Agreement.

The modest aim of this first chapter is to introduce the central theme of the thesis and provide an outline for the chapters that follow. The second chapter addresses my approaches and begins by recognizing that there is a critique built into my thesis and moves to address some of the relational questions that arise when one develops a critique. My point here is that research projects like this one are relational in nature and it is thus important to think about how the relational ethics of my project itself corresponds to the relations that my project engages. The third chapter engages legal pluralist literature as means of theorizing about indigenous normative orders as legal orders. One of the primary issues confronting the pluralist relates to the understanding of how law emerges or is created by non-state legal communities. This is the matter that I take up in this chapter, particularly as it relates to two issues. The first is whether it is more sensible (or perhaps correct) to treat law as something created through discrete, identifiable processes of deliberation, or as emergent through either non-rational processes or processes that are

unknowable to the researcher. For reasons that will later become apparent, I argue that law is more constructively conceived as the product of deliberative practice. This will lead me to my second more important concern, which is in understanding how imperial forces influence those jurisgenerating deliberative processes so as to ensure that non-state legal orders do not significantly disrupt the inequities of power and resource distribution entrenched in the current ordering of social life.

Chapter four defines with greater precision how I understand imperialism to operate. Here I turn to a body of post-colonial literature that identifies and problematizes the manner in which forces outside of a sovereign or self-determining community exert influence over processes internal to that community. To demonstrate a contemporary manifestation of imperialism, in chapter five, I discuss an agreement negotiated under the BC Treaty Commission—the *Maa-nulth Final Agreement*.¹ A critique of this Agreement is woven through the entirety of this thesis, as is the language of hegemony and imperialism. Chapters four and five bring clarity to the concept of imperialism, as I understand it, and substantiate my claim that the *MFA* is imperial with reference to the Agreement's clauses. Chapter five also assesses the ways that imperialism can be identified in the language used to deliver the treaty. In particular, I look at how the ideas

¹ *Maa-nulth Final Agreement Act, 2007*. To avoid repetition, I will refer the Maa-nulth Final Agreement also as “the Agreement”, “the MFA” or “the Treaty”. This Agreement was ratified by the Maa-nulth Nations on October 20th, 2007. It was given legal effect in BC with Bill 45, *Maa-nulth First Nations Final Agreement Act*, 3^d Sess., 38th leg., British Columbia, 2007 (assented to 29 November 2007). Canada approved the Agreement with Bill C-41, *An Act to give effect to the Maanulth First Nations Final Agreement and to make consequential amendments to other Acts*, 2^d sess., 40th Parl., 2009, (as passed by the House of Commons 26 January 2009). The Maa-nulth is one of three Treaty Agreements signed in British Columbia in recent history. The first is the *Nisga'a Final Agreement*, finalised in 1997, which is available online at: <http://www.gov.bc.ca/arr/firstnation/nisgaa/default.html>. The second is the Tsawwassen Final Agreement, which was ratified by the Tsawwassen people on July 25, 2007. The Tsawwassen Final Agreement is available online at: http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/final/tfn_fa.pdf.

of self-determination and liberation have been engaged to justify an agreement that commits the five consenting indigenous tribes to a legal order that is harmonized with the liberal norms of the Canadian state and to relinquish their claim to more than 95 percent of their ancestral territory.

The contradictions between the liberation that the Maa-nulth people believed they approved with their votes and the “unfreedoms” inherent to the Agreement itself are stark. I argue that the enthused response to the MFA results from the process through which the Maa-nulth people have come to embody a disoriented subjective state. Colonialism and imperial processes have had a severely disruptive and reorienting affect on our subjective consciousness as individuals, and thus changed the manner in which we conceive of ourselves and what it means to live proper and well. I argue that this disorientation is made possible through imperial dynamics and processes that are identifiable through a careful analysis. In this case, I argue that the Maa-nulth people’s historical subjection to colonial forces has left them disoriented to the extent that it has become difficult to identify the constraining character of the freedom elaborated in the *Maa-nulth Final Agreement*. For those Maa-nulth citizens that recognize the *Agreement’s* constraining character this disorientation makes it difficult to imagine as possible a freedom beyond that which is presented as possible by the imperial powers.

In the concluding chapter (six) I gesture to one possible method of averting the imperial trappings of contemporary comprehensive rights negotiation, or its close kin, Aboriginal rights litigation. I suggest that if we desire to be free from imperial dominion, we should

direct our individual and collective practices toward thickening of Indigenous ways of living lawfully. One such practice is the totem making and the ritualistic and deliberative practices that surround them. While I have direct experiences within this complex nuanced tradition, my understanding of it is admittedly thin and disoriented. I raise the concept of totemism in the concluding chapter as means of gesturing toward a possible way for us, as a community, to build our selves out of the problems of imperialism that are the thesis's primary target. Thus, my intention is not to provide a detailed scholarly analysis of Maa-nulth totemic traditions. Such an analysis would certainly be of great value to the thesis at hand, and would allow me to use the term in a more thick, empirical manner. However, my use of the concept of totemism is not well grounded, and is used with elasticity and deployed for its theoretical and rhetorical purchase on the problems identified in the body of the thesis. The concept also helps me to conclude my thoughts on a more optimistic tone and avoid the unhelpful slide into nihilism that my thinking sometimes leads me to. I give totemism emphasis in my thesis title, and in the introduction and conclusion because it is the drop-off point of this thesis. It represents the kind of practice that I hope the more substantive augments of my thesis will turn us to.

My argument in this concluding chapter is that, through sustained practiced engagement with our totemic traditions, the totems will thicken to the point where they begin to decentre and displace the imposed order from the comprehensive place it now occupies. My hope is that it would come to be seen and engaged as one legal order among many. This concluding chapter *suggests* that our totemic traditions provide a more appropriate and improved orienting model that will keep us grounded in our histories and disclose

some unique and hopefully improved responses to the relational problems of inequality, dependency and exploitation that currently stratify the existing pluralities of our world.

In this chapter, I also suggest that western tradition has a peculiar mode of totemism which western legal and political scholars refer to as “constitutionalism”. This is a kind of totemism that is removed from the citizens, created and refined by the social technicians of modern society. In contrast, the Maa-nulth totem is created by a people with one ear turned back to our histories, listening to the creatures who created our world, and the other forward, toward the future lived by the proverbial seventh generation. As we listen, we allow both stories to guide our hand, embedding themselves in totems that that will stand before the community. These totems will stand as a storied reflection of the normative ideals that bring us stability to stand where we are and the confidence to walk into the future. For every new relationship disclosed or shift in authority, new totems are carved and placed beside older decaying totems that are returning themselves to the earth and leaving space for newer ones. The creation of the totem is a communal event involving many people to fell the tree and to do the work needed to prepare the tree for transport. Once the totem is carved, the people would be called to witness the totem rise, and engage in ceremonies that enjoin their agency with that of the totem’s story. The advantage of this kind of orienting practice is that it is organically and consistently engaging the community. It keeps the community involved in the processes of totemic creation as each generation is charged with the responsibility of creating new totems that often reference the old totems but also account for changing circumstances, present contexts and future inspiration.

At the outset, before getting into the substantive chapters, I will outline some thoughts I have on creating academic critique as a developing indigenous thinker.

Chapter two: Critique as Relational Practice

My intention in the paragraphs that follow is to set out what will be the tone of the critique that will animate the rest of this thesis. At its most basic my argument in this chapter is that it is important to pay attention to the development of our criticisms with an understanding that writing is a relational exercise. Appreciating the relational dynamic of the scholarly enterprise, in my view, gives rise to important questions about the particular mode of critique engaged and highlights the critical importance of scholarly reflexivity. I believe this is true for any scholarly work but my discussion will focus specifically on critique developed within the indigenous community.²

Three problems of Critique:

The failure to adequately consider this relational issue of critique has led to three problems.³ The first problem is that Indigenous thinkers simply do not offer critiques of their communities, feeling that doing so would disrespect the work and effort of those that have been working on the subject of the critique. This I will call the ‘calm waters complex.’ The second problem arises when the critic comes out bearing their teeth, frustrated and ready to tear into anyone standing in their way. This I will call the ‘callous warrior complex’; it is only slightly more effective than the calm waters approach because critique is easily dismissed as resultant of the attitude and maturity of the critic

² While my discussion of critique is located within a specific indigenous community, I do believe that many of the insights have a broader application. The problems I identify, and the principles I rely on for resolution are intended to be more general. If these general principles are correct or persuasive, then their application extends to the academy, or any of the communities we belong to.

³ There are likely more but for my purposes three contrasting points will serve to make the point that there are trappings that catch our critiques.

rather than of a meaningful analysis of substance. Its utility comes in providing those few frustrated individuals with a cathartic moment and a rallying point to gather those who hold similar views. We see examples of this in many of today's youth warrior movements. The third problem arises when an individual offers what may be a sharply honed critique but does so in accordance with the established institutional structures and conventions which often have the effect of neutralizing its transformative potential. Here the critique is domesticated as it passes through institutionalized mediums, translating it into a language that often resonates more with existing institutional vocabularies and imperatives than the original concerns of the critic. This final problem I will call the "convention complex." It is effective only for those individuals who view assimilative integration into the state institutional structures as an inevitable and/or worthy response to the indigenous struggle. Examples of it can be seen in Canada's comprehensive⁴ or specific⁵ claims processes.

Each of these 'complexes' grows out of or is exacerbated by an imperial mode of relationship.⁶ The calm waters complex likely arises out of an unhealthy aversion to conflict, stemming from the social disruption of the residential school experience and the

⁴ An example of a comprehensive claims process in Canada is the British Columbia Treaty Commission. As the word "comprehensive" suggests, these claims attempt to resolve the entirety of aboriginal rights in a single agreement. For details of Canada's comprehensive claims policy, see http://www.ainc-inac.gc.ca/pr/info/trty_e.html.

⁵ Specific claims are brought by First Nations against Canada for its breach of Treaty promises, statutory or fiduciary responsibilities. For discussion of Canada's specific claims policy, see <http://pm.gc.ca/eng/media.asp?id=1696>.

⁶ Initially, I wrote only that these complexes were rooted in a colonial mode of relationship. However, I cannot say for certain that they would not have been present and created problems within a pre or un-colonized Indigenous community. I do believe that colonization is implicated in these complexes, but I want to steer away from a debilitating victim discourse. These complexes are blinding to our communities, and regardless of their genesis, their implications need to be thought through.

many social ills that plague our communities today.⁷ The callous warrior arises out of the same situation but falls to the other extreme by responding with violent and unreflective forcefulness. The convention complex reflects the situation of someone who tries to walk the line between these two extremes and offers critique, but allows the normative and institutional apparatuses imposed by the settler society to circumscribe and thus neutralize its impact.

The aim of this chapter is to work toward liberating the critique of my thesis from these three problems by self-consciously grounding it in the values and principles embedded in Nuu-chah-nulth teachings. My hope is also to emphasize the importance for scholars to be self-consciously critical of their modes of critique; being mindful not to simply absorb the academic or aesthetic conventions of their discipline. As researchers, our scholarly interventions are an active component of a relationship with those who read our work and those for whom our work speaks. My belief is that all writing is embedded in a web of relationships and it is therefore important to pause and give thought to how the scholar's relational ethic meshes with the broader context of the writer's project. One important aspect of this analysis is an assessment of how that relational ethic fits with the broader context of what the writer is trying to achieve with their work. Here the concern is whether the relational ethic embedded in their scholarly work is consistent with the ethical structure of the project the scholar is advocating. This is an means/ends

⁷ See L. little bear, "Jagged Worldviews colliding" in Marie Batiste ed., *Heeding Indigenous Voice and Vision* (Vancouver, UBC Press 2000).

consistency concern that I believe is especially relevant to scholars whose project entails a vision of improved social relations.⁸

Background

The inspiration for my thesis grows out of my thinking on the process of treaty making in British Columbia and my community's involvement with it. I come from the Toquaht tribe, who, along with four other Nuu-chah-nulth tribes on the west coast of what is now known as Vancouver Island, compose the Maa-nulth Treaty Group.⁹ The treaty process, and the Maa-nulth Final Agreement my community signed, are the topic of chapter five. I raise this here simply to make the point that the subject of my research project relates to a community with whom I am intimately connected. My people have been seeking treaty since we began to feel settler encroachments on our lands and authority. Treaty, for us, was initially understood as being about securing self-determination and securing enough land to maintain our way of life.¹⁰ With the exception of the Douglas Treaties signed between 1850 and 1854, British Columbia denied that Indigenous people had any rights to land.¹¹ Not surprisingly, our tribes never subscribed to this view and continued to press Canada and its settlers for formal and informal recognition and respect for our land and governance rights through treaty agreement. My tribe has been involved in active treaty

⁸ I am feeling myself falling into a theoretical hole here. Clearly more work is needed to substantiate this 'researcher—relational ethic' thesis, but I need to move on. My hope here is simply to provoke imagination on this issue. For an excellent book on developing Indigenous methodology, see L. T. Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Place: Zed, 1999).

⁹ For a general overview of developments in Maa-nulth Treaty negotiations, see: www.maanulth.ca.

¹⁰ Paul Tennant, *Aboriginal People and Politics: the British Columbia Land Question*, (UBC press, 1990), at page 60.

¹¹ Governor James Douglas signed 14 Agreements with Indigenous Tribes on Vancouver Island, where land was given up "entirely and forever" often in exchange for cash, blankets and usufructory rights. These Agreements have been interpreted as Treaties by the Courts. See, for example, *R v. White and Bob* (1964), 50 D.L.R. (2nd) 613, 52 W.W.R 193 (B.C.C.A.). The text of these treaties can be viewed online at: <http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/trtydg/trtydg-eng.asp>.

negotiation since 1994, actually for much longer than that but that was the first time since 1875 that the British Columbia government responded seriously to Indigenous rights and land claims.¹² The province, along with the federal government and Indigenous elites in the province produced a six-stage approach to treaty making designed to resolve all questions of Indian rights in a single comprehensive document with *certainty* and *finality*.¹³ There are sixty tribes in BC that are currently negotiating treaty, but the process has been very slow. As of the date that I write this, only two treaties have been approved by all parties involved.¹⁴

One of those tribes is the Toquaht, who are Maa-Nulth, who on October 21st, 2007 voted to accept the *Maa-nulth Final Agreement*¹⁵ with 77.5% majority.¹⁶ Three weeks later, after approving the *Maa-nulth Final Agreement Act*, the BC liberal government hosted a celebration. In front of a crowd of roughly 200 Maa-nulth delegates all gathered in the legislature's rotunda, Gordon Campbell and the Maa-nulth chiefs signed the Agreement. "This is a triumph for generations of Maa-nulth leaders and people,"¹⁷ said Mr. Campbell

¹² It was in 1875 that James Douglas signed his last treaty in British Columbia. Note that the BC Treaty commission emerged in the wake of a developing body of common law (including the seminal *Calder v. British Columbia (Attorney General)* [1973] S.C.R. 313, [1973] 4 W.W.R. 1 which acknowledged that Aboriginal Land Title existed prior to colonization) that recognized Aboriginal title and rights. The commission was also formed in response to growing unrest in indigenous communities as indicated by road blocks in the late 1980s and early 1990s as well as the Mohawk uprising at Oka in 1990.

¹³ The Certainty and Finality provisions are found in §1.11.1 of *Maa-Nulth Final Agreement*, *supra* note 1.

¹⁴ The *Maa-nulth Final Agreement* and the *Tsawwassen Final Agreement*, *ibid*.

¹⁵ *Ibid*.

¹⁶ "Treaty Passes With Flying Colours" *Bulletin for Membership Maa-nulth Treaty Society*, (December 7, 2007), at 1. Note that this is only the Toquaht voting results. The overall result for all 5 Maa-nulth tribes was 68.3 %. A summarisation of results is available online at: http://www.maanulth.ca/downloads/media_Voting_Summary_Oct_21_final.pdf.

¹⁷ Jeff Rud "First Treaty with Island First Nation goes to Legislature" *Times Colonist* (November 21, 2007). I attended this event in person, but the direct quotations are drawn from the media's published account.

as he presented the Maa-nulth chiefs with a traditional Maa-nulth canoe—Campbell had even given the canoe a Nuu-chah-nulth name, which he translated to the crowd as “the one who calms down the water.”¹⁸ The atmosphere was electric, as the Maa-nulth delegates whistled and screamed, pumping their hands in the air. Campbell went on, “This is about self-determination, to set out the future you want and then working together to build it. And I want to say congratulations to all of you for the strength of your vision when you voted to ratify this treaty.”¹⁹ The crowd grew more ecstatic. The chiefs of the five Maa-nulth tribes shook Mr. Campbell’s hand. The eldest among the chiefs, Bert Mack—the Toquaht Tyee Hawiith, band council chief, and treaty negotiator—stepped forward and the crowd quieted to listen. He presented the Premier with a paddle and said, “You are now the captain of our canoe.”²⁰

I share this story because it captures well what I believe is going on at the treaty table, and in my view highlights the central problems that animate my thesis. The symbolism here suggests that this treaty is not one of liberation from settler domination, but rather a continuation of settler control of our peoples and territories. The Maa-nulth Treaty Agreement cements British Columbia’s control of our Nation, giving it full and clear title of 95% of our lands while appearing to give land and rights to our people. BC is giving us a single canoe, which they appropriated from us and in return we promise to allow Gordon Campbell and the BC government to control its direction. I understand this Agreement to be deplorable as a full and final resolution of our claims against Canada

¹⁸ D. Steel, “Journey Begins to Opportunity and Excitement,” *Ha-Shilth-Sa*, (Dec 6, 2007) 18.

¹⁹ J. Rud, *supra* note 17.

²⁰ *Ibid.*

and the province. To me, this point is clear and uninteresting—it has been argued convincingly by Stewart Philip, Arthur Manuel, Taiaiake Alfred and others.²¹ What interests me is how this Agreement can be viewed as cause for celebration within my community. Framed in this manner, my analysis and critique will focus squarely on the indigenous community—on my respected elders and family.

Academic Critique as Self-Practice

The catalyst for my thinking on this issue of critique is my co-supervisor, James Tully.²²

I met with Jim Tully and another friend Brad Bryan²³ in September 2007, and I recall not being able to follow much of that conversation, but one of Jim's pithy statements stood out—a better life is actual. Knowing Jim, this statement is likely rooted in a nuanced reading of late Foucault, Gandhi and other political philosophers combined with his own brilliance, but my dumbed-down reading is fairly commonsense and falls into two separate insights. The first relates to a conception of the self as inherently agentic, embodying power regardless of how deeply subjected the self is within hegemonic power

²¹ Each of these writers have spoken out clearly against the BC Treaty Commission. Nesconalith Chif, and prominent Aboriginal Rights Activist Arthur Manuel spoke at the Hupachasath Meeting hall in September, 2007 condemning the BC Treaty Commission, and Stewart Philip, grand chief of the Union of British Columbia Indian Chiefs has remarked to the media on several occasions that modern treaty agreements are extinguishing Aboriginal Rights and title in exchange for business certainty (for example refer to the various comments on the UBCIC website at: <http://www.ubcic.bc.ca/> or BC Treaty Opponents Rally Outside Legislature," CBC, (October 15, 2007), online: < <http://www.cbc.ca/canada/british-columbia/story/2007/10/15/bc-legislaturetreaty.html>>. Taiaiake Alfred has been an outspoken critic of the process since, and many of his contentions are written in T. Alfred, *Peace, power, righteousness : an indigenous manifesto* (Don Mills: Oxford University Press, 1999) especially 119-128. More recently, he refers to these contemporary treaties as "false" treaties designed to facilitate assimilation. He contrasts these to the old peace and friendship treaties that were, he argues, designed to promote peaceful coexistence. See *Was*ase: Indigenous Pathways of Action and Freedom* (Toronto: Broadview, 2005) at 77.

²² I will be informally referring to my co-supervisor in this chapter as Jim. I once referred to him as "professor", and he answered by calling me "student". His response helped me to understand the stiff formality associated such titles for those individuals whose humility does not allow them to revel in honorific titles.

²³ Brad Bryan teaches in the Faculty of Political Science at the University of Victoria.

relations.²⁴ The second, growing out of the first, relates to the exercise of that power and is captured in Gandhi's famous statement 'We need to be the change you wish to see in the world'.

The first category identifies the power to act, and the second provides an ethical imperative to use that power in a way that is consistent with the particular values that characterize the vision of justice one's work advances. Foucault warns that if we do not act on this agency and consciously find ways to work our ethics into the self, institutionalized dynamics of governmentality will step in and do the work of subjectification.²⁵ That is to say, if we do not do the work of subjective introspection, whereby we are consciously and continually renovating the particularities of our ethical composition through deliberate practices, that work will be done subconsciously at the initiative of society's various modes of ideological dissemination which will shape the contours of one's ethical constitution and deeper sensibilities in a manner that is consistent with or does not disturb existing asymmetrical power relations.

My intention in using this chapter is to set a tone of critique that harmonizes with my desubjectifying (to use a Foucauldian term) or decolonizing (to use a post-colonial term) self.²⁶ As a Toquaht individual, my technique of desubjectification or decolonization is to regenerate the principles and values embedded in my culture and live in accordance with

²⁴ M. Foucault, *The Hermeneutics of the Subject*, trans by Frederic Gros. (New York: Palgrave Macmillan, 2005) at 292.

²⁵ *Ibid.*

²⁶ I use the term desubjectifying as opposed to desubjectified intentionally to indicate that I view this as a procedural concept, and not an arrival point. The processes of subjectification will be ever present because there is no escape from subjectifying power that is entrenched by ideological means.

them. Taiaiake Alfred is one of the most articulate proponents of regeneration, and he notes that being ‘Indigenous’ is not actually at all about ‘being’ but rather ‘doing’. Ghandi captures this active conception of being by attaching it to the verb change—“be the change.” Alfred notes that static nouns or labels such as ‘Indigenous’ or ‘aboriginal’ have little significance from an action oriented, verb based Indigenous mode of thought. Alfred explains:

Living as Onkwehonwe [as an indigenous person] means much more than applying a label to ourselves and saying that we are indigenous to the land. It means looking at the personal and political choices we make every day and applying an indigenous logic to those daily acts of creation. It means knowing and respecting Kanien’kehaka, Innu, and Wet’suwet’en teachings and thinking and behaving in a way that is consistent with the values passed down to us by our ancestors.²⁷

I draw from Alfred’s quote above, and work in general that regeneration is a two-step process that first involves coming to know our teachings, and second, acting and thinking in accordance with them. I will use this two-step framework to structure the remainder of this chapter.

I have written critically on topics directly relating to the problem identified above and as of yet, I have not given any of my work to those involved in the leadership of my tribe. I have been encouraged by some professors and friends to develop this work for publication but I have feared doing so. I feared that by sharing my insights and opinions on our tribes approach to treaty I would be creating division and conflict within my tribe. I know of people who had the courage to criticize verbally the direction of my tribe at band meetings, but their arguments have been quickly dismissed as uninformed and disrespectful. Those times that I have spoken up, I have faced the same treatment—

²⁷ T. Alfred, *Wasa*se supra* note 21 at 33 .

dismissed as an arrogant troublemaker, influenced by the ideas of people whose experience is too remote to be of any relevance to our situation.

Thus, for the most part, I have been subject to the ‘calm waters complex’. I have been highly critical of decision making in my tribe, but my interventions have been either non-existent or cautiously quiet. There are a few exceptions to this where I have gravitated to the other pole, falling more into the callous warrior complex where I blasted our leaders with a ‘false consciousness,’ ‘self-interest,’ or ‘spineless’ critique. I told them that they could not hear what I was saying because they had been duped by government policy, that they were selfishly using the Tribe to secure personal gains, and/or that they had submitted disgracefully because they lacked the courage to forge a path to freedom. It was not until pondering the topic of this paper that I have seriously considered my own responsibility in this situation. My responsibility lay not in whether or not to render critique, but rather in how I deliver it—in the methods employed to convey my opinions.

The first thing I realize in thinking about my particular mode of critique is that its roots are in an academic context. I have learned how to develop arguments that work reasonably well when writing a paper or presenting to a class of university students. Perhaps one day this skill will be useful in policy circles or when speaking with those who engage our community from the outside, but it has had little purchase within. It therefore appears that my critiques have been formulated for and trapped in an academic context, where they have limited transformative capacity. Thus, in important ways, I have been subject to the convention complex, allowing my critique to take shape within the conventions of the academy. I have not worked consciously to develop methods of

analysis and argumentation that work for my community, or that grow out of an Indigenous understanding of the world. That work I begin below, where I will discuss two totemic principles of the Nuu-chah-nulth worldview and then move on to analyze their relevance to my approach to critique. I use the word “totemic” to connote a certain flexibility and organicism to what I would otherwise be tempted to call foundational, paradigmatic, or constitutive principles.

Heshook-ish Tsalwalk

One totemic principle that figures prominently in Nuu-chah-nulth stories is *heshook-hish tsalwalk*.²⁸ It is a relational concept that refers to the interconnectedness of the universe. For the Nuu-chah-nulth, it is in establishing the appropriate balance that we find personal/communal security, freedom and happiness. *Tsalwalk* teaches us that when the delicate balance in relationship is disturbed, the effects reverberate outward producing dysfunction and pain for many, regardless of culpability. Suffering would continue until the balance was re-established. Richard Atleo describes this as “the theory of *tsalwalk*.”

He states:

The notion that all things are one stems directly from assumptions found in Nuu-chah-nulth origin stories that predate the conscious historical notion of civilization and scientific progress. This theory provides another interpretation about the nature of existence based on Nuu-chah-nulth world view.²⁹

In thinking about *tsalwalk*, it quickly becomes apparent that the false consciousness critique may not be the right way to think of the problem. If the foundational orienting principle of *tsalwalk* is balance, it is the maintenance of balance that is the general life

²⁸ Social Foundations have a stabilizing function, but must also be understood as dynamic and shift over time. My intent here is not to essentialize a particular paradigmatic principle within a Nuu-chah-nulth world view. Rather, my aim is to identify general orienting principles at the base of Nuu-chah-nulth social order and philosophy. This theme of change will be addressed with more detail in Chapter Four’s section on Indigenous Agency and in the concluding chapter as a concept built into Maa-nulth totemic practices.

²⁹ E.R. Atleo, *Tsalwalk : a Nuu-chah-nulth worldview* (Vancouver ; Toronto: UBC Press, 2004) at p. xi.

project. The object of social life is not, as the enlightened moderns would tell us, about a linear discovery of truths or the progress. Our stories teach us that we've all been duped, to one extent or another. This is the human condition—Raven or Mink often show us that the perpetual 'dupedness' of our existence makes for much of the playfulness we experience in life.³⁰ Our teachings tend to bring clarity to those relational principles and ethics that bring disruption or balance to the world.

Understanding that the world is full of tricks, in my view, shows the modern's faith in progressive developments of humanity to be a particularly disruptive trick that has thrown the entire planet off kilter. As moderns, we tend to assess relationships on the basis of who has it right or wrong. We look to identify those who are moving forward, and those who are moving backwards. We are led not to balance our relations with others, but to learn from the more enlightened and teach those moving backward. This mode of thinking has produced hierarchical categories the world over, and has been employed to justify asymmetrical relations of domination and exploitation between man and woman, rich and poor, white and colored, the global north and the global south, and settler and Indigen.

Eesok

One technique used to restore and maintain balance is found in the totemic concept of *eesok*, which is a Nuu-chah-nulth word that means respect with caring. In editing a book on Nuu-chah-nulth teachings, Debbie Foxcroft notes that *Quu?as*, the Nuu-chah-nulth

³⁰ For Nuu-chah-nulth accounts of trickster stories see: Atleo, *Ibid*, at 1-22; and generally G. Clutesi, *Son of Raven, son of Deer: Fables of the Tse-Shah People* (Port Alberni: Clutesi, 1994); E. Sapir & Swadesh, *Nootka Texts: Tails and Ethnological Narratives*, (New York: AMS Press, 1939); or G.M. Sproat, *Scenes and Studies of Savage Life* (London: Smith, Elder & Co, 1868); P. Webster, *As Far as I Know: Reminiscence of an Ahousah Elder* (Campbell River: BC Heritage Trust, 1983).

world for Indigenous people, “meant holding respect for life in all things, the spirit in all things. They had respect for self, for other people, for the land, the ocean and all the sources of food, clothing and shelter.” *Eesok* was understood to be a defining characteristic of us as *quu?as*—as human beings. To act disrespectfully was to betray one’s humanity and risk a disruption of the balance. *Eesok*, for the Nuu-chah-nulth was exhibited in practices of hospitality and generosity. Foxcroft echoes this in noting that that to our elders being *Quu?as* means “being hospitable, sharing and helpful—being generous with whatever you have.”³¹ In that same volume, my late uncle Archie Thompson remarks on the respect that we are called on to extend to social outcasts:

Some of the people, they seem to be a reject. Nobody wants to talk to them. They’re alcoholics. You and I don’t give them any kind of sense of belonging. It is you and I’s [sic] responsibility to make that person [feel welcome], regardless of how he is.... to call him in, give him something to eat. You as an Indian must be proud, ‘cause we’re called the sharing people. Our responsibilities are great.³²

At this point I am sure some readers are thinking that this discussion of respect reflects a highly idealized, romantic vision of a past that itself was characterized by imbalance.³³ These critics have me on one point—that this is an ideal. But my intention is not to say that we were living this utopic ideal before the settlers came but rather to identify the principles that we, in our better moments, sought to engage our practices. Against the ideal of *eesok* was the reality of our selfishness and we had Raven and Mink to remind us of the imbalance that occurs when we acted on it.³⁴

³¹ D. Foxcroft ed. “The sayings of our first people (Penticton: Theytus, 1995) p.21.

³² *ibid*, 23.

³³ One easy point to support the existence of imbalance was the presence of both a slave and noble classes within Nuu-chah-nulth society.

³⁴ Mink and Raven are tricksters in the Nuu-chah-nulth tradition. They are rather benign beings who are not out to hurt anyone, but often contravene important norms of sharing and generosity through trickery to satisfy

There were certain rigorous institutional and self-practices that aided our people in appropriating the ideals entailed in *eesok*. The self-practices involved ritual fasting, where our people would place themselves in sacred places, where they would sit without food or water for days in deep contemplation and prayer. Here they would wait for a vision to bring them strength and understanding. Another practice was bathing, where they would wash themselves with cedar at low tide, while praying and singing. These practices were ways of working over themselves in an ethical way, and of gaining access to the cosmological world, to which they would petition for a restoration of *tsalwalk*.

There were also institutions designed to facilitate *eesok*, which included the system of governance within which leaders called *Hawiih* were raised to embody the principles of generosity. They would be tested along the way to ensure that they were being formed by the teachings given to them.³⁵ Another example of the *eesok* ideal can be found in our economic system that was based on expenditure. There was an imperative for wealth accumulation, not for personal enjoyment or luxury, but for giving away. Most of our items would be given away at our potlatches, which could be held for a number of reasons, such as the transfer on names or rights, the coming of age of children, marriages, and memorials. A chief left with absolutely nothing after a potlatch was a chief worthy of the utmost respect.

their own bodily cravings. The results of their trickery typically come back on Raven and Mink. For a discussion of Raven in Nuu-chah-nulth stories, see Atleo, *supra* note 29 at 1-22. For more general accounts of the trickster in Nuu-chah-nulth stories, see the works cited in *supra* note 30.

³⁵ My father told me a story about a chief who took his son (who was to be the next chief) and his nephew out for a paddle. The chief suspected that his son was developing unsavoury traits. He tipped the canoe intentionally, and sure enough his son was screamed, and pulled his cousin so that he could get into the canoe first. He nephew was composed, and helpful, and made sure that the boat was stable and every one was safe before he hopped back in. The chief decided to pass the chieftainship on to his nephew rather than his son.

Reflexive Analysis

This is the section where I outline what I know of the teachings above and apply it to my particular mode of critique. If I do my job this is where it all comes together. To begin, some may ask why one would orient themselves toward imbalance and principles of care and respect when doing so sets that individual against the momentums of society and at odds with the institutions that structure socioeconomic interaction within it. Compounding this problem is the recognition that discord and asymmetry are the general state of the world, so what motivation is left for individuals to stand on the side of balance and respect? As noted above, within the Nuu-chah-nulth worldview there is an understanding that disharmony produces suffering for the agent and all her relations. *tsalwalk* reminds us that this is an inevitable consequence of disharmony. Thus, a pragmatic orientation toward the creation of a better world understood in terms of a reduction of harm to the self and one's community would direct the individual to practices of harmonization. Such practices also have cosmological/theological imperatives I am not currently equipped to understand, but the importance of which cannot be dismissed.³⁶

Accepting the call toward balance and respect, I now turn to its application to my current project. It seems important to begin by emphasizing that scholarly critique is a relational engagement, and it is a venue where the balance of relationships can be harmonized.

³⁶ The developing field of post-secular studies has argued convincingly that that sharp divisions between theology and social theory are artificial. For example, John Milbank argues that the supporting premises of secularized of political theory grew out of Christian theology. See John Milbank, *Theology and Social Theory: Beyond Secular Reasoning* (Malden: Blackwell Publishers, 2001) at 14. The theological/cosmological aspect of *tsalwalk* and *eesok* is important to my analysis, but I am currently ill equipped to develop it.

heshook-hish tsalwalk reminds me that all my conduct should be working toward balance and *eesok* reminds me that our most powerful tool to produce that balance is respect, exhibited through acts of generosity, helpfulness and hospitality. So for me, the question is, how are these principles relevant to my research problem—the problem of why the Maa-Nulth people are celebrating an imperial Agreement. How do I probe this question and respect my relationships and not add to the imbalance of this world?

An important point to keep in mind is that *eesok* also entails a respect of the self. For this reason, the principles of generosity cannot be said to legitimate a calm waters complex, where someone withholds their critical views for the sake of tranquility. Relations of respect do not equate to a calm waters rationalization of relations of peace at all costs. There may be times when our work is intervening in a battlefield, where the stakes are high and it is necessary to prepare an offense as means of protecting subaltern communities and principles of balance and harmony. In this context, I take *eesok* to mean that even in battle, we are to conduct ourselves respectfully, which in my view negates the callous warrior complex. Callousness is a hardening emotion that by definition works against respect and therefore also against balance. We also have a responsibility to ensure that the institutions we act within and through are themselves embedded in principles of respect. Thus, for example, the modern principles of practical efficiency and the cold, detached objectivity of the bureaucratic state work against *eesok*, even if we, ourselves, approach state institutions (whether they be educational/judicial/political) form a posture of respect. Otherwise, our respectful conduct becomes co-opted by the entrenched normative framework of those institutions.

Again, to return to topic of my thesis, I believe the ideas I am developing are going to lead me into a difficult confrontation. I am convinced that the *Maa-nulth Final Agreement* is a dangerous instrument, and my principles of respect for my people, my ancestors and myself are leading me to clash with our leaders who are behind the treaty. My question here is how to conduct myself in a way that is respectful of them. At present, I can think of two responses. The first is to acknowledge where these individuals have come from and particular challenges that they have faced, as well as the positivity that has flowed from their life. In this particular case, I need to be mindful of the fact that most of the people promoting treaty have been through residential school, and lived under the much heavier hand of the state and its agents. I genuinely believe that it is thanks to their calculated submissions and ability to flex with the tides of colonialism rather than break that I sit here today with the ability to ask these questions.

The second is to acknowledge that these people may not be all to blame and that the trickster may be at work in the situation. There is a way in which the dynamics of imperialism and modernity work together to create a very complex world that, it seems, have created an ideal playground for the trickster. Without at doubt, we have to varying degrees been swept up on modernity's pursuit of progress to the point where it now becomes difficult to identify the trickster's movements. Our subjection to imperial dominion has drawn us away from *eesok* and *tsalwak*, and left us susceptible to believing in the misleading promises of enlightenment progress.³⁷ There are ways that imperialism

³⁷ Taiaiake Alfred has picked up this point and asserted that we are not, at this moment, ready to resolve the question of Indigenous rights (personal communication, 2005). Glen Coulthard had argued that we need to

and colonialism have disoriented indigenous people, which in my view creates an urgent imperative of reorientation that we must confront before engaging the settlers to resolve our claims comprehensively. If we fail to stabilize ourselves, we will further impair our capacity to counter the trickster's tactics. Thus, when our leaders reach out to accept constrained offerings of freedom, they may not actually see the slight of hand and move to accept the offering in good faith. There may be others who identify the trickery but do not know that they have the capacity to counter and produce a more favourable outcome.

There is a story of Skate and Raven that is demonstrative of the points I am raising here—the point that we may not identify the trickery, and second, where we have recognize trickery at play, we have lost sight of our capacity to counter it. The trickster raven had suffered a particularly long winter. Just like this year, the warm spring weather was delayed and food remained scarce much longer than Raven had planned for. His winter food caches were gone and he was starving. As he was flying over the ocean, he noticed Skate coming up to the beach. As Skate walked down the beach Raven noticed how healthy and plump he was. Skate was a bottom feeder and even in cold weather, there was plenty of food to be eaten at the oceans floor. Raven felt his hunger badly as he looked down at Skate's plump, healthy body. He had an idea.

Raven had his wife Pash-hak go and tell Skate that he wanted to play a spear throwing game with him. Pash-hak was much less suspicious in appearance than Raven was, and Raven hoped that she would entice Skate to accept his challenge. Skate initially refused,

desubjectivate ourselves rather than seek recognition while in our current condition as subjects of empire. See his *Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada, Contemporary Political Theory* 6,4 (2007),

but after Pash-hak's insistence, he accepted. He went down to the beach, and being an honourable competitor, Skate offered Raven the fist throw. Raven grinned as he looked at Skate's wide body thinking there would be now way he could miss. He reached back and threw his spear quickly. To his surprise, Skate simply turned sideways, practically disappearing and the spear fell harmlessly to the ground. Skate picked up the spear and took his turn. Raven jumped up and used his wings to hover in the air, above the spear. Raven hastily grabbed the spear and threw it as quickly as he could, hoping to catch his opponent off guard. Again, Skate turned sideways. This infuriated Raven, said "don't do that"! Seeing the extent of Raven's frustration, Skate agreed not to turn sideways, so long as Raven agreed not to use his wings. Raven Agreed, and so Skate picked up the spear and went to throw the spear. Anticipating that Raven would leap over the spear (without using his wings), Skate paused for a moment in his wind up. Sure enough raven did jump, and one moment too soon. As soon as Raven's feet hit the ground, he was struck by the spear.

It seems to me that this is a good parable for our current situation. Except now, we have lost touch with our ability to identify the Raven's devious tactics. We are lured by the genuine, friendly smile of Pash-hak and we come to meet the trickster failing to recognize the grave nature of the duel at the negotiating table. We do not know that there are spears hurled in our direction and so we do not think to dodge them before it is too late. In those cases where we have the foresight to know what lies ahead, we feel like helpless easy targets because we have been told for generations that we are fat, easy targets that will in time fall prey to the spears of modernity. We have lost our self-

awareness, and do not see that we are not as defenceless as we have been led to believe. We have forgotten that sometimes we just have to turn sideways, away from our adversary to avert their threats.

My hope is that as we move to stabilize ourselves through our own orienting traditions, we will recover our capacity to recognize the threatening advances of imperialism and our defensive and offensive capacities to neutralize those threats. However, I am getting ahead of myself here. Let me first move on to speak to legal pluralism.

Chapter Three: Toward a Liberated Legal Pluralism

The intent of this chapter is to explore the utility of legal pluralism as a theoretical lens to analyze indigenous legal orders. My brief introduction to legal pluralism reveals it to be a rich theoretical lens that prompts a respectful and nuanced treatment of non-state normative orders and institutions as possessing legal character. However, the manner in which legal pluralists have characterized non-state legal orders has been a source of contention. Two particular problems will be discussed in this chapter. Jeremy Webber has identified the first in his persuasive argument that pluralist analysis must account for the deliberative decisional components involved in the creation of law.³⁸ In this chapter I supportively examine Webber's argument yet argue that it problematically avoids a questioning of power and the manner in which it is alive in the decisional processes that give rise to law. Put another way, I argue that Webber's decisional emphasis fails to account for the hegemonic forces that enframe the agency of non-state community's field of possibility (real or imagined) as they move to generate law.

As means of setting the broader background of this chapter, I will begin by speaking of the treaty negotiation processes as a jurisgenerative site. My intention with this opening is to make clear what is at stake for me in the arguments I raise. I will then move on to a discussion of what I understand to be the general insights of legal pluralism as they have developed through two distinct periods, focusing on how they inform and direct a scholarly analysis of indigenous legal communities and how these theoretical premises

³⁸ J. Webber, "Legal Pluralism and Human Agency " (2006) 44:1 Osgoode Hall Law Journal 167.

and developments are implicated in the considerations of contemporary treaty negotiations. From there I will move to discuss Jeremy Webber's work on legal pluralism and human agency to address the question of how law is generated in non-state legal traditions. The principle consideration here is whether those processes that generate law are an important site of scholarly analysis. My opinion here is supportive of Webber's argument that the jurisgenerative processes are what should be protected, rather than the substance generated that should be the consideration of contemporary aboriginal rights jurisprudence. Finally I will argue that a pluralist consideration of agency must also account for hegemony. Hegemony is a concept that refers the complex and dynamic manner in which power works to structure self-governing relations between hegemonic (dominant) and subaltern (subordinate) agents. A hegemony analysis draws attention to the ways power works to constrain and enable differentially situated actors so as to maintain or exacerbate existing power imbalances.³⁹ On the question of power, Webber's analysis is decidedly unhelpful, and I will point toward a body of post-colonial literature to better help navigate and process the problem of hegemony.

Maa-Nulth Final Agreement: Domesticating the Plurality

As noted above, I come from the Toquaht Tribe, which has recently ratified an *Agreement* under the British Columbia Treaty Commission.⁴⁰ The *Agreement* settles comprehensively *all* the claims of both Aboriginal Rights and Title for the Toquaht and

³⁹ For a general overview of the literature on hegemony see chapter four of J. Scott, *Power: Key Concepts, Polity* (Cambridge:2001) p. 71-91.

⁴⁰ *Supra* note 1, *Maa-Nulth First Nations Final Agreement*.

the other four Maa-nulth tribes who ratified the *Agreement*.⁴¹ §.1.11.1 of the *MFA* makes this point clearly, stating that “[t]his Agreement constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, of each Maa-nulth First Nation.”⁴² There are provisions in the Agreement that provide for a periodic review of the Treaty, but the obligation is simply to meet. Each party has to agree to any alteration of the Agreement. We should therefore expect the current structure and content of the Maa-nulth Agreement to be with us for a very long time. Given its comprehensive final nature, it is an *Agreement* with immense socio-legal significance.

So far as I have seen, there are three predominant stories about this treaty process. The first is that it represents an opportunity for our nations to develop our economies and take charge of our lives without the confines of the *Indian Act*.⁴³ This, I call the “liberatory fantasy” narrative.⁴⁴ The counter-narrative understands the treaty as a surrender document that concludes the long struggle against settler domination and absorbs the indigenous parties into a liberalized spheres of the colonial project. I call this the “sorrowful surrender” narrative. The third narrative recognizes the *MFA* is a morally flawed *Agreement* that does entrench existing power imbalances but also provides the signing nations with tools that, if properly wielded, can produce real advantages over our existing situation under the *Indian Act*. Understanding that sound, equitable agreements

⁴¹ This agreement is signed between Canada, British Columbia, and Five Nuu-chah-nulth tribes: the Toquaht, Ucluelet, Huu-ay-aht, Uchucklesaht, and the Kaa:’yu:’k’t’h’/Chek’tles7et’h.

⁴² *Supra* note MFA.

⁴³ §1.6.1 the *Indian Act* has no application to any Maa-nulth First Nation, Maa-nulth First Nation Government, Maa-nulth First Nation Public Institution, Maa-nulth First Nation Corporation and Maa-nulth-aht as of the Effective Date, except for the purpose of determining whether an individual is an ‘Indian’”. See *Ibid*, at p 4. Chapter 15 of the Agreement lays out the details of the transition of governance from the Indian Act to the Maa-nulth Agreement.

⁴⁴ The title “liberatory fantasy” I have borrowed from Alfred’s heading in *Wasasse*, *supra* note 21, at 180.

will always be beyond our reach, this third narrative proceeds strategically into imbalanced negotiation forums in the hopes of improving their social and economic woes. They do not believe they are liberating their people, or that they are surrendering anything that has not been effectively taken from us. I call this the pragmatic progress narrative.

My sense is that most of our people are pragmatic progressives. When pressed and behind closed doors, even the most avid proponents of the *MFA*, whose official rhetoric advances a strong ‘liberatory fantasy’ line, will admit that this is a bad agreement qualified by the view that it is the best we can get right now and the fear that even less will be available us later.⁴⁵ And those individuals on the other side, standing strongly against the *MFA* as a surrender document, will often concede that it would be difficult to reject an agreement that improved markedly on our existing conditions. Thus, the material question on the Maa-nulth people’s minds leading up to the *MFA* ratification vote was about whether its provisions could produce a better life for our people. The vote last October (2007) revealed that most of our people believed that it would lead to a better future. It was approved by 68%⁴⁶ of eligible Maa-nulth voters, despite the fact that the *Agreement* established Gordon Campbell as the “captain of our canoe.”⁴⁷

⁴⁵ For example, Judith Sayers has been a vocal supporter of the Maa-nulth through their Treaty Negotiations, but when speaking privately, she acknowledges that she would never settle for their Agreement. Shawn Atleo is another person who has been a strong supporter of the Maa-nulth treaty but will agree that its terms present a weak model of Aboriginal Rights (both from personal communications).

⁴⁶ *Maa-nulth First Nations, October 21, 2007 Vote Count Results*, Maa-nulth Treaty Society, online at: http://maanulth.ca/downloads/media_Voting_Summary_Oct_21_final.pdf.

⁴⁷ *Supra* note 20.

As noted previously, I was one of the few not celebrating this *Agreement*. I could not help but view the *MFA* as fundamentally standing for the principle of surrender – of submitting ourselves to the Provincial government and its representative as our new captain, our new chief. Despite the rhetoric the *Agreement* was delivered with, I saw it as a symbol of cowardice not courage, and colonial domination and dispossession not self-determination. Although the *MFA* may recognize a degree of self-determination, its exercise is enframed by the same institutionalized confines that structure the settler’s civil society.⁴⁸ Thus, we are drawn into a mode of social being that facilitates imperialism, where institutions avail us tools to benefit from imperialism rather than uproot it or work against it.⁴⁹

It is likely apparent by now that I tend toward an endorsement of the ‘sorrowful surrender’ narrative when considering the *Agreement*.⁵⁰ However, my view is that even the pragmatic progressives must reject this *Agreement*. I say this because of three main reasons that I raise here for purposes of context and cohesion, but will pick up with greater detail in Chapter 5. The first is the certainty clause, stipulating that the *MFA* is a

⁴⁸ The concept of civil citizenship is contrasted to civic citizenship by James Tully. In general, the civic model of citizenship is directed by the people themselves, who organize themselves independent of government institutions, to “citize relations for their own sake.” The civil citizenship model organizes within the deliberative structures of the state, seeking to affect the citizen/governance relationship through, for example, collective bargaining or formalized negotiation processes. See *Public Philosophy in a New Key: Volume II, Imperialism and Civic Freedom* (Cambridge: Cambridge UP, 2008) at 291.

⁴⁹ For an excellent discussion of imperialism as ideology see Chapter 3 of Robert C.J. Young, “Post-Colonialism: An historic Introduction,” (Oxford: Blackwell, 2001) at 25-43. Here, Young convincingly argues that colonialism and imperialism need to be analyzed independently, and that an end to colonial rule does not necessitate an end to imperial ideology.

⁵⁰ Reflexively, I characterize myself as adopting a sorrowful surrender narrative. However I would define myself as a pragmatic progressive, if ‘progress’ were defined in moral and ethical terms with an orientation toward uprooting imperialism rather than advancing material gain. Thus, the sorrow of surrender stems from giving up not on a cherished essentialized identity, but more from a submission to imperial rule.

certain, final, and comprehensive resolution of Aboriginal Rights Claims.⁵¹ There is no turning back to renegotiate.⁵² The second problem is that we give up our claim to 95% of our traditional territories and have the remaining 5% of our landholdings brought under the *Land Title Act*.⁵³ One only has to look to what happened with the Metis Script, or under the *General Allotment Act* or the more contemporary example of the Alaskan corporatisation model in the US, to foresee that the Maa-nulth landholdings will soon be depleted.⁵⁴ Finally is the fact that the Maa-nulth governance and law making authority is not pre-emptive—it coexists with federal and provincial law, and in the event of a conflict, it generally prioritizes Federal or Provincial law over Maa-nulth law.⁵⁵

What I am interested in exploring in this paper is less that the *MFA* is an imperial instrument, although I will dwell on this matter for some time in Chapter 5. My interest is understanding why the *Agreement* has been accepted so readily and enthusiastically by

⁵¹ See the *MFA* certainty clauses, *supra* note 1, §1.11.0-1.11.2.

⁵² The periodic review mandated by the *MFA* really has no teeth. All it ensures is that every 15 years, the parties sit down and discuss how the treaty is going. Each party is required to pay for their participation in the review process, and no one is under an obligation to act. See *supra* note 1, §1.13.0-1.13.8.

⁵³ See *Infra* note 1, chapter 3 on Land Title. Land can now be alienated freely, and subject to mortgage. Any wealth that comes through treaty comes in land, which will likely be sold for purposes of self-interest and development.

⁵⁴ The Dawes General Allotment Act, 1887, ch. 119, 24 stat. 388, divided Indian Country into plots of land that were held by individuals, who could sell the lands to non-Indians. As a result, a significant portion of Indian land was sold, leaving many tribes people landless. For a historical overview of this process see: R. Clinton, Goldberg, Tsosie, *American Indian Law: Native Nations and the Federal System: Cases and Materials*, 4th ed. (Newark: Lexus, 2003). In Alaska, the US Congress extinguished Indian Title and organized the Alaska Indians and Inuit into corporations who could select a portion of lands to be held in alienable fee simple. Thus, much of the land allotted to the Alaskan Native corporations was sold off. For an overview of Alaska's situation, see W. Canby, *American Indian Law in a Nutshell* 4th ed, (St. Paul: Thompson West, 2004) at 397-405. Similarly, in 1874 the Metis had received a script of either a portion of alienable land or its equivalent cash value to settle their claims with Canada. For an overview of this historical period for the Metis see D. Sprague, *Canada and the Metis, 1869-85* (Waterloo: Wilfred Laurier UP, 1988).

§1.5.0 of the *MFA*, *supra* note 1, states that Federal and Provincial Law apply to the Maa-nulth people and their institutions. §1.8.0 lays out the relationship of laws, and gives clear priority to Federal and Provincial laws over Maa-nulth law. I raise these criticisms here simply to give background context to my engagement with legal pluralism. The *Maa-nulth Final Agreement* will be discussed directly in Chapter 5.

the Maa-nulth people. I hope to understand how the Maa-nulth people have come to understand improvement, and why people think (and how they came to think) that this Agreement is capable of making our lives better. The question for this Chapter relates to how the theoretical insights of legal pluralism help to probe this question.

Legal Pluralism

I have only recently been introduced to legal pluralist theory and I have found it to be immensely helpful in developing my thinking on the problems outlined above. As a developing legal scholar recovering from a formal undergraduate legal education, the insights of legal pluralism have opened up the way I think about law. My interests have been with the indigenous legal traditions, and through my LLB studies I felt as though there was very little space to speak meaningfully to this topic.⁵⁶ Undergraduate studies, and the mainstream in general, perceives law primarily in formalistic terms as arising out of statutory enactments or the judgments of a common law court.⁵⁷ Legal pluralism works against this presumption and adopts a broader understanding of law that includes non-state norms of order that may or may not be connected to the state sovereign.

Sally Engle Merry, a scholarly pillar among pluralists, describes legal pluralism as “generally defined as a situation in which two or more legal systems co-exist”, and that, “recent work [in legal pluralism] defines ‘legal system’ broadly to include the system of courts and judges supported by the state as well as non-legal forms of normative

⁵⁶ Thankfully John Borrows was at the University of Victoria, and provided opportunity to engage these issues at the LLB level of study.

⁵⁷ Legal formalism is a branch of legal theory that views law as an autonomous and closed system of rules. It is often contrasted to instrumentalism, which theorizes law as a tool that serves the interest of dominant groups. See Gary Minda’s discussion of the two sides of legal modernism in, *Post Modern Legal Movements*, (New York: NYUP, 1995) at 21.

ordering.”⁵⁸ The inclusivity of this theoretical framework allows one to think seriously about the spaces occupied by non-state legal orders operating within the states claimed boundaries.

According to John Griffiths’ foundational survey of legal pluralism,⁵⁹ legal pluralism’s descriptive character equips the analysts with theoretical tools capable of penetrating the pervasive imperial ideology he calls legal centralism.⁶⁰ He writes:

According to what I shall call the ideology of legal centralism, law is and should be the law of the state, uniform for all persons, exclusive of all other law and administered by a single set of state institutions....

In the legal centralist conception, law is an exclusive, systematic and unified hierarchical order of normative propositions.... while the various subordinate norms which constitute ‘law’ carry moral authority because of their position in the hierarchy, the apex itself – the sovereign or the grundnorm or rule of recognition - is essentially given. It is the factual power of the state which is the keystone of an otherwise normative system which affords the empirical condition for the actual existence of ‘law’.⁶¹

Legal centralism holds that for phenomenon to be characterized as law they must connect back to the state through the explicit common law or legislative declaration or by a reasonable and informal validation of a foundational ‘grundnorm.’⁶² A successful connection to the state would ascribe to the normative subject legal character thus transforming it into law. Legal pluralists argue that the priority legal centralist thought

⁵⁸ Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law and Society Review 869 at 870. I am not sure why Merry calls non-state normative orders non-legal. This differentiation appears to acknowledge a normative plurality, while at the same time failing to challenge the imperial character of a formalized positivistic legal theory.

⁵⁹ John Griffiths, "What is Legal Pluralism" (1986) 24:1, Journal of Legal Pluralism and Unofficial Law

⁶⁰ For an excellent discussion of imperialism as an ideology, see Chapter 3 in Young, *supra* note 49, at 25-43.

⁶¹ *Supra* note 59 at p.3.

⁶² *Ibid*, at 5.

places on the state institutional apparatus distorts the empirical account of what is actually happening on the ground in a given society. Perhaps overstating the case, Griffiths claims that, “[l]egal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion.”⁶³ Minus the absolutist nature of this assertion, Griffiths’ point is well taken. Far from being organized around the tidy bright lines of legal doctrinal formulations, the normative ordering of a society is far more nuanced and shot through with contradiction to the extent that one author describes it as “an unsystematic collage of inconsistent and overlapping parts.”⁶⁴ This insight is particularly on point when situated within my project.

From an indigenous perspective, understanding the normative ordering of society as inconsistent and overlapping seems both commonsensical and profound. It is commonsense because it corresponds with our lived experience of a normative order that is distinct from the legal mainstream. It is true that we go through our lives influenced and formed by state law in identifiable ways, but we also know that there is an alternate set of norms generated by our own communities that directs us to behave in ways that do not always align with state law. It is profound at the same time, because we tend not to think of our normative orders as having legal character.⁶⁵ As we move to understand our indigenous normative orders as legal orders, we will begin to think seriously about how these legalities relate to Canadian law. In my case, I will analyze the nature of the

⁶³ *Ibid.*, at 4.

⁶⁴ *Ibid.*

⁶⁵ Val Napoleon et. al. note that it is difficult to have indigenous peoples consider their normative orders as having legal character. They therefore note that “it is hard to talk about law”. See *Where is the Law in Restorative Justice?* In Yale Belanger, ed, *Aboriginal Self-government*, 3rd ed, (Saskatoon: Purich Press, 2008) at 359.

relationship and how that relationship is implicated in the development of the MFA. However, simply adopting a pluralistic analysis of legality does not necessarily help me advance the primary concerns of this thesis, which are anti-imperial in character. This point comes clear by looking at the different ways that pluralism has been framed over the years.

Generational Developments in Pluralism

There have, at the very least, been three generations of pluralism.⁶⁶ The first, classic legal pluralism, grew out of the post-colonial situation to examine the interface between European and indigenous law. The second deepens these insights by identifying a plurality of normative orders within a state. The third generation looks critically at the development of legal orders moving beyond a description of normative ordering focusing instead on the deliberative processes that give rise to laws.

A. Classic legal pluralism

Emerging in classic legal pluralism was an understanding of the state as the only source of a society's law, but also that the state could allow for a measure of authority to be delegated to recognized non-state normative institutions to regulate certain groups in the population.⁶⁷ Under this scheme, the legal control of a state is often divided between

⁶⁶ This distinction is admittedly artificial. I do not know legal pluralism well enough to divide it between generations, and I doubt that it would divide into neat temporal categories. However, there are different ways that theorists have conceived of legal pluralism, and the discussion about legal pluralism tends on a loose temporary basis. I have organized these developments temporally for rhetorical purposes to organize my own thoughts and present them in a cohesive manner.

⁶⁷ *Supra* note 59 at 5.

groups on the basis of ethnicity, religion, nationality and geography.⁶⁸ A pluralistic ordering of law is justified in situations of social or geographic diversity by the pragmatic observation that a localized legal authority will establish order more efficiently than a centralized authority could, and it (the local authority) would be viewed as more legitimate than one imposed from a distance.⁶⁹

Far from presenting a radical shift or destabilization, this shallow pluralist doctrine does little to disturb the legal centralist suppositions. On this point, Griffiths notes that weak pluralism,

... is merely a particular arrangement in a system whose basic ideology is centralist. The very notion of 'recognition' and all the doctrinal paraphernalia which it brings with it are typically reflections of the ideal that 'law' must ultimately descend from a single validating source.⁷⁰

Interestingly, the classical pluralist's analysis did not assess industrialized settler states like the United States and Canada. This failure is not very surprising as this line of scholarship appears to be motivated by a practical, rather than ameliorative concern. Researchers were interested in improving the description of colonial rule rather than questioning the legitimacy of its normative claims. Thus discovery justifications asserting that colonial law was introduced into a vacant field on Turtle Island were undisturbed by this first wave of pluralist thought.

Understanding the assumptions of this mode of pluralism is helpful in making sense of the rhetoric of self-determination associated with the Maa-nulth agreement. The rhetoric

⁶⁸ *Ibid.*

⁶⁹ *Ibid* at 7.

⁷⁰ *Ibid* at 8. Also note other stuff on recognition, which will be spoken of in the chapter on imperialsim.

of recognition has dominated the indigenous political agenda since the 1970s,⁷¹ and Canada's comprehensive claims policy and the BC Treaty Commission have begun a process of recognition of indigenous inherent rights. However, Canada continues in its steadfast refusal to acknowledge the legal force (i.e. binding obligation) of inherent rights that have not received formal recognition through agreement or common law judgment. We see here the catch that indigenous nations find themselves in, where they are required to engage the state in recognition procedures in order for their laws or rights to be recognized by the Canada. (this is the imperial turn) The state sponsored recognition process reveals Canada to be thoroughly committed to a legal-centralist ideology that respects only those non-state legal orders that have been filtered through its institutionalized recognition procedures.

B. Deep Legal Pluralism

A deeper theory of legal pluralism emerged in the 1970s that would fundamentally destabilize the place of legal centralist ideology and the juridical monopoly it ascribed to the state. Of course, this destabilization was theoretical, and took place only in the conceptualizations of the persuaded legal scholar or analyst. This framework identified plural normative orders in practically every society⁷² and would focus its analysis on the relationship between multiple legal orders that are often both separate from and dependent on the state.⁷³ Emerging here is what appears to be a theoretical view of

⁷¹ For an excellent discussion of the problems inherent to contemporary recognition initiatives, see G. Coulthard, *Subjects and Empire*, *supra* note 37.

⁷² Merry *supra* note 58 at 873.

⁷³ *Ibid.*

society as a series of interlinking and overlapping semi-autonomous social fields.⁷⁴ According to this scheme the state is no longer conceived of as the supreme overlord and is understood to share the juridical field with a host of other forms of legal ordering.⁷⁵ State law would share this field and impose itself at times but state action is not required to 'legalize' the rulemaking authority of the non-state entity. In Sally Falk Moore's words,

The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a large social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, and sometimes by its own insistence.⁷⁶

By understanding multiple legal orders to be sharing the same social field, in a manner that was, at least in part, independent of the state, Moore's analysis challenges the foundation of legal centralist ideology. This appears to be the point where it becomes possible to speak of legal traditions whose juristic authority stems from non-state sources as law. This theoretical lens permits, in fact prompts, the socio-legal empiricist to assess normative orderings operating alongside the state legal regime and not necessarily the subordinate product of sovereign ordinances. While state law may impose itself on non-state legal orders, and aim to control and domesticate them by enforcing its own normative framework, it does so through influence and imposition.

The theoretical implications of this deeper pluralistic framework presented radical and compelling arguments that undermined the foundation of state centric conceptions of

⁷⁴ Sally Falk Moore, "Law and Social Change: the Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7:4 Law and Society Review 719

⁷⁵ Merry *supra* note 58 at 873.

⁷⁶ Moore, *supra* note 74 at 722.

law.⁷⁷ The decentering of state law in this way often leads theorists to resist speaking in the distorting terms of state centralist legal doctrine, such as state sovereignty. It would also equip empirical researchers with a theory that would improve the empirical record of the society's legal phenomena.⁷⁸ In the indigenous context, there are clear advantages to this approach because it presents an opportunity to speak of a non-positivistic indigenous customary normative order as legally authoritative. This brand of pluralism would present researchers with a powerful analytical tool to identify the ethnocentric and oppressive character of legal centralist conceptions of law. For my purposes, it would allow indigenous people to confront the racism inherent to the Hobbesian 'state of nature' ideology by demonstrating theoretically that they, along with virtually every human community, lived under the rule of law. Under a deep pluralistic analysis, assertions made under the rubric of "the rule of law" would have to address seriously questions about whose law is spoken of and of its relationship to other legal orders. Under this lens, hierarchies of legal orders could not simply be assumed as the natural state of things, but would be the subject of inquiry, and some theorists would rely on them to justify or uproot the rationalities supporting the hierarchic existence of legal orders.⁷⁹

To relate this discussion back to my own research, deep pluralism is helpful in developing a conceptual framework for indigenous constitutionalism. The traditional

⁷⁷ Merry *supra* note 58 at 873. Here Merry describes this deeper pluralism as an "extraordinarily powerful move". They must not have had indigenous people engaging in theoretical discussions, or they likely would have figured this out much earlier. I say this because from a perspective of an indigenous individual than a legal theorist, the deeper pluralist insight seems more commonsensical than groundbreaking.

⁷⁸ Griffiths *supra* note 59 at 4.

⁷⁹ The work of justifying and uprooting hierarchy is not taken on directly by many of the legal pluralists. There is an emancipatory animus to legal pluralist theory, but the descriptive nature of pluralist literature (likely owing to its roots in the social sciences) prevents it from rooting this emancipatory element in the theory itself.

conception of constitutionalism referred to the body of doctrine and theory associated with interpreting the state constitutional structure. This theory counters the privilege that classic constitutional theory bestows on the state by presuming as fact a context of constitutional pluralism. Indigenous constitutional orders, of course, do not pre-empt the operation of state constitutional law—there is a concurrent operation. Indigenous nations do not have the power to repel the legal assertions of the state directly, and must order themselves at least formally, often begrudgingly, in accordance with heavily enforced and protected state constitutional principles. I believe that it is this kind of begrudged acceptance that is implicated in the acceptance of the Maa-Nulth Final Agreement. Thus, I find legal pluralism useful both in its recognition of plurality of legal orders and its potential for recognizing the privileged position and hegemonic force of state law. To examine hegemony with the anti-imperial imperatives I carry with me, it is necessary to look beyond the descriptive nature of legal pluralism that I have discussed till this point.

C. Beyond a Descriptive Theory

The potential for understanding how hegemony operates within the plurality has not, to my knowledge, been fully realized by legal pluralists, who have had some difficulty reaching beyond a descriptive analysis. For these theorists pluralism has been very useful for gaining a better understanding of what is actually happening on the ground, as it has provided an imperative for legal theory to reconcile itself with the empirically observable reality of non-state legal phenomena. While incredibly useful in its revelation of doctrinal fallacy, legal pluralism's empirical focus provides unsatisfying conclusions for a researcher seeking release from existing oppressive dynamics empirically observed

within the plurality. Under current pluralist scholarship, the state often seems simply to disappear, and the concept of state sovereignty, so fundamental to legalcentralist doctrine, dismissed as unhelpfully distractive. While there is a clear emancipatory element the substantial body of pluralist literature, Jeremy Webber insightfully notices that this aspect is lacking a clearly defined theoretical foundation.⁸⁰ Without clear theoretical support for an emancipatory anti-colonial project, pluralist theory can be utilized to advance the imperatives of both a hegemon and subaltern.⁸¹ I will now turn to Webber's work, and how he proposes we think about an emancipatory imperative within pluralist theory.

Understanding Agency in a Pluralist Analysis

Jeremy Webber notes that the emancipatory legal pluralist literature often fails to realize the theoretical importance of the deliberative procedures that lead to their creation. Understanding the deliberative processes involved in determining what is obligatory in a specific situation would lead the pluralist researcher away from what are often misleading descriptive accounts of non-state legal systems. Webber writes,

In the absence of direct data as to what the society's members consider to be obligatory, the theorist's accounts often reconstruct the living law. This

⁸⁰ Webber, *Legal Pluralism and Human Agency*, *supra* note 38

⁸¹ This point becomes abundantly clear in Brian Tamanaha's work. He takes Griffiths, Boaventura de Sousa Santos and many of the emancipatory pluralists to task for their conceptualizations of law and legal pluralism. Tamanaha argues that the emancipatory claims of these pluralists are as ideological as those supporting legalcentralism. Thus, he sets pluralism up as a hermeneutical project, where the theorist works to understand the plurality of legal orders operative. He argues that strong emancipatory pluralist theory is internally inconsistent, that the conception of legal-centralism is outdated and false and that their theoretical insights grow out of post-colonial empirical analysis and are not suitable to an analysis of the western state. He uses these arguments to hold that the strong pluralists have failed their hermeneutics is flawed, they do not understand the nature of law, and how it should be analyzed as separate from norms. He then goes on to propose a normative imperative for a state-centric conceptualization of law, and argues that it would provide more fruitful and theoretically sound grounds from which to advance the emancipatory aims of critical scholars. See Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," (1993) 20:2, *Journal of Law and Society*, 192-217.

reconstruction is derived as much from the theorist's own judgment as to what is fundamentally required as it is from any observations of the rules actually applied.

The failure to capture the active dimension significantly impairs many legal pluralist theories. It prompts them to treat as matters of fact normative claims that are contested within the very circumstances in which they are presumed to operate.⁸²

Webber proposes that the legal pluralist develop a theory of obligation that focuses on the processes of deliberation, interpretation and adjudication through which norms are negotiated.⁸³ It is the reasoned obligatory character of these norms that gives them legal character and differentiates the habitual from legally bound social intercourse. Webber argues that these processes mediate community disagreement as to the content of norms the community agrees to be bound by, and are present in one form or another in every human society.

Webber thus directs our attention away from (although not completely) the particularities of normative phenomena, which he correctly argues are best characterized as dynamic, contested and provisional—a characteristic he captures with the Latin phrase “*modus vivendi*.” He is convincing in his proposition that a focus on particularities of normative phenomena often leads into a messy field of subjectivity. This is a field where the decision of whether to support a normative structure turns on the moral and ethical sensibilities of the theorist as they relate to their incomplete but necessarily reified understanding of the normative phenomena. Webber seems to suggest that the emancipatory legal pluralist can avoid these trappings by elaborating the procedural

⁸² *Supra* note 38 at 168.

⁸³ *Ibid.*, at 170.

elements of norm deliberation through which a community reasons its obligation. The theorist will find herself on much stronger ground in arguing for the respect and protection of these deliberative procedures than on the contested, hybrid and ever-changing norms themselves. This approach would avert the slide into normative judgments regarding which legal orders deserve recognition and protection, and which should not. In Webber's more concise phrasing,

We should not aim to protect a predetermined body of norms, for legal orders are always richer, more complex and more dynamic than a focus on norms alone would suggest. We should respect that order's practices of normative deliberation and decision making—the processes by which normative claims are discussed, disagreement adjudicated (in the largest sense of 'adjudicate' including all means of settling disputed norms), and the resultant norms interpreted and elaborated. A similar caution applies when deciding whether another normative order is worthy of respect. There too we should concentrate on process, not just on the norms that issue from those processes.⁸⁴

We can see, according to Webber's formulation, that even in those situations where particular norms are viewed as repugnant they may still be worthy of recognition so long as they arise out of a decision making process acceptable to the community they bind.⁸⁵

Webber's work has been immensely illuminating for me. In highlighting the active human element operating within specific legal orders, he fills what seemed to be an important gap in pluralist scholarship and in my thinking about indigenous law. For my purposes, it directs my analysis to the place where I want to take my analysis—that is to the process through which the Maa-nulth Final Agreement was reached, and away from a distracting normative assessment of whether its terms are 'good' on the basis of my

⁸⁴ *Ibid* at 170.

⁸⁵ Accepting and recognizing norms we do not like was in fact the subject of a paper Jeremy Webber recently presented on March 2, 2008 at the University of Victoria's DEMCON conference on Recognition and Self-determination.

subjective dispositions. I am not so narcissistic as to believe that our community should order itself under an obligatory structure of my choice. But I am also uncomfortable with Webber's inferred direction to rely on the existing formalized decision making institutions and to accept the norms therein created as binding.

I am convinced of the need to reach provisional agreements as to the content of binding norms in the context of disagreement so that we can live harmoniously with our community. That, in my view, is a truism. My problem lies in the fact that formalized decision making structures often grow out of situations of profoundly unjust distributions of power and that asymmetry is reflected in the decisional products. This is the point that chapter Five stands to substantiate in reference to the Maa-nulth Final Agreement. Simply because a normative structure is created out of a formalized decision-making process, and people organize themselves in accordance with it, does not, in my view, make the decisions generated therein legitimate. Even if the community perceives the decision making body as legitimate, such a view may be more a product of the constraining and enabling forces of imperialism than the free will of the subjects. This theoretical point will be elaborated more fully in Chapter Four. My point here, simply put, is that Webber's focus on human agency does little to problematize the ways that existing and profoundly oppressive unequal relations of power are reflected in the formalized decision making processes of non-state legal order.

The lack of attention Webber gives to power is not likely an oversight. Webber is too thoughtfully systematic to have unintentionally glossed over this important issue. My

sense is that a hegemony analysis would bring Webber to a place where he does not want to go—that is a place where he is looking beyond the decisions made by a community and assessing their value through some kind of normative analysis. He develops a persuasive argument to justify his approach, holding that the human desire to live peaceably together requires that we defer to collectively made decisions.⁸⁶ To support this view, Webber argues that,

[t]he existence of any normative order depends on some matters being governed by a collective position. When people disagree (as we do over just about anything) that collective position has to depart from what some of us would prefer if left to our own devices. We nevertheless have reason to acquiesce in those positions precisely so that we can obtain the benefits of living in an ordered society governed by a sense of justice, not just the will of the strong.⁸⁷

Thus, Webber may be seen as a strong communitarian, committed to a paradigmatic ethic of conviviality. Considerations of power and hegemony are important, but since power exists in all communities and is complicated by matters of human agency that both collaborate with and resist it, Webber chooses to make conviviality his focus and directs the pluralist's justice concerns into the state structure.

Conviviality—the desire to live together peaceably in society—is therefore a forceful inducement towards accepting the collective position. And although it may be irritating, it is not deeply problematic that society's justice departs from our own. That is the inevitable result of living in a diverse society where we find ourselves in community with people with whom we disagree.

To rationalise his focuses on conviviality, Webber relies on a Hobbesian conception of power as it relates to mediating the deep and endemic normative disagreements that are

⁸⁶ Webber, *supra* note 38. This argumentative theme arose in an earlier article Jeremy Webber wrote, titled “Relations of Force and Relations of Justice: the Emergence of Normative community between Colonists and Aboriginal peoples” (1995) 33 Osgoode Hall L.J. 623.

⁸⁷ *Ibid.*

found, he posits, in every society. Since consensus is unachievable, power is necessary to impose a provisional and peremptive normative order so that we may still live at peace with each other.

Webber turns to Thomas Hobbes to develop a foundational theory of political legitimacy that appreciates disagreement, without falling into the fallacious presumption that any society can be founded on consent.⁸⁸ For Hobbes, the baseline norms established by the sovereign are accepted pragmatically by a people whose desire to live under the benefits of an ordered peaceful society outweigh their desire to live under a legal order that satisfies their personal or more locally derived or subjective normative dispositions.

Webber states,

Even if the norms are imposed by an irresistible power, even if the norms are not precisely what one would wish, people have reason to acquiesce. In any society in which people disagree, the alternative is not that one will be able to live by one's own norms because, given disagreement, we can have no confidence that our ideas of justice will prevail. We cannot both live in society and do whatever we want.⁸⁹

Hobbes' normative pragmatism is framed in the negative—the imperative for acquiescence grows out of a fear of living in a state of nature, where life is 'nasty, brutish and short'. Webber tends toward the positive, holding that acquiescence is motivated instead by a convivial desire to access the benefits of living in peaceable community with our neighbours.

In the abstract, Webber's analysis makes sense. It seems right that, on every level, living in community will require compromise and that there will likely always be objections to

⁸⁸ *The Hobbesian Premise*, Unpublished (to my knowledge) paper in the personal archives of the author. P.5.

⁸⁹ *ibid*, p.7

the particular legal framework a community chooses to impose on its members. In my view, the logic of this premise falls apart in situations of empire, where peoples are coerced into living in stratified community, where they and their territorial and bodily resources are interpolated as resources opened up to an exploitative outsiders. In such situations, acquiescence likely result (at least initially) from the practical assessment that the imposing imperial agent is both more powerful and intolerant of difference that inhibits its exploitive desires. In these situations it is difficult to avoid the conclusion that it is brute force rather than conviviality that provides the root justifications to work within the imposed socio-political or legal order to find justice. A theory orientated toward emancipation and de-imperialization would, in my view, look to justify a rejection of that order rather than to rationalize an acquiescence to its terms.

Webber is right to say that there are distinct advantages to obeying the rules heeded by those whose hands wield the more devastating weapons. Order, as Webber notes, is likely the greatest of these advantages. Order and predictability do provide tangible psychological and material benefit to both the hegemonic and subaltern subjects. However, if the maintenance of order is our primary imperative *within* imbalanced social relations, eclipsing other more flattening and egalitarian imperatives, then it is extremely difficult to imagine a post-imperial world. By framing conviviality as a high order principle and directing the disgruntled subaltern into the state's deliberative structures to preserve that order and pursue justice, my fear is that Webber is maintaining and refining the very 'rule by force' logic he is trying to step away from.

To be fair, Webber would not likely see himself as prioritizing conviviality over matters of justice. His point is that the upheaval created by revolting against the imposed order will produce results that serve no one's interests and bring us no closer to justice. The resistant subject does not have the power to impose its conception of justice, so rebellion stands only produce greater disorder and justify the hegemon's resort to more forceful and violent preemptory measures. Our challenge in this situation is first to realize that the issue here is not one of forceful imposition, but rather of competing conceptions of justice. One he calls broadly, society's, which can marshal the coercive force of the state, and the others belong to the various subaltern groups that, compared to the state, have diffuse and non-comprehensive powers of coercion. What the subaltern has is the normative force of their justice claim, which can be brought into the state's institutionalized forums of norm deliberation. Our struggles for justice are to be directed toward these deliberative institutions so as to ensure that they remain open-ended and responsive to the alternative articulations of justice. If presented persuasively with alternative claims to justice, an open and responsive deliberative institution will produce a reformulated and (more) pluralistically just *modus vivendi*.

To relate back to the concerns of this thesis, if I accept Webber's argument, it becomes very difficult to imagine a *Treaty Agreement* that would favour the Maa-nulth much more than the current *MFA* does.⁹⁰ My sense is that Webber's argument presents a nuanced rationalization of a 'convention complex' that binds the subaltern to the state's institutional structure. It is also the argument of the pragmatic progressive 'yes' voters

⁹⁰ If the common law develops in a manner that sharply eclipse those recognized in the *MFA*, then it is possible that Canada's (and the Province's) comprehensive claims policies will be forced to raise their bottom line.

(for the *MFA* ratification), whose position on treaty has been to push the federal mandates as far as they can and sign the deal there. For these people, treaty has less to do with justice than with moving forward under the best circumstances settler society will allow for us. Matters of justice are present, but we accept that the particular vision of justice that emerges from deliberation will look different from our own. While we may feel that giving up 95% of our claim to lands and liberalizing our legal ordering to facilitate state prerogative to be unjust, we non-the-less acquiesce under a rationale similar to the one Webber advances. It is this shift toward accepting ‘society’s justice’ that gives continuity to the deeply unjust system of imposed colonial rule and maintains the imperial character of the relationship between indigenous and settler society.

My primary objection to Webber’s Hobbesian premise springs from the fact that we had the benefit of a peaceful, ordered society prior to the assertion of European sovereignty. Order was not absent and the land was not void of *nomoi* or *terra nullius*. Furthermore, if state law were to be removed today, we would not likely find ourselves, as Hobbes and other influential philosophers such as Kant had presumed, in a violent chaotic state of nature. This is to say that indigenous normative orders both pre-existed the imposition of western law and continue to co-exist with state law up to the present.⁹¹ This is the value of the deep legal pluralist insight, as it allows us see the state as a single player within the geographical fields over which it claims authority. The legal orders operative in any field are multiple and overlapping. The problem, so far as indigenous communities are concerned, is that they overlap in a vertical fashion and privilege state law with the top

⁹¹ Professor John Borrows has made this important point lucidly and tirelessly, and with great persuasive success. See generally, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: UT press, 2002).

position.

In the colonial period, the privileged position of state law was rationalized with reference to the Hobbesian premise that indigenous peoples lived in a state of nature. Law was a gift that the west would sometimes have to impose on non-western subjects. In our context this premise seems to survive in the imperial legal centralist ideologies that impose a state citizenship identity on indigenous peoples and direct them into the state's legal framework—in our case, s.35, or the BC Treaty Commission—to negotiate the legality of their own normative traditions. So long as access to the indigenous normative orders is mediated by or filtered through the state's legal framework, the type of order the state desires will be maintained. We, as indigenous peoples, would thus be spared a return to a brutish state of nature.

Most of us accept that Hobbes's formulations of the proper relationship between western and non-western social orders to have been an ideological justification of colonial imposition. Many of us think that his ideas should be laid to rest, left to decay with the colonial world that we think we've moved beyond. Deep legal pluralism has the theoretical potential to disrupt the privilege Hobbes bestowed on the western legal traditions. It allows us, as indigenous people, to turn away from state law and reference our own traditions to determine how to live lawfully. My fear is that Webber's conviviality/acquiescence thesis renovates Hobbes' premise and thins the deep legal pluralist insight by directing our justice claims back into the state. Webber's work can thus be read as a justification of western hegemony and as an ideological rationalization

of imperial expansion. In this next chapter I turn to some of the thinkers whose ideas lead me to this worry.⁹²

⁹² These are strong words, but they are genuine fears. I have no doubt that I have misread Jeremy Webber on more than one account, and the substance of this critique grows out of my engagement with Webber's written words, rather than directly out of his ideas. This is always the case, but I make special mention of it here because of my respect for Webber as a valued interlocutor and trusted mentor. I am sure he and I will carry on a conversation on this topic in the near future.

Chapter Four: Imperialism

The concept of imperialism, as I understand it, refers to those structural and discursive mechanisms that enable one entity, be it a king, corporation, state or chief, to impose its views and agenda upon another and perhaps exploit that other forcefully through formal direct, or informal indirect exertions of its power. Colonialism is the classic institutional expression of formalized imperialism. The days of colonial empire have been gone for some time now but, as I hope to show in this chapter, the move into the postcolonial world order has done little to disrupt imperial relations of control, domination and exploitation that were entrenched in the colonial period. As James Tully writes,

different aspects of the contemporary global order continue to be structured by imperial relationships inherited from five hundred years of Western imperialism. These relationships survived decolonization in the twentieth century in a new phase of imperialism, standardly called post-colonial imperialism or informal imperialism.⁹³

My sense is that we would be wise to pay attention to the lessons learned on the international scene as we seek liberation from the Indian Act and relate to Canada through Treaty.

Informal Imperialism

The post war move toward decolonization has revealed the dexterity of imperial ideology, showing it entirely capable of functioning in a world of self-determining sovereign subjects.⁹⁴ Imperialism has survived decolonization and now thrives under

⁹³ Tully, *supra* note 48, at 6.

⁹⁴ To be sure, there were informal expressions of during the colonial period. Tully reminds us that there have “always been two ‘faces’ or ‘wings’” of imperialism. *Ibid*, at 134.

these new conditions of self-determination by way of less formal and indirect interactive means.⁹⁵ Thus, when the world powers appeared to return authority to the colonies, they in fact had not given up much at all. This is because the former colonies were released into a global order of nation states where the norms regulating intrastate exchange had been by that time, firmly entrenched. For these former colonies to be recognized as legitimate players on the international scene, they would have to structure their nationalisms around a Westphalian state model; this move would go a long way toward ensuring that the former colonies structured their power in a manner that was familiar to the imperial states and supportive of their exploitative interests. Instead of managing the new self-determining states directly and forcibly, they would be controlled informally through their interaction with international governing bodies such as the League of Nations and later through non-governmental monetary organizations including the International Monetary Fund, World Bank and a host of transnational trade laws enacted under the General Agreement on Trade and Tariffs or the North American Free Trade Agreement.⁹⁶

With the imperial powers establishing the framework for the exercise of sovereign state power, into which the new states would be absorbed, the hierarchic and exploitative relations that characterized the colonial period would continue into the new period of colonial deconstruction.⁹⁷ Now, the ex-colonies would become states establishing institutions that would prop up a local elite class to exercise state sovereignty, and with

⁹⁵ *Ibid* at 196.

⁹⁶ For a historical overview of this informal mode of imperialism see A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

⁹⁷ R. Young, *supra* note 60 at 25.

whom the ex-colonizer could engage to pursue its interest in the new colonies. As now nation states, the ex-colonies would be absorbed into a hegemonic world order that would ensure the colonial relations of coercion and control would be maintained in post-colonial structures of global governance. Those who desired international status from outside the hegemonic forms of global governance were denied it.⁹⁸ As states, the former colonies would participate in a global order that was normalized to reflected the power imbalances generated in earlier periods of direct imperialism.

Through this channelling of the former colonies into the nation state order, the ideologies of imperialism survived colonial deconstruction and have been rearticulated within the rhetoric of self-determination and engaged as a means of extending its reach beyond the colonial era. With general civilizational narratives falling out of fashion, the empires were no longer able to assert their will on self-determining states without new forms of justification. The ideological privilege that the old stories of unilinear social development and associated doctrines of discovery and *terra nullius* bestowed on the imperial powers were no longer tenable as these empires were now understood as single players operating within a plural order of global governance. Additionally, imperial powers faced with the problem that effective colonial rule required significant administrative expense, moved to officially informalize their mode of exploitation.⁹⁹

⁹⁸ This was the case for Haudenosaunee leader Deskaheh, who sought recognition of Mohawk national status with the League of Nations. He delivered the “Red Man’s Appeal for Justice”. He was in Geneva for a year trying to draw attention to Canada’s infringements on their autonomy that the British Recognized with the Two Row Wampum. His appeals were denied. For an overview of the archival records pertaining to these events, see: Joelle Rostkowski, “The Redman’s Appeal for Justice: Deskaheh and the Legue of Nations,” *in Indians and Europe: An interdisciplinary Collection of Essays*, C.F. Feest ed.(University of Nebraska UP,1999) 435.

⁹⁹ To be sure, informal modes of imperialism have been present through out the colonial period, and formal imperial modes exist today. Citing Mommsen, Tully makes this point by noting that the actual historical

Recounting Immanuel Kant's thinking, James Tully points to two central features of this informalized mode of imperialism: a) a judicial language that normativized international constitutional states; and b) a social scientific language that universalized historical development, depicting the world's societies as moving from savagery to the constitutional state.¹⁰⁰ By merging these two languages of European enlightenment—the juridical and the social scientific—Kant painted a convincing and lucid picture that foresaw “a just and universal post-colonial world of identical, free and independent constitutional states under public international law, opened to capitalism and free trade, and governed informally by a ‘league’ of the advanced states, that is nonetheless the particular historical product of European colonial imperialism.”¹⁰¹ Later thinkers would append the norm of self-determination of peoples to Kant's vision without disturbing the underlying social scientific/judicial presumptions.¹⁰² As applied, the norm of self-determination would simply mean that imperial subjects elected or appointed the representatives of state to participate in the “league” while the great powers controlled its form.

This updated form of imperialism may be more dangerous than its formal expressions in colonialism. It may be seen as more dangerous because the benefactors of imperialism are shielded behind a veil of subaltern agency and are not seen as responsible for the

practices of imperialism comprise diffuse and ‘interactive’ and often ‘eccentric’ (reactive) forms of governance that responded to diverse forms of resistance and collaboration of imperialised peoples in localised, ad-hoc, and unpredictable ways.” See “Lineages of Empire: The Historical Roots of British Imperial Thought,” *Proceedings of the British Academy*, 155, 3-29 at 9.

¹⁰⁰ Tully, *supra* note 48 at 143.

¹⁰¹ *Ibid*, at 144. Tully also gives a more detailed sketch of the imperial features of Kantian theory in the first chapter of this book, titled *The Kantian idea of Europe: Critical and Cosmopolitan Perspectives*, at 15-42.

¹⁰² *Ibid*, 152-158.

devastating social/environmental consequences flowing from their exploitive agendas. When these consequences are felt by the imperial subjects, their rebellion is directed to their national governments rather than the imperial powers. Kwame Nkrumah captured this point with lucidity in his famous statement that informal imperialism—what he calls neo-colonialism—is the worst form of imperialism because:

for those who practice it, it means power without responsibility, and for those who suffer from it, it means exploitation without redress. In the days of oldfashioned colonialism, the imperial powers had at least to explain and justify at home the actions it was taking abroad. In the colony those who served the ruling imperial power could at least look to its protection against any violent move by their opponents. With neo-colonialism neither is the case.¹⁰³

As noted earlier, by absorbing the ex-colonies into the established Westphalian model of international nation states, the ex-colonies would remain entrenched in an informal imperial relationship. So long as the self-determination of the ex-colonies remained enfolded by liberal democracy and the world economy, the imperial powers could control them indirectly. That is to say, through strategically supporting, channelling and constraining the post-colonial state's self-determination and democratic freedoms, the imperial powers could secure continued access to the world's resources. Robert Young has made this point well, in his survey of postcolonial theory. In his words,

The 'idea' of imperialism was to redeem the plunder of colonialism precisely at the moment when that plunder had been extended into a hegemonic world political system. What the 'idea' [of imperialism] actually involved, however, was harder to say, and imperialism itself was correspondingly multifarious.¹⁰⁴

¹⁰³ K Nkrumah, *neo-colonialism, the Last Stage of Capitalism* (London, 1965) p. xi. Quoted in Tully, *supra* note 99 at 8.

¹⁰⁴ Young, *supra* note 60.

The multifarious nature of imperial modalities makes it difficult to identify the precise nature of the ideologies driving imperialism and how they were manifest in and thus twisted subaltern conceptions of freedom. This difficulty, in turn, creates diagnostic challenges that make it tricky to operate (or know one is operating) in a truly counter-hegemonic, anti-imperial fashion. Where imperial dynamics are identified in existing normative structures and change is sought, activists sometimes find the system open to modification. Their dissent is channelled into institutions of democratic norm deliberation. However, the democratic negotiation of the norms that structure existing relationships takes place within a field of unequal power relations. In our situation, as indigenous peoples in Canada, our efforts to challenge imperial norms are directed into hegemonic deliberative institutions such as Canadian courts or law or the Treaty Commissions. From within these institutions, the norm of self-determination may release us from the Indian Act so long as we are organized under constitutions and a liberal economic order that allows for the continuation of imperial penetration. What emerges is a less formal mode of imperialism that has more democratic legitimacy because we are able to participate in it through the exercise of limited powers of self-government. The fact that this new mode of relationship is partially co-constituted complicates the face of imperialism because imperial structures and ideologies are now clearly interwoven with our own agency.

The prevalence and complexity of current modes of informal imperialism has led Hardt and Negri to argue, at least implicitly, that there is no escaping the world of empire, as there currently exists no deimperialised space to retreat to. They state,

The rule of Empire operates on all registers of the social order extending down to the depths of the social world. Empire not only manages a territory and a population but also creates the very world it inhabits. It not only regulates human interactions but also seeks directly to rule over human nature. The object of its rule is social life in its entirety.¹⁰⁵

My sense is that Hart and Negri's characterization of Empire is astute but that it may also overstate its ubiquity in a manner that can lead to problems. Their argument is insightful in that it directs us to understand empire (what in this chapter I am calling imperialism) as interested in more than simply the physical world—in land and material exploitation. It seeks also to control the inter and intra-personal aspects of the human exchange and how we understand the human condition.¹⁰⁶ On the other hand, I think the breadth of imperialism is overemphasized by Hardt and Negri, as I believe is a mistake to comprehend imperialism as completely encompassing of our existence as individuals and collectives. Conceiving ourselves as fully caught within Empire inhibits us from identifying and thickening the ways that that we ourselves and others are acting otherwise.

The Breadth of Imperialism

Understanding imperialism as broad in scope seems correct and stands as a good reminder that our emancipatory efforts and thinking should be directed not just to asymmetrical power relations and material distribution *but also* to ideologies, discourses and institutions that structure our understandings of ourselves, of community and of our responses to the world. It seems that if we fail to address meaningfully the more subjective and intersubjective dynamics of imperialism—that is the manner in which

¹⁰⁵ M. Hardt & Negri, *Empire* (Cambridge: Harvard UP, 2000) at xv.

¹⁰⁶ Coulthard, *supra* note 37.

imperial power is implicated in the formation of the resistant imperial subject and relations between subjects—then emancipation, in the best case, we will only better equip and better subjectivate us to work within and benefit from the settled imperial relations of domination and control. Political Theorist, Glen Coulthard, political philosopher Nikolas Kompridis and legal theorist Val Napoleon have honed in on this point masterfully in their writings on recognition.

Recognition and Subjectivity

Coulthard argues that Canada's ability to sustain an imperailized relationship of exploitative domination over indigenous people depends on its ability to entice indigenous subjects to identify with asymmetrical forms of recognition that the colonial state and settler society grant to them. Drawing on the theorizations of Franz Fanon, Coulthard argues that in contexts of imperial domination,

not only are the terms of recognition usually determined by and in the interests of the master (the colonizer), but also over time slave populations (the colonized) tend to develop what [Fanon] called 'psycho-affective' attachments to these master-sanctioned forms of recognition, and that this attachment is essential in maintaining the economic and political structure of master/slave (colonizer/colonized) relations themselves.¹⁰⁷

Echoing Coulthard's interjection, Nikolas Kompridis also writes about how subjectivity factors into struggles for recognition. He warns that the recognition processes proclaimed to remedy relations between oneself and others by reframing our cognitive orientation toward the other also have deep re-cognizing affects on the self. Kompridis writes,

The act of re-cognizing the other will also involve a struggle with oneself, a struggle in which one's own self-understanding, one's prior commitments and justifications as well as the language/s (of interpretation and evaluation)

¹⁰⁷ *Ibid* at 6.

from which they derive their intelligibility and cogency, *will be at stake*. That is why such a struggle for re-cognition is at once cognitive and affective, demanding an examination of one's reasons and one's sensibility, and of each in light of the other.¹⁰⁸

By way of an example, writing from a legal background, Val Napoleon has assessed that the manner in which the Gitksan pursuit of legal recognition of their rights and title has altered their sense of self, bringing them to identify with the Canadian judicial system and rights framework to understand their entitlements instead of their own legal traditions.¹⁰⁹

Coulthard, Kompridis, and Napoleon demonstrate the constitutive or subjectivating aspect of recognition. As indigenous people asking the state to look at us and respond to us differently, we generally frame our case with reference to two broad sources of authority. One source is our own constitution and the rights and responsibilities that flow from it; the second is the normative structure of the state recognition forums. The content of our recognition claim is drawn from the former; the latter source works to reformulate that content in a manner that the state will comprehend and respond to. Thus, what we present to the state has been pre-domesticated for the purposes of attaining standing and having our case heard. Then, within an asymmetrical field of power, the state agents deliberate with us, before an adjudicative body or in negotiations, to decide what aspects of the claim to recognize. What emerges from this complicated process is a highly domesticated version of the original claim. Nevertheless, the substance recognized becomes a powerful sword that we may wield against imperial

¹⁰⁸ N. Kompridis, *Critique and Disclosure: Critical Theory Between Past and Future* (Cambridge: MIT Press, 2005) at 210.

¹⁰⁹ Napoleon, notes that the experience of taking a recognition claim through Canadian Courts effectively freeze-dried what were otherwise fluid elements of Gitksan society. "Aykook: Kitksan Legal Order, Law and Legal Theory" (Ph.D Dissertation, University of Victoria, 2009) [unpublished].

interference, principally because it has been endowed with state authority. Thus over time the recognized substance comes to reconstitute us, the subaltern, and entrenches a gateway between us and our imperial masters.

At this time, for cohesive purposes, it seems appropriate to foreshadow the argument of my concluding chapter. I find it helpful to think of the products created by processes of recognition (treaty agreements, court judgements, or negotiated policies) to be totems. These agreements or judgements are propped up to stand as an embodiment of values that define us and principles we will defend. As we go about the intense work of mounting a recognition claim, we are effectively carving new totems for our people. Today, it seems, our people look through a thick layer of Aboriginal rights jurisprudence, s.35, and/or other treaty agreements, to interpret our own stories and understand who we are as people and peoples. The problem I tried to describe in the previous paragraph is that these are domesticated totems, developed not only in an imperial context but infused with imperial understandings and power relations. For the indigenous and settler subjects, these totems tend to reinforce a deeply compromised value structure and stand to reinforce asymmetrical relations of power. Accordingly, indigenous subjectivities become reworked by the recognition procedures and products. Their self-understandings of freedom and right relationship are reformulated with reference to treaties, rights jurisprudence and/or s.35, and thus they become entrenched within the hegemonic fields of western liberal rights discourse.

Imperialism and Indigenous Agency

It is important to bear in mind that imperial forces were in effect prior to the contemporary period in which indigenous peoples have strived for recognition. As previously noted, imperialism is multifarious, and plays off many ideological and/or material conditions to advance its aims of redeeming the plunder of colonialism. Accepting the suggestion that the current recognition paradigm administered by the Canadian state is embedded in an imperial dynamic, we must turn to understand why indigenous agents have sought its recognition in the first place. My sense is that imperial dynamics have worked to channel indigenous peoples into the state's rights recognition paradigm. Below I suggest three such dynamics.

a. Colonial Disorientation: Hoquotist

The reality of our situation is that we are now dispossessed and possess what is largely a disoriented and a confused sense of self, largely due to aggressive and direct policies of dispossession and assimilation. This point is made by both Coulthard and Napoleon in the works I quoted above.¹¹⁰ Taiaiake Alfred is another indigenous scholar who for some time now has been reminding indigenous people that colonialism and the settler state's law and policy have effected indigenous people deeply as individuals, dislocating them from their birthrights.¹¹¹ The colonial assault on the individual has correlatively, and perhaps more profoundly, had a more damaging affect on our collectives. In Alfred's words,

It is the damage done to the national consciousness of our peoples, the wearing thin of our nations' cultural and political foundations, and the weakening of our collective sense of community that present the most

¹¹⁰ Insert Val and Glen's arguments in general.

¹¹¹ That indigenous peoples have a confused sense of self, and have been disoriented by colonialism is foundational premise of the three books Alfred has published: PPR, Was, and RTA.

significant threat to our continuing existence as new generations of our people emerge and grapple with new realities in the struggle to survive culturally, politically and spiritually.¹¹²

The Nuu-chah-nulth, the larger group of tribes the Maa-nulth are affiliated with, often speak about this disoriented condition in metaphorical terms, referring to themselves as being *hoquotist*—a phrase translated to say, “our canoe is flipped over”. I learned this word for Wickanninish, an Ahousaht elder and political leader who now serves as the president of the Nuu-chah-nulth tribal council. “Our people are lost,” he told me. “They know what they are doing [in negotiations or decisions made in the Band Council] is wrong and it is only the tip of the iceberg. I believe the corruption is rampant, no matter which region you go in the province. Our people have a description for this. We are *Hoquotisht*. Our canoe is flipped over.”¹¹³ He went on to tell me that this disoriented state resulted from the fact that we no longer know our stories and more specifically, the fact that we have become disconnected from the perceptual orientation and responsibilities that flowed from those stories. I have found that *Hoquotisht* as a metaphor captures our disoriented state well, rivalling Alfred’s precise and polemical eloquence. I have expanded this metaphore elsewhere in the following manner:

The currents of colonialism have overturned our canoe and left us at sea disoriented, where our struggle simply to survive is the focus of our life’s energies. In previous generations, there was a deliberate effort to ensure that we did not get back into our canoe. Now that this pressure has been alleviated somewhat we have the opportunity to rebuild our canoes but we seem to have

¹¹² T. Alfred, “First Nations Perspectives on Identity,” (2009) AFN *First Nations Citizenship and Research Policy Series: Building Towards Change* (In archives of the author).

¹¹³ For a more detailed discussion of *hoquotisht*, see J. Mack, “Hoquotisht: Returning to our Canoes through Story” in *Storied Communities* Johnson, Webber & Lessard (Vancouver: UBC Press, forthcoming).

forgotten how. It is likely that the canoe that was overturned is lost at sea, weathered and fragmented. Our challenge now is to return to the homeland and begin carving our canoes anew. Many difficulties quickly become apparent as we attempt this. We have forgotten so many things, including how to paddle, which land we belonged to and how to carve. Further, there are few old growth cedars left from which to build a canoe.

Instead of doing the work of finding our way back to our homelands and rebuilding our canoes, we often choose to board the newcomer's vessel without full awareness of its course. In our panic, we reach out to what ever live sources and aid that most readily available to us. We tell the newcomers that while they are in our territory we have a right to be on board their ship, itself purchased with the exploits of our land. Though we do not know where this ship is going we have learned that it moves fast and is loaded with comforts and entertaining trinkets. Having grown accustomed to this vessel we tell ourselves returning to the canoe is too complicated a process and that the world has changed in ways that make the slow moving canoe obsolete. The canoe, it seems, is inappropriate to the non-recreational, or rather non-cultural needs of our industrialized existence. Still, we feel a nostalgia for the old canoe so we petition the ship's captain to have one placed beside the totems adorning the ship's deck. At lest then we could enjoy looking at it and perhaps take it for a weekend paddle when we have the time.¹¹⁴

Put more directly, the above point is that we were weakened and disoriented in the colonial period and are now seeking relief from the continuation of imperial pressures by joining up with imperialism. There was once a time when this move toward integration into the state would have been justified by virtue of the poor quality of a life of resistance. This was a time when the compromises implicated in joining up with the state's political/institutional structures were readily apparent. People had living

¹¹⁴ *Ibid.*

knowledge of freedom and knew that it had been unjustly taken from them with extreme force. Now this loss of freedom is justified by virtue of the material benefits we can gain by defining ourselves within the imperial structures of the constitutional state.

b. Mobile and Hybrid Identity

Being informed by the anti-essentialist insights of what we call postmodern thought, we tend to no longer refer to the constitutional structure of the state as imperial or colonial. Instead, we are encouraged to think of the state structures as culturally hybrid, and believe that by joining up with it and understanding ourselves through it, those structures become, or at least can become Indigenized.¹¹⁵ In previous generations we adopted this imposed order to secure our literal survival; now we do so to secure our right to a better life. Further, we have moved on from what is characterized as a reactionary and essentialistic view of ‘us and them’ to a new understanding of ourselves as a pluralized collective, where each of us are both ‘us’ and ‘them’ at the same time.¹¹⁶ With the rest of Canadians, or humanity for that matter, we are the same as well as different, depending on which axes of comparison is assessed. Culture is now understood to be transient and fluid, ‘liberated’ from the thick and irrational rites and privileges it once bestowed on us. Now, we find ourselves in a liberalized postmodern age where the culturally mobile hybrid identity is normativized and accepted as a given.¹¹⁷

¹¹⁵ While I am not entirely sure about this, my fear is that this argument is advanced by John Borrows. Allain Carins has read John

¹¹⁶ The notable exception here is Taiaiake Alfred who continues to develop a careful and nuanced but somewhat dichotomous indigenous/settler analysis to understand imperial relations. See his works cited in *Supra* note 21.

¹¹⁷ Seyla Benhabib leads the way on this front. She has urged what she calls “strong multiculturalists” to “face the embarrassing fact that most individual identities are defined through many collective affinities and through many narratives.” *The Claims of Culture* (Princeton: Princeton UP, 2002) at 16.

These insights are accurate in so far as they recognize the dynamic nature of culture, but they also can be extended to such a degree that it no longer makes sense to theorize about matters of justice along lines of ‘us and them’; instead we must turn our minds to conceive of justice and reparation along the lines of a more intersectional and interactive model of justice that accounts for the multiplicity of voices that now account for us. In this context, a focus on the ‘us’ is to work backwards against pluralism and to romanticize and privilege a provincialised atavistic tribal identity. From that simplified unitary identity we conceive of a particularized justice and dig ourselves therein to defend the specificity of that vision to the rest of the world we encounter. In the current intellectual climate, this essentialist orientation is no longer tenable for critical scholars who are choosing to avoid the mess created by a cultural understanding of justice and tend toward a theory that reaches beyond the specific manifestation of cultural norms to address the infringements of freedom on a more general, structural or individualist theory.¹¹⁸ Others move to deproblematize syncretism and the absorption of indigenous norms into Canada’s legal framework and assert that the calls for the protection of state law and the calls for freedom from its imposition are presumed, at least on the face of it, to be equally indigenous and equally just.

¹¹⁸ Courtney Jung delivered a paper arguing for a turn to away from the mess of culture and toward a more general theory of structural injustice. “The Moral Force of Indigenous Politics,” *Fourth Annual Workshop of the Consortium on Democratic Constitutionalism* (University of Victoria, 2008). Similarly, Benhabib has argued that “An individual’s group membership must permit the most extensive forms of self-ascription and self-determination possible. There will be many cases when such self-identifications may be contested, but the state should not simply grant the right to define and control membership to the group at the expense of the individual; it is desirable that at some point in their adult lives individuals be asked whether they accept their continuing membership in their communities of origin. *Supra* note 116 at 19.

My fear is that this theoretical climate of mobile hybridity has made it possible for indigenous peoples to reconfigure their imagined selves (in both the deliberative communal and subjective individual senses) in a manner that aligns with state norms and limits their vision for the future within this state apparatus. We are not afraid of embracing the other and adopting their ways to secure advantage for ourselves because we are coming to believe that there is very little at stake. Since we generally start from poverty today, materially we have only to gain. Since we now believe in the fluid, mobile nature of our cultural identity, we also believe that there is little of significance to lose by embracing an integrated model of advancement. The problem, so far as my purposes here are concerned, is not that we are being drawn away from a so called authentic indigenous life by integrating into the Canadian mainstream. I am persuaded by the anti-essentialist perspective and hold a view of culture and identity as being constructed and pliable. My concern is with imperialism and the manner in which the insights of anti-essentialism have been marshalled to inflate the complexities of cultural identity to the point of unmanageability by normativising a mobile and hybrid conception of identity.

Perhaps in situations where imperialism was not at play, and power was relatively balanced between cultural groups, this would not be a concern. My sense is that power factors heavily into this situation in a manner that privileges certain normative orders and encourages others to integrate into it. Thus, the mobility of any subaltern cultural identity is, through a multiplicity of forces, channelled into the hegemonic liberal order of the state. Movements toward indigenous aspects of identity are of course identifiable

but the trend seems to go the other way. The problem is that the anti-essentialist view of culture has become so prevalent that we now speak of indigenous culture and identity as multifarious and identifiable on many sides of normative political debate—pulling, for example, both toward a modernizing vision of integration and toward the ancestral vision of regeneration.

The anti-essentialist insight that cultures are diverse and changing is true and that is likely the source of their danger. You will see indigenous elders at treaty negotiation meetings who consistently open with prayers. You will see Aboriginal judges in the Canadian court system, drawing on indigenous sources of normativity in their rendering of judgement, or Aboriginal business people in board rooms referencing indigenous ideologies to develop business plans. People exhibit culture in a myriad of different and often opposing ways, and we therefore have to de-essentialize our conceptions to acknowledge culture as “not identical to itself”.¹¹⁹ While correct, Nikolas Kompridis reminds us that this insight is incomplete.

*[a] culture that is strictly nonidentical with itself would be a culture without a past. It should be pretty much self-evident, but obviously not self-evident enough, that a condition of self-critically transforming the culture to which we complexly belong is that we claim it as our own, take responsibility for its history, its rights and wrongs. The lack of any identification with our culture renders us indifferent to its fate, indifferent to its future possibilities as much as to its past injustices.*¹²⁰

Kompridis reminds us that we must also bear in mind that there are meaningful and important similarities that grow out of the shared histories and commitments of those

¹¹⁹ J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge UP, 1995) at 5.

¹²⁰ N. Kompridis, “Normativizing Hybridity/Neutralizing Culture,” (2005) 33 *Political Theory* 318, at 340.

belonging to a particular cultural group. While these histories and commitments are internally negotiated and perpetually contested, they are identifiable and inform our sensibilities and ethical constitutions. These shared histories and associated commitments bestow on us certain rites and responsibilities that keep us immersed in the particularities of our past and attentive to the unique world of possibility that our history opens up to us. This history informs our collective and individual subjectivities in a manner that generates the complex-sive similarity necessary for the very production of normativity. That is to say the normative phenomena of a culture grow out of its historically informed and collectively (formally and informally) negotiated sameness. Yes, these norms are contested by some within that culture, and they are continually re-negotiated and thus dynamic and fluid. This is why I refer to it as a complex-sive similarity. It is these similarities that constitute us as a people and generate the normative grid through which we perceive the world and conceive of proper relationship within it.

There is no question that modernity works to break us free from the particularities of our pasts—of our complex-sive similarity—and embed us in what Walter Benjamin famously called a “homogenous empty time”.¹²¹ In so far as modernity is able to free us from our unique histories and the complex particularities it bequeaths, it will also unsettle the particular normative framework generated by that history. In our case, there can be no doubt that the normative grid of our histories have been radically suppressed by colonialism. Of course the suppression was not complete and indigenous normativity

¹²¹ “Thesis on the Philosophy of History” in H. Arendt ed. *Illuminations* Trans. Harry Zohn (New York: Schocken, 1969).

continues to be active in our lives albeit in a rather incomprehensive, unsettled or unsedimented manner. We can identify instances of sedimentation, where indigenous normativity has settled into liberal state structure through, for example, the common law judgement or treaty agreements. The manner in which these norms settle into the state's normative framework is, of course, negotiated. The problem is that those negotiations take place within the hegemonic domain of the state where the sedimented normative particularities of settler society are simply undisturbed and presumed. As a result, these negotiations resettle the indigenous normative order in a manner that binds them to a the state. The problem is that these norms settle in a manner that both embeds indigenous peoples in the universalized norms of an liberal governance and imperial enlightenment while thinning out those aspects of indigenous normatively deemed inconsistent with the state norms.

Implicit in the argument that I have framed here is a deeper and more troubling severance. Specifically, we are being cut from the rich interactive histories that generated those norms because they have become irrelevant to the social world we encounter. This is a history that many of us still feel responsible to. It is a history that that we still feel living in us, and feel responsible to and for. My fear is that the anti-essentialist critique, and its focus on mobility and hybridity often serve imperialism by making this severance more palpable to indigenous subjects.

c. Enframing imaginations

The second, related and more concrete manner in which imperialism has cultivated grounds that make the turn to an imperialized and state sponsored recognition paradigm possible is the manner in which it enframes the scope of possibility within the liberal state. Enframing is a helpful term used by Martin Heidegger in reference to the manner in which all that is new, novel or different is ordered into a framework of existing and taken for granted truth claims through a conservative self-referencing style of reason.¹²² Rather than allowing the engagement with different forms of life and modes of reason to decentre existing understandings of the world, they are conceived of and interacted with as resources to be ordered into a resolutely centered world. Difference is engaged within what we may call the concealed and unquestioned truth-frames of modernity. Difference and novelty are discovered as means of developing existing 'truths' and advancing the imperatives that grow out of them. The style of reason employed to determine what is and is not a useful discovery is conservative in that its voyage into the unknown grows out of an imperative to develop the infrastructure that supports the modern mode of being. All of existence becomes conceived of homogenously as a resource and the challenge is to properly order it into the world disclosed by the fathers of enlightenment. Difference that does not correspond with these imperatives is considered irrelevant and either stamped out (if threatening of existing truths) or left to fade away (if perceived as benign). If I understand Heidegger correctly, then it is this mode of engagement with the world's phenomena that Heidegger refers to as enframing or *Gestell*. Walter Benjamin picks

¹²² For an overview of this Heideggerian concept see generally, Heidegger, M. "A Question Concerning Technology" *Basic Writings* Ed. David Krell (New York: Harper Collins, 1993) at 321.

up this point in his assessment of the west's engagement with its own history: "For ever image of the past not recognizable by the present as one of its own concerns threatens to disappear irretrievably".¹²³ In the situation I am analyzing, what is disappearing are those aspects of our history as indigenous peoples that are not cognizable within the state's conceptions of what it means to be a liberal citizen. Whether or not we are to become liberal citizens is not a live question—what is material is how we are to be ordered into the liberal state's citizenry.

Of course, we may not care what is or is not recognized by the state. However, in Canada we find ourselves in a position where the state has effectively asserted control over our lands and governments so it makes sense that our ameliorative efforts must also involve the state. For us to stand around discussing amongst ourselves what a proper relationship would look like would do nothing to relieve the problems of our situation. To address the structural aspects of our impoverishment, we must involve the State. The problem emerging here lies in finding ways to engage Canada in a discussion of how to resolve our relational problems. We do not possess the power to determine the forums or manner of engagement. There have been periods in our history where we possessed greater or lesser amounts of influence over the forums of engagement but our influence has always been far less than determinative. So, to remedy the real and felt socioeconomic woes of our communities, we seek out the settler state in the forms that it is willing to engage us. We have been told that there are three forums of possible engagement: litigation in its courts, negotiated agreement under the state's treaty

¹²³ *Supra* note, 121: 255.

agreement commissions, or continuing on under the Indian Act and, dealing with the Indian Department and its agents. This, it seems to me, is an example of the way in which imperialism works to enframe what we understand to be the real world and thus direct our energies into a hegemonic field that is firmly within their control. Matters of sovereignty and its moral justification are presumed as self-evident and not up for negotiation in these three forums, whose authority contemplates only the administration of sovereignty and citizenship rather than a questioning of these concepts' foundational premises.

The problematics of this situation can be analyzed on many different levels. For my purposes, I want only to shed light on one ideological effect, which is the manner in which this situation circumscribes the fields of actuality, which I believe restricts our ability to perceive and thickly imagine alternative worlds as possible. Above I have described a two step process under which this circumscription takes place. First, the hegemonic Canadian state has dispossessed us of much of our lands and cultural heritage and then asserted control over our individual and collective bodies. We therefore find ourselves in a rather desperate situation where the remedy of our situation necessarily involves the settler's state which produced our desperation and now seems to hold the keys to our material freedom. Second, when the logic supporting the state's dominion is shown untenable and out of step with the liberal principles on which western society believes it is founded, the state is forced to engage us to reevaluate the relationship. However, to ensure that there is no real threat to the imperial dominion, the state controls the field of engagement. As we engage, we find that the foundational questions of what it means to

be a citizen, what it means to be governed or govern, or how to relate to each other and all that inhabits our worlds have already been definitively answered. Living in accordance with our own conceptions of what it means to be *cuu'as* (human) is recognized only in so far as it can be ordered into the world previously imagined by the modernists of enlightenment. Thus, we are led to believe that a de-imperialized, indigenized freedom is not in the cards for us but nevertheless, our impoverished material conditions lead us to engage. My sense is that the turn of our intellectual and material resources toward these compromised forms of engagement has blinded us from a broader world of actuality and the possibilities that can grow out of our existing conditions. Here, I will return to Hardt and Negri, and the more troubling aspect of their radical thesis on empire.

The Limits of Imperialism

In *Empire*, Hardt and Negri imply that imperial release is beyond our reach at present and point ahead to a better world that may be possible if we advance with thoughtful strategy toward a counter-hegemonic future. We are always already imperialized subjects operating within an imperial field. Similarly, Benedict Anderson has argued that the world's national communities have to choose from the nation models developed in Europe and America.¹²⁴ Narrowing this position even more from the right wing, certain post-Cold War writers have argued that only one modular form of social order is left to choose from. Here, of course, is Francis Fukuyama's famous argument that:

¹²⁴ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* revised edition (New York: Verso, 2006) at 140.

What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.¹²⁵

According to this view, communism represented the only real alternative to the liberal constitutional democracy. While discrete alternatives may be identifiable, they are thought to grow out of unique circumstances that would be unsustainable for the majority of states. For example, Hugo Chavez has argued that Venezuela represented an functional alternative to the western liberal model.¹²⁶ In a response titled “History Stands Against Him”, Fukuyama argued that the difference represented by the Venezuelan model was sustained by the fact that the country has massive oil reserves.¹²⁷ Oil has provided Venezuela with a revenue source that has allowed Venezuelans to control their engagement with the global market. When those oil sands dry up, Venezuela will no longer be able to withstand the free-flow of history, and will open its doors and be absorbed into it the homogenous empty time of modernity.

Hannah Arendt’s insights have some currency here, as she highlights the ideological character of the constricting idea that history propels the western modes of government. Specifically, Arendt notes that the political events and political action that gave rise to modern forms of governance and continue its spread are ideologically conceived as historical processes. Understood as such, the spread of western liberal democracy throughout the world has thus becomes depoliticized and understood as a historical

¹²⁵ Francis Fukuyama, “The End of History and the Last Man (New York: Free Press, 1992).

¹²⁶ H. Chavez, Address to the United Nations (New York: 20 September, 2006) online: <http://www.commondreams.org/views06/0920-22.htm>.

¹²⁷ F. Fukuyama, “History’s Against Him”, Washington Post (6 August, 2006) online: <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/04/AR2006080401768.html>.

rather than a hegemonic current. Arendt insightfully refers to this historicization of politics as a “totalitarian development.” It is distinct from the totalitarian regime, or what I am referring to as direct imperialism, in that it has discovered, as she writes,

“...the political means to integrate human beings into the flow of history in such a way that they are so totally caught up in its “freedom,” in its “free flow,” that they can no longer obstruct it but instead become impulses for its acceleration. This is accomplished by means of coercive terror applied from outside and coercive ideological thinking unleashed from within—a form of thinking that joins the current of history and becomes, as it were, an intrinsic part of its flow.¹²⁸

It seems to me that both Anderson and Fukuyama’s reasoning and bleak conclusions are ideological in this Arendtian sense. Their thesis neutralizes imperial expansion by rationalizing totalitarian rule as historical process. Speaking personally, this is a thesis I do not accept. I say this simply because my experience shows them to be counterfactual. It is simply not the case that non-western peoples have organized their self-understanding—their imagined communities—around the modular forms of governance availed to them by the western states. Here, I enjoin Partha Chatterjee’s objection to Anderson’s thesis that ,

[i]f nationalisms in the rest of the world have to choose their imagined community from certain ‘modular’ forms already made available to them by Europe and the Americas, what do they have left to imagine? History, it would seem, has decreed that the postcolonial world shall only be perpetual consumers of modernity. Europe and the Americas, the only true subjects of history, have thought out on our behalf not only the script of colonial enlightenment and exploitation, but also that of our anti-colonial resistance and postcolonial misery. Even our imaginations must remain forever colonized.¹²⁹

¹²⁸ *The Promise of Politics*, (New York: Schocken, 2005) at 121.

¹²⁹ Partha Chatterjee, “Whose Imagined Community,” G. Balakrishnan and B. Anderson eds. *Mapping the Nation* (London, Verso, 1996) at 216. I am thankful for James Tully for bringing this article to my attention.

Chatterjee goes on to note that his objection is empirical, not sentimental. Rather than identifying with the west's 'modular' forms of national society, he asserts that the most imaginative and forceful anti-colonial movements around the world have grown out of social modalities that are patently non-western.¹³⁰ There are other people and communities who have either not been subsumed in the modular forms propagated by the West or who are effectively finding ways of easing its grip and living freely. Their example stands to remind us that the scope of our actions is not completely enclosed by empire, and that acting otherwise is possible.

Conclusion

Most of this chapter was concerned with developing an expansive understanding of how the dynamics of imperialism facilitates an interaction between hegemonic and subaltern subjects that reinforces existing power imbalances. In the last section of this chapter, I have suggested imperialism is not as ubiquitous as some thinkers imply. I have read Hardt and Negri as implying that imperialism is fully encompassing of our existing reality. Here however I prefer to believe, what have been to me the more helpful (and hopeful) words of Jim Tully, that "a better world is actual". As noted in chapter two, this statement can be understood in Ghandian terms, as a directive to "be the change." As I reflect on it here, it seems Tully may also echo Chatterjee's view that there are sites in the world, within our own worlds, where that change is being actuated. The better life is before us now, being lived by others in our communities. There are ways that we ourselves are actually living it. The fact that we have difficulty identifying these

¹³⁰ Ibid. For examples of non-western nationalisms on the ground, see B. Santos *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge UP, 2005).

instances of “acting otherwise” may be more an indication of our own distractedness rather than the actual state of things.

By stating that a better life is actual, Tully reminds me that hegemony is a form of trickery that can be identified in the progressive or radical’s critique just as readily as anywhere else. By characterizing the present as being fully enclosed by imperial structures, Hardt and Negri’s liberatory gaze is directed ahead in time, creating what we may call a forward-looking emancipation complex. This complex leads one to perceive existing structures or discourses as essentially imperial and irrelevant to an anti-imperial struggle. Those who use the language of freedom and liberation in relation to existing forms of, for example, recognition and reconciliation have been co-opted. The critic’s ameliorative energies are therefore turned toward the future, away from existing structures and discourses, and ahead with the hope of creating new conditions of possibility. As indigenous people we cannot help but look backward to the histories that inform our identity in hopes of identifying principles and practices in a period when we were untainted by imperialism. In adopting this method, we problematically tend overlook existing conditions, dismissing our world of experience as inherently imperial.

I hear Tully calling us to a more emancipatory analytic disposition toward the present, reminding us that our critical edge and liberatory thinking and action grow out of existing circumstances. Our thinking about freedom must account for the always already condition from which our existing thoughts and actions are marshalled. If we understand imperialism to be all encompassing of our current conditions, definitive of both our

subjectivities and the social world we encounter, then the idea of a deimperialized world is kept beyond the reach of our actual hands, to be achieved in a period that is necessarily “always later.”

The idea that another world is actual carries with it great depth of insight that I intend to explore in more detail later.¹³¹ Here, I raise it to make the small point that, while imperialism permeates much of our existence, its effects are not comprehensive. The normativity that grows out of our histories is still with us today. Imperialism, as I have argued, does work to settle or sediment those norms in a particular manner—a manner that does great violence to the histories that constitute us as a people. However, there are sites where peoples are reaching beyond the imperial structure to draw on different histories to construct more equitable norms of relationship. These peoples are not simply resisting—they are actually living differently, in a manner that is neither pre-scripted by nor reactive to imperialism.

My view, which will be picked up in the concluding chapter, is that our anti-imperial efforts should be directed to caring for these sites so as to thicken our capacity to “act otherwise”. We should cultivate practices that enhance our connection to the more egalitarian and equitable norms of our histories and present to develop our constitutionalism. First, let me try to substantiate the conception of imperialism put forward in this chapter with reference to the Maa-Nulth Final Agreement.

¹³¹ For Tully’s use of this term see *Public Philosophy in a New Key*, *supra* note 48 at 301-302.

Chapter Five: Maa-nulth Final Agreement

This chapter stands as an attempt to pull together the previous two chapters with an analysis of certain components of the Maa-nulth Treaty Agreement. This Agreement provides the catalyst for the ideas developed in this thesis, and I have tried to thread references to it through this each of the previous chapters. Here, I will place this Agreement at the center of my analysis, as I will attempt to analyze it under the theoretical lenses I have sketched with the chapters on pluralism and imperialism. My intentions here are to show that the MFA does three things. First, it affirms legal plurality by recognizing the Maa-nulth as a legitimate legal community within Canada. Second, the Agreement acts to domesticate Maa-nulth jurisgenerative authority so as to harmonize it with Canada's liberal democratic norms. Finally, the MFA acts to bind the Maa-nulth to the state's existing political/institutional structure and all the interests entrenched therein. Thus, through our agreement, the MFA effectively hands over much of the control of our nations to the federal and provincial governments, and Canada producing a shallow, hierarchically stratified legal pluralism within the state.

Let me pause for a moment here and recap the central points of the previous two chapters. Chapter three addressed legal pluralism to establish that there exists a plurality of legal orders sharing the same space, and that state action is not required to create law. I argued here that contrary to the theoretical postulations of legal centralist thought, the state does not have a monopoly on the jurisgenerative authority within its claimed borders. This is helpful in thinking about indigenous normative orders, as it aids us in

thinking of the Nuu-chah-nulth social order as being regulated by 'law'. I have also noted that it is important to conceive of law as procedurally developed through deliberative processes, and not simply emergent through unidentifiable processes. While these two pluralist insights are helpful in analyzing indigenous legal traditions, they do not necessarily lead to an assessment of the relationships between legal orders and correlatively to perceive as problematic the manner in which multiplicity of legal orders become hierarchically or at least asymmetrically ordered.

It is this asymmetrical and power laden ordering that I explored in chapter 4. There, I turned to post-colonial theory to develop an analysis of indigenous legal orders that I believe is more capable of accounting for power. I argued that the exploitative asymmetrical relations established in previous generations of colonialism are reinforced in our contemporary period through less formal means. Imperialism works to recover for the hegemonic crown what was taken in earlier colonial periods. The ideologies that supported colonial rule have been delegitimized and there has been a move toward decolonization on the global scene. However, updated imperial ideologies have been marshalled multifariously to ensure that the resources of colonialism, which include ourselves as indigenous subjects, as well as our ancestral homelands, could still be exploited for the benefit of the colonial hegemon.

In relation to subject of this chapter, I think it is fair to characterize contemporary comprehensive claims processes in Canada, including the Maa-nulth treaty, as a process of deconstruction similar to the decolonization project. The BC Treaty Commission is

designed to remedy what are now understood to be illegal and morally unjustifiable relations established in the colonial period. Drawing on Robert Young, I also comprehend imperialism to be the ideological impetus to secure for the hegemon continued access to what he aptly calls the “plunder of colonialism.”¹³² In this case, I understand that plunder to be both ourselves and the land we belong to.¹³³ In the Nuuchahnulth language there is one word that is used to refer to ourselves, the land and all that is included in it. This word is *ha’houlthee* (this Nuu-chah-nulth term refers to everything within the boundaries of a Nation’s territory). Thus, when I state that the BC Treaty Process is an institutional deployment of imperial ideology, my claim is that this process is drawing the Nuu-chah-nulth *Ha’houlthee*, or in Young’s terms, the plunder of colonialism into the liberalized spheres of the state.

The *MFA* thus ensures that we are still subject to a constitutional and administrative legal order that we did not create, and within this domesticated order we remain dispossessed. Rather than deconstructing our imperialized existence by providing for a reincorporation of the imperial takings into our own social/legal/economic traditions, this process, I believe, acquires our consent to lock Canada’s colonial plunder into the Canadian legal order where it will be subject to state authority and opened to the domestic and global economies for potential exploitation.

¹³² Young, Postcolonialism, *supra* note 60.

¹³³ In the Nuu-chah-nulth political order the division of authority is between the *ha’houlthee* and the *hawiih*. *Hawiih* are the individuals responsible to the *ha’houlthee*. The *ha’houlthee*, Wickanninish tells me, refers to “the distinct boundaries of the tribe’s territory and all the things contained in those boundaries, and all the people contained in those boundaries.” Thus, *ha’houlthee* refers to people, animals, plants, and minerals. Each of these things composing the *ha* are intimately connected (see note 4 discussion of balance and *Heshook-ish Tsawalk*) and the *hawiih*’s responsibility was to engage in practices of listening and balancing the voices and concerns of the *ha’houlthee*.

In the remainder of this chapter I will attempt to reinforce this claim that the *MFA* is embedded in an imperial framework by analyzing some of what I believe to be the key provisions of the text of the *Agreement*. Specifically, I will look to the preamble to identify the spirit of the *Agreement*, as well as the more directly active provisions relating to certainty, land and jurisdiction. I will then move on to assess problems of Maa-nulth subjectivity, and discuss how processes of imperial processes of subjectivation have made the Maa-nulth agreement possible.

Let me begin with a few caveats. My objections to the *MFA* are admittedly somewhat shallow. The straightforward nature of my objections makes this *MFA* analysis an uninteresting endeavour for some. The second caveat relates to the fact that the *MFA* is an incredibly complex agreement containing many interdependent provisions, clauses and chapters. It is also unprecedented, as it and the *Tsawwassen Agreement* are the only two *Final Agreements* produced by the BC Treaty Commission to be ratified and both will gain legal effect at almost the same time.¹³⁴ My intention here is not to give an analysis of the overall legal effect of the *Agreement* or to quantify, through detailed legal analysis the value it represents for Maa-nulth society. Such an analysis would be tedious and difficult, and beyond the purposes of this thesis.

¹³⁴ *Maa-Nulth Final Agreement* and *Tsawwassen Final Agreement*, supra note 1.

My purpose here is simply to make the case that this *Agreement* is embedded in and supportive of imperial relations. I will also discuss why this *Agreement* was deemed acceptable to the Maa-nulth people.

MFA Preamble

The *MFA* preamble consists of nine short paragraphs that set the foundations supporting the Agreement. The *MFA* Preamble elaborates the background context that brings the parties together to agree on the provisions that follow. Generally speaking, the preamble has legal significance only in so far as it clarifies ambiguities found in the active provisions. La Forrest, J, then speaking as a Supreme Court of Canada justice, made this principle clear in stating “it would be odd if general words in a preamble were to be given more weight than the specific provision that deal with the matter.”¹³⁵ My interest in the preamble is not with its legal affect but rather in the narrative background that it sets to the Agreement. I turn to it to identify the narrative spirit the Agreement rests on. Ruth Sullivan, a leading authority statutory construction, states that “the primary function of a preamble is to recite the circumstances and considerations that give rise to the need for legislation or the ‘mischief’ the legislation is designed to cure.”¹³⁶ Sullivan further notes that “[b]y spelling out the assumptions *the legislature* takes to be true, the policies and principles *it* wants to advance and the values to which *it* is committed, the preamble offers interpreters an authoritative form of guidance.”¹³⁷

¹³⁵ *McVey V. United States of America*, [1992] 3 S.C.R 475 at 525, 97 D.L.R 94th) 193.

¹³⁶ R. Sullivan, ed., *Driedger on he Construction of Statues*, 3rd ed. (Toronto: Butterworths, 1994) at 259. In *Blacks Law Dictionary 8th ed. s.v. “preamble”* is defined similarly as “an introductory statement in a constitution, statute, or other document explaining the document’s basis and objective; esp., a statutory recital of the inconveniences for which the statute is designed to provide a remedy.”

¹³⁷ *Ibid.* Emphasis in original.

My argument here is that the preamble sets the Agreement within a spirit of internal colonialism.¹³⁸ The stories found in the Preamble set up the Maa-nulth as an asserting party and Crown as the recognizing party. Canada's constitutive story—the story that supports Crown sovereignty—is presumed. The Maa-nulth are free to make assertions outside of this existing constitutional framework (and they do), but absent Crown recognition those assertions are, in the view of the Crown, of no legal effect. Further, all such recognition granted thus far has taken place within the story of Crown sovereignty.

This point was made abundantly clear in *Sparrow*:

It is worth recalling that while British policy toward the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the crown.¹³⁹

To be sure, the branch responsible for adjudication within this constitutional story (the courts) has recognized Indigenous assertions in a manner that presses the political branches (the Crown) beyond their current administrative policies and mandates. The Crown therefore faces a legal imperative to re-organize the administration of Crown sovereignty to account for Indigenous claims and assertions. The deeper aspects of the indigenous story that call for a re-negotiation and de-imperialisation of Canada's constitutive stories are identifiable in Preamble, but only in the form of unbinding assertions of a politically weak and (as demonstrated in the Agreement's terms) deeply compromising community.

¹³⁸ For a discussion of internal colonialism, see J. Tully, *The Struggles of Indigenous peoples for and of Freedom* in Ivison, Patton, and Sanders, *Political Theory and the Rights of Indigenous People* (Cambridge: Cambridge UP, 2000) 36-59.

¹³⁹ *R. v. Sparrow* [1990]. 1 S.C.R. 1075, at para 49.

The preamble consists of only 9 paragraphs which I have listed below and numbered for referencing purposes. They are not numbered in the original text.

WHEREAS:

1. The Maa-nulth First Nations assert that they have used, occupied and governed their traditional territories from time immemorial;
2. The Maa-nulth First Nation have never entered into a treaty or land claims agreement with the crown;
3. The *Constitution Act, 1982* recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada, and the courts have stated that aboriginal rights include aboriginal title;
4. The Maa-nulth First nations assert that they have an inherent right to self-government, and Government of Canada has negotiated self-government in the Agreement based on its policy that the inherent right to self-government is an existing aboriginal right within s.35 of the *Constitution Act, 1982*;
5. The Maa-nulth First Nations' existing Aboriginal rights are recognized and Affirmed by the *Constitution Act, 1982*, and the Parties have negotiated this agreement under the British Columbia treaty process to provide certainty in respect of those rights and allow them to continue and to have effect and be exercised as set out in this Agreement;
6. Canada and British Columbia acknowledge the perspective of the Maa-nulth First Nations that harm and losses in relation to their aboriginal rights have occurred in the past and express regret if any actions or omissions of the Crown have contributed tot hat perspective, and the Parties rely on this Agreement to move them beyond the difficult circumstances of the past;
7. Canada and British Columbia acknowledge the aspirations of the Maa-nulth First Nations to preserve, promote and develop the culture, heritage, language and economies of the Maa-nulth First Nations;
8. Canada and British Columbia acknowledge the aspirations of the Maa-nulth First Nations and the Maa-nulth-aht [Maa-nulth people] to participate more fully in the economic, political, cultural and social life of British Columbia in a way that preserves and enhances the collective identity of the Maa-nulth-aht as the Maa-nulth First nations and to evolve and flourish as self-sufficient and sustainable communities; and
9. The parties are committed to the reconciliation of the prior presence of the Maa-nulth First Nations and the sovereignty of the Crown through the negotiation of this Agreement which will establish new government-to-government relationships based on mutual respect.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:¹⁴⁰

Given that I have front-loaded this section by outlining the structure of my argument, the following analysis will be somewhat repetitive. What immediately becomes apparent is the manner in which the MFA frames the Maa-nutlh as profoundly weak subjects aspiring to make the most of, rather than overcome, an internally colonized situation. As

¹⁴⁰ *Supra* note 1, at 1.

noted in the final paragraph, the agreement is not about reconciling competing claims to sovereignty, but rather is intended to adjust the administration of crown sovereignty to account for the “prior presence” of Indigenous nations on the land. Canadian sovereignty is not in question and, for that matter, neither is Maa-nulth sovereignty, which is notoriously absent from the text. By presuming questions of sovereignty to be settled, the preamble elaborates a story in which the Maa-nulth are seeking recognition and justice within the constitutional structure of the Canadian state. Accordingly, the Maa-nulth find themselves and the stories they bring to this Agreement to be enclosed within a narrative of internal colonization. This is a situation where the Maa-nulth plead for recognition and the crown, restricted only by the opinions of its adjudicative branch, is in the position to choose what to recognize and how to recognize it.

Foundational questions of legitimacy are not entertained by the Crown, and its imperatives for negotiation spring from its judicial branch (paragraph 3,4,5) and existing Aboriginal policy (economic/political/cultural) and constitutional structure (paragraph 4,7,8,9). A deep questioning of legitimacy would be the primary concern of the Maa-nulth, but the Crown does not care much about the pre-occupations of the Maa-nulth. What the Crown has to care about is developing a more efficient and effective Constitutional structure, common law jurisprudence and policy framework. The preamble appears to be telling a story every student of Aboriginal law or politics knows. That story is that Aboriginal peoples are Canadians who *may* have legal rights, the substance of which remain ambiguous. The backdrop story not expressly mentioned is that these undefined Aboriginal rights have created costly administration regimes of

consultation and accommodation. The Agreement stands to clarify these ambiguities. Further, indigenous communities are economically depressed. The Agreement is presented as a kind of stimulus package to alleviate the community's socio-economic woes and hopefully turn them into contributing, rather than draining, components of the BC economy. Finally, there is a story of thin cultural plurality. It is a story that conceives of the existing constitutional and economic framework as culturally neutral and when properly administrated fully capable of meeting the needs of a multiplicity of cultures. The Agreement gives explicit recognition of the Maa-nulth people's place in this cultural mosaic.

Common sense seems to suggest that a Treaty which has anything to do with addressing historical injustice and remedying the imperial mode of relationship developed in the colonial era, would conceive of the recognition processes as moving precisely in the opposite direction. The settler population would be attempting to indigenize its presence and "rediscovering America"¹⁴¹ or "recovering Canada"¹⁴² by seeking recognition from the local populations that it wrongly subjugated in earlier colonial periods. Common sense also suggests that power is more determinative than justice when looking at negotiated Agreements between parties. It is worth assessing the stories that bring each party to the table independently. We should expect the story of a more powerful party to figure more prominently in the spirit of the Agreement.

¹⁴¹ This helpful phrase was introduced to me by James Tully in personal conversation.

¹⁴² Borrows, *supra* note 91.

From the perspective of the Crown, the MFA has very little, if anything, to do with justice or de-imperialising norms of relationships. It is not about renovating the indigenous/settler relationship for the sake of (some of) our de-imperial wants. Rather, the Agreement springs from a set of court opinions that have brought a measure of ambiguity to the Crown's claims over indigenous peoples and territories. From *Calder* (1973) onward, Canadian courts have continued to tell governments that Aboriginal people possess legal rights that 'burden' Crown sovereignty.¹⁴³ Indigenous uprisings have also gone some way toward demonstrating the high economic cost of ignoring the claims of indigenous peoples against the Crown.¹⁴⁴ Further, the economically depressed and socially marginalized state of most indigenous communities place a burden on government budgets. It has been shown more cost effective to address this financial problem preventatively by integrating the socially marginalized into the socio-economic system so as to make them producers rather than drains on the public purse. The Province commissioned KPMG, a financial consulting firm based in Vancouver, to assess the economic costs of signing or not signing a treaty, and it summed up the financial benefits by saying that "[w]hen all the financial impacts in B.C. are considered, British Columbia can expect about three dollars worth of total financial benefit for every dollar of provincial financial cost."¹⁴⁵

¹⁴³ *Calder v. B.C.A.G.*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1; *Sparrow* [1990] *supra* note 136; *R. V Van der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 (CanLII),

¹⁴⁴ Here, I am referring to various uprisings, including Oka, Calidonia, Gustafson Lake, as well as road blocks.

¹⁴⁵ BC Ministry of Aboriginal Affairs *The Benefits and Costs of Treaty Settlements in British Columbia: A Summary of the KPMG Report*, (2002) accessed online:

www.llbc.leg.bc.ca/public/PubDocs/bcdocs/.../rpts_kpmgsum.pdf at p. 2.

From the Maa-nulth perspective, matters of justice are central to treaty negotiations, at least at the outset. The indigenous people, generally speaking, say that they still own everything in the territory—a point made clear for the Maa-nulth in their *Ha'wiih* Declaration, signed 1994 when they were still negotiating under the Nuu-chah-nulth treaty table:

Since time immemorial, we the Nuu-chah-nulth *Ha'wiih* are the rightful owners and carry the full authority and responsibility to manage and control all that is contained within each of our *Ha'houlthee*. Strict traditional laws and teachings dictate that it is our responsibility to govern our territories by managing and protecting all lands, waters and resources within our *Ha'houlthee* to sustain our *muschim* and our traditional way of life.

Our authority and ownership have never been extinguished, given up, signed away by Treaty or any other means or superseded by any law. We continue to seek a just and honourable settlement of the land and sea question within all of our respective territories.¹⁴⁶

This Declaration was filed with the BC Treaty Commission to satisfy the Nuu-chah-nulth treaty table's statement of intent requirement and its sentiment of this Declaration is captured in the first preambular paragraph.¹⁴⁷ The general starting position of the Nu-chah-nulth, and Maa-nulth is that their authority still exists and the Crown infringements on it still lack justification. As noted in the *Hawiih* Declaration, Nuu-chah-nulth authority has never been given up or legitimately taken from them. Contrary to the Crown's position, there is no mention of Canadian court decisions in the Nuu-chah-nulth *Hawiih*

¹⁴⁶ Nuu-chah-nulth Ha'wiih Declaration, 1994. This declaration was drafted under the direction of the 12 Nuu-chah-nulth chiefs who were beginning to engage the Federal Government and the Province in the BC Treaty Commission. The three of them were forced

¹⁴⁷ §.1.1 of the *BC Treaty Commission Agreement* (1992) online: http://www.bctreaty.net/files/pdf_documents/092192_bc-treaty-commission-agreement.pdf defines a First Nation as ready for negotiations in the following manner: "An aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia." For the Nuu-chah-nulth, the constituents were not consulted about entering into treaty, and this *Ha'wiih* served as the mandate to enter into negotiations.

Declaration, and the first paragraph of the preamble makes clear that the Maa-nulth view their authority as independent on any form of Canadian law—it is inherent to their own social order and not contingent on the Royal Proclamation, s.35 or any other legal construct of the Crown. Treaty, as originally conceived by the Maa-nulth, is about freeing their authority from the constraints of Canada and British Columbia and establishing a just relationship based on principles of balance and mutual respect. Such an agreement is necessary to legitimately settle newcomers in our ancestral homelands and restore equilibrium to the Maa-nulth *ha-houlthee*.

Thus, we find that each party is at the negotiating table for reasons that are fundamentally divergent. The Crown is there to resolve the ambiguities of Aboriginal rights under their law and to address an economic problem that grows out of a section of its population. The Maa-nulth are there to address matters of deep injustice that call into question the constitutional framework that structures the current relationship of indigenous and settler peoples and stratifies their *Ha-houlthee*. The existence of the gap between the negotiating party's motivations to treat with each other is not problematic on its own. In fact, it should be expected that parties representing such divergent cultural peoples and histories would diverge in their aims in negotiation. This kind of difference is the stuff we must expect to grow out of a situation of legal pluralism and for which we must develop tolerance. The problem is found in the manner in which the Agreement's preamble sets the claims up against each other so as to reinforce Canada's imperial agenda and suppress the Maa-nulth people's deeper liberatory imperatives.

This brings us back to a point made earlier: the indigenous party's claims are reduced to assertions for which they are requesting recognition, and the settler party's claims are assumed and they have the privilege of recognizing aspects of the Aboriginal claim on their own terms, under the shadow of its own legal framework. The preamble makes clear that the crown's motivations for engaging in this recognition process are found in its own legal framework, and not the naked 'assertions' (ie those components of aboriginal claim not created in, recognized, or likely to be recognized by Canadian law) of the Aboriginal claimants. If the Agreement had de-imperial aspirations and sought to draw the Indigenous party out of their internally colonized situation, its Preamble would have told a different story. It would be a story where the settlers recognize themselves as illegal occupiers that are seeking the recognition of indigenous peoples to legitimate their presence. It would be the indigenous party performing the recognition, and through negotiated agreement providing legitimacy to the settler's existence. It would be the Crown's 'later occupation' reconciled with Indigenous 'sovereignty' Instead, the Crown is entirely unreflective of its position in indigenous homelands and thus fails to see itself as an occupying power. This unreflectiveness comes through most clear in paragraph 6, where we see Canada's inability to apologize for its atrocities against indigenous peoples and lands, and instead expresses regret for the *perspectives* that indigenous people may have about being wronged by the Crown, and for anything the Crown may have done to contribute to that *perspective*.

Certainty, Finality and Modification

In my opinion, the most troubling aspect of the treaty lie in its certainty provisions. The certainty provisions are meant to ensure that the entirety of Aboriginal rights held by the First Nations and individuals that sign the agreement are set out exhaustively in the Agreement. Any rights that existed outside of its terms are extinguished. This is troubling, not simply because it produces a constraining and assimilatory framework. The truth is that we are already constrained by a liberal constitutional order that facilitates our exploitation and assimilation. The MFA does not change this. The problem is that the MFA contains provisions that forever bind us to this imperial relationship, and extinguishes our legal rights to “act otherwise”.

To be fair, there has been a move away from the extinguishment of Indigenous Rights as a policy position for British Columbia’s treaty negotiations. Realizing that the language of extinguishment was unacceptable to First Nations, the province revised its policy in 2002. In introducing the new policy, the Honourable Geoff Plant stated,

First nations have told us that they will not accept an extinguishment of rights to achieve certainty. We acknowledge the validity of this position. British Columbia therefore rejects the use of extinguishment or the technique known as cede, release and surrender.¹⁴⁸

Instead of extinguishment clauses, treaties now include modification clauses stipulating that all Aboriginal rights possessed by Indigenous group are modified so as to be expressed exhaustively in the Agreement. §35, and thus becomes confined to the pages of the treaty. The Crown insists that nothing is extinguished.¹⁴⁹

¹⁴⁸ B.C Treaty Commission, *Update*, January 2003, online: http://www.bctreaty.net/files/pdf_documents/january03update.pdf at 4.

¹⁴⁹ *ibid.*

The slight of hand behind this move from an extinguishment policy to one of certainty is easily spotted. If there is any change at all, it is semantic rather than substantive. If it is to have any material effect over the extinguishment approach, I think it will be to the advantage of the Crown rather than the indigenous party. This is an opinion shared by the Union of BC Indian Chiefs, who state that

the net impact of the "certainty" provisions sought by Canada and B.C. will be to create a double standard with regard to title and interests in the land. Canada, the province, and third parties have their rights and interests recognized and protected. These rights are not defined or in any way limited by the Agreement. The Indigenous group, on the other hand, have all of their rights reduced to the written word of the Agreement.

These certainty provisions are far more restrictive than any of the "extinguishment language" which has been used in other modern land claims agreements to date.¹⁵⁰

I would also say the certainty provisions are for the crown's benefit for two other reasons. The first relates to the fact that "existing aboriginal rights" are recognized and affirmed by the *Constitution Act 1982*. According to liberal democratic constitutional theory, the rights embedded in the constitution cannot be extinguished, even where consent is proffered. However, modification of constitutionally recognized rights over time is expected, as most jurists and juridical theorists understand constitutions to be living documents that can and must change over time to account for evolving conditions.¹⁵¹ Thus, the move to modify Aboriginal rights out of existence, rather than bluntly extinguishing them, will likely be seen to rest on a more sound constitutional theory.

¹⁵⁰ UBCIC *Certainty: Canada's Struggle to Extinguish Aboriginal Title*, online: UBCIC <<http://www.ubcic.bc.ca/Resources/certainty.htm>>.

¹⁵¹ This is changing dynamic is expressed in the living tree metaphor that every law student leans about in first year constitutional law. This metaphor is thought to originate in an opinion of Lord Sankey who called for a progressive interpretation to constitutional documents by likening them to "a living tree capable of growth and expansion within its natural limits." *Edwards v. A.-G. Can.* [1930] A.C. 124, 136.

The second manner in which modification benefits the Crown relates to treaty interpretation. The Common Law has created certain safeguards against a reading down of the Treaty rights against the interests of the Indigenous party.¹⁵² Through agreement, updated framework allows the Crown to modify this interpretive privilege out of existence. Under the common law, Aboriginal treaties in Canada are guided by the following interpretive canons:

- a) be given a large and liberal interpretation;
- b) be constructed as Aboriginal people understood them;
- c) be interpreted flexibly so as allow for their development, and not to freeze treaty rights; and
- d) be interpreted in light of extrinsic evidence so as to allow the indigenous party's perspective to inform the meaning of treaties.¹⁵³

Given that Indigenous peoples rarely understood themselves to be extinguishing their rights in the older Treaties, which had consistently promised that their way of life and usage of the land would be protected, the above mentioned interpretive canons provide some defence against the legal legitimacy of the extinguishment clauses in the cease and surrender treaties.¹⁵⁴ That is to say, a jurist reading an older treaty through the above

¹⁵² Interpretive principles supporting a liberal construction of treaties in favour of the Indigenous party were first introduced to Canada's common law in *R. v. Taylor and Williams* [1981], 62 C.C.C. (2nd) 227 (Ont. C.A.). Here, the Court stated that "Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the effect." This echoes a US Supreme Court statement in reference to a Cherokee treaty much earlier that "The language used in treaties with Indians should never be construed to their prejudice... How the words of the treaty were understood should form the rule of construction." *Worcester v. State of Georgia*, 6 Pet. 515 at 582 (S.C.U.S. 1832).

¹⁵³ *Rv. Badger* (1996), 133 D.L.R. 4th 324 (S.C.C).

¹⁵⁴ The analysis here only references t defence under Canadian law. Clearly, Indigenous legal traditions would consider these Canada's interpretation of these treaties to be illegitimate on many grounds other than those found in these canons of treaty interpretation. For an example of a thicker indigenous conception of Treaty see generally, S.Y. Henderson, "Empowering Treaty Federalism" (1995) 58 Saskatchewan Law Review 241.

cannons would have strong grounds to consider the extinguishment clauses invalid. Under the Maa-nulth treaty these cannons are contracted out of existence.¹⁵⁵ §1.15.6 stipulates that “The provisions of this Agreement are not presumed to be interpreted in favour of any party.” Because the indigenous party now speaks, reads and writes in English and retains professional consultants and lawyers to negotiate treaties, a jurist may think that the cannons noted above may no longer be appropriate. Given the power discrepancies relative to the negotiating parties, and the fact that as a general rule indigenous people remain uninformed as to the broad implications of the Treaty (a point I will return to later in this chapter), the theory on which these interpretive canons rests may still be relevant. The canons themselves may be modified to account for our modernized conditions, but the theory underlying theory supporting them would still apply. Whether or not s.1.15.6 can be read to extinguish these provisions remains to be seen. If these cannon’s are a creation of the common law, and not a constitutionally protected Aboriginal Right, they will be read as “modified” out of existence.

The intent of the certainty model is to provide a once and for all answer to the Indian problem. Any Aboriginal right claimed by a Maa-nulth citizen will have to be processed through the Agreement’s provisions. The Agreement very clearly states that it is a “full and final settlement” of the Aboriginal rights question for the First Nation as a collective, and for any of the individuals who identify with that nation.¹⁵⁶ There are ten concrete carefully crafted provisions drafted to ensure that the treaty is read as a complete,

¹⁵⁵ *MFA, Supra* note 1, §.1.15.1-10.

¹⁵⁶ *Ibid*, §.1.11.1 states: This Agreement constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, of each Maa-nulth First Nation.

exhaustive expression of the Maa-nulth Aboriginal rights, including Aboriginal title.¹⁵⁷

The central modification provisions read as follows:

Notwithstanding the common law, as a result of this Agreement and the Settlement Legislation, the aboriginal rights, including the aboriginal title, of each Maa-nulth First Nation, as they existed anywhere before the Effective Date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement.¹⁵⁸

For greater certainty, the aboriginal title of each Maa-nulth First Nation anywhere that it existed before the Effective Date, including its attributes and geographic extent, is modified and continues as modified as the estates in fee simple to those areas identified in this Agreement as the Maa-nulth First Nation Lands and other Maa-nulth First Nation Lands of that Maa-nulth First Nation.¹⁵⁹

The Maa-Nulth people further release the Crown from all past claims, and “forever save harmless Canada and British Columbia from any and all damages...”.¹⁶⁰ It does seem that there is very little space to assert rights not contained in this Agreement. Unless there is some way to prove that the certainty provisions themselves are illegal, the *MFA* will likely stand as the sole and complete expression of the Maa-nulth people’s Aboriginal rights. Of course, the Agreement can be amended, but amendments must be agreed to by all parties.¹⁶¹

Not surprisingly, the Provincial and Federal governments do not extinguish their common law authority to infringe on the Maa-nulth rights secured in the *MFA*. Certainty seems only to flow one way, as indicated by the fact that the s.35 rights recognized by the *MFA*

¹⁵⁷ *Ibid*, §1.11.2 states : This Agreement exhaustively sets out the Maa-nulth First Nation Section 35 Rights of each Maa-nulth First Nation, their attributes, the geographic extent of those rights, and the limitations to those rights to which the Parties have agreed.

¹⁵⁸ §.1.11.3

¹⁵⁹ §1.11.4

¹⁶⁰ §1.11.7

¹⁶¹ The *MFA* Amendment Provisions are found at §1.14.14. There are also provisions stipulating that a periodic review must take place on a specified date (that is not given in the treaty itself, and is simply defined as the “periodic review date”). These provisions are found in §1.13.1-8. §1.13.7 and they clarify that the parties are under no obligation to amend the Agreement. The periodic review only requires the parties meet to discuss how the treaty is working. Further, each party is responsible to fund their participation in the periodic review.

continue to be subject to the common law infringement test, just like any other s.35 right. So long as Crown infringements are made in accordance with a valid legislative objective and satisfy the criteria set out in *Sparrow*, those infringements are legal.¹⁶² The right of infringement created by the court continues, and the Aboriginal Rights recognized by the MFA cannot be taken as certain.

Certainty, in this situation, clearly benefits the Province and Canada, whose general rights and obligations are not contemplated by the MFA's provisions. Somewhat ironically, certainty has been celebrated by the Maa-nulth themselves. This point was made clear in discussions about the *Tsilhqot'in* decision which was rendered on the very day that Maa-nulth were celebrating Provincial approval of their Agreement.¹⁶³ The decision recognized that the Xeni Gwet'in had proven title to 49% of their claim area.¹⁶⁴ UBCIC Grand Chief, Steward Philip contrasted this result with the Maa-nulth and Tsawwassen Agreements stating:

The astonishing inconsistencies between this decision and the two Final Agreements are absolutely monumental - why would any First Nation be foolish enough to ratify any BCTC settlement agreement for less than 5% of their territory when the Xeni Gwet'in has achieved recognition of their Aboriginal Title to 50% of their territory?¹⁶⁵

¹⁶² *Sparrow*, *Supra* note 136. Here, the court created a test under which the Crown could justify infringement of the proven and constitutionally protected rights.

¹⁶³ *Tsilhqot'in Nation*, *supra* note 140. Both the rendering of this decision and the province's celebration of the Maa-nulth Agreement occurred on November 21, 2007.

¹⁶⁴ *Tsilhqot'in*, *supra* note 140. This reasons for judgement would certainly have bolstered the argument that the MFA was a bad deal and thus aided our efforts to persuade people that it was so. Unfortunately, for our case, the reasons were delivered too late. I have one colleague who was consulting for the Treaty Commission when this the *Xeni Gw'etin* decision was rendered and he states that the office was afraid that this decision would "kill the treaty process."

¹⁶⁵ UBCIC Celebrates Xeni Gwet'in Court Victory. Online at: http://www.ubcic.bc.ca/News_Releases/UBCICNews11210701.htm.

In response to these criticisms Robert Dennis, chief negotiator for the Huu-ay-aht and lead spokesperson for the Maa-nulth treaty group proclaimed that the Maa-nulth people had certainty.¹⁶⁶ All the Tsilhqot'in had at the end of their long and arduous title case was a mandate to negotiate and a long road of appeals to look forward to. The Maa-nulth, on the other hand, possessed a hard earned and certain rights. Dennis's response, quoted from a Times Colonist article, is below:

"We're very happy that we've chosen this path," Dennis said, adding the Maa-nulth determined that going to court would cost "millions and millions" and result in multiple appeals.

"But then we looked at the treaty, and we looked at the opportunities it brought," he said. "It brought us more revenue, it brought us more governance, it brought us more land, and it brought an allocation to resources. So, clearly, this is the path we've chosen."¹⁶⁷

The benefits of possessing a set of clearly defined rights for the Maa-nulth are clear—it provides them with concrete parameters for the expression of their rights. So long as their operations do not contravene the provisions of the treaty, or extend beyond its bounds, their actions will be free from Crown interference. Thus, indigenous enterprise can rely on a predictable environment and aid their efforts to attract investment capital and plan development. The danger, as I intend to show in following discussion of land and jurisdiction, is that with this certainty comes radical limitations. Rather than liberating our nations from the restrictive order imposed by the Indian Act, our governance is liberalized through this Agreement to allow freer intercourse with the Provincial economy. We are also dispossessed of more than 95% of our traditional territory.

¹⁶⁶ J. Rudd, "Island's first modern-day treaty a 'vision of future' Deal lets Maa-nulth leave painful past behind, chiefs say," *Times Colonist*, November 22, 2007. Online: <http://www.canada.com/victoriatimescolonist/news/story.html?id=22a72e1e-e2e5-4774-923e-aaf06e66f4fa>.

¹⁶⁷ *Ibid.*

Land

This section will be short, as my only concern here is with the quantum of land offered. The land returned to Aboriginal people under the BC Treaty Commission is based on a population formula. The Province has been very clear that “the total amount of land held by First Nations should be roughly proportionally to their population (less than 5%).¹⁶⁸ With the MFA, the province improved on this mandate. The Maa-nulth’s claim to 100 % of their territory is thus modified by the MFA to be expressed in less than 5%.

The MFA breaks down the claim of each of the 5 tribes that have signed the Agreement independently. For my purposes, it seems necessary only to analyze one of them, since they all are negotiated under the same formula.¹⁶⁹ Since I am from the Toquaht Band, I will analyze their land quantum. For illustrative purposes, I have included three maps below. The First depicts the claim area, the second the depicts existing Toquaht reserves and the third depicts the Toquaht’s Treaty Settlement Lands.

¹⁶⁸ *The Benefits and Costs of Treaty*, *supra* note 143.

¹⁶⁹ Federal and Provincial negotiators mandate collapses the land and funding packages together. They have decided, on the basis of population, that each will cost them a certain amount. A value is placed on the land under claim and Band decides how much land to buy with the monies made available through treaty.

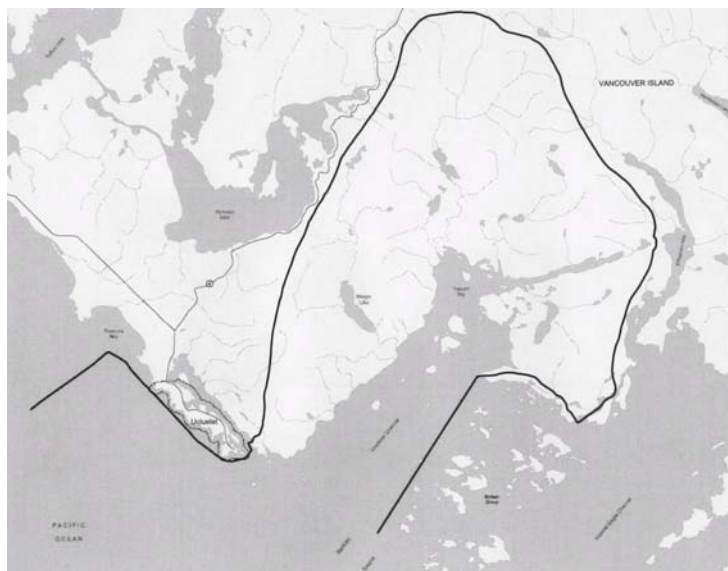


Figure 1: Toquaht Claim Area¹⁷⁰

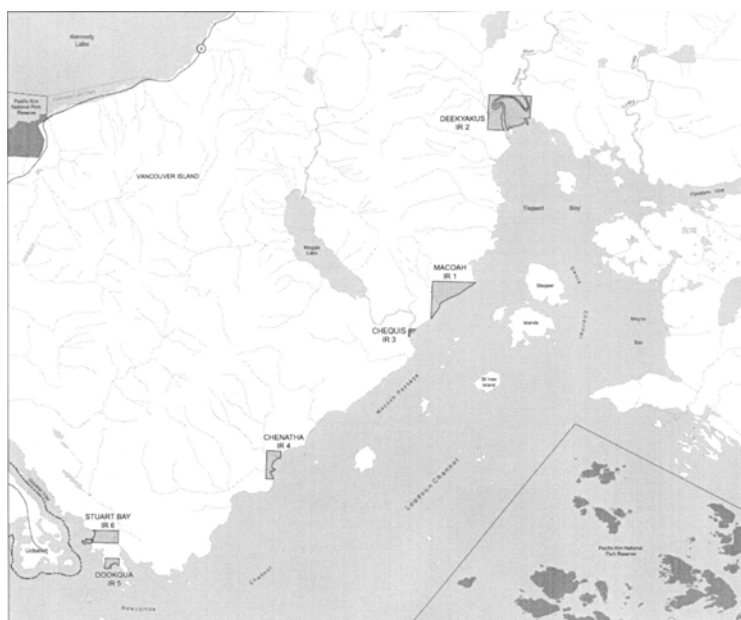


Figure 2 Existing Reserves¹⁷¹

¹⁷⁰ Supra note 1, Appendix A-3. p.6 . Note that the claim area is scaled at a much smaller rate, making the lands offered in treaty appear to compose a larger portion of the claim area. This effect is found in the Treaty Appendix itself.

¹⁷¹ Ibid, Appendix B-3.1(a). p.63.

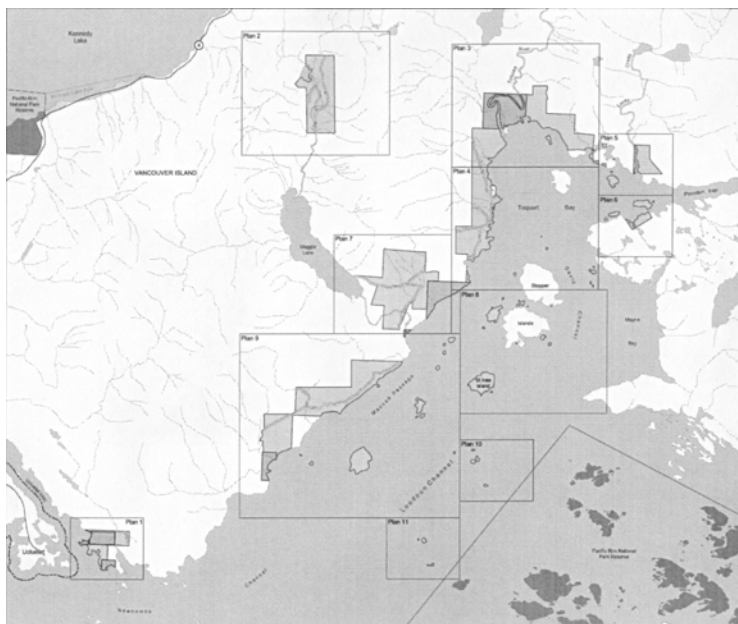


Figure 3: Treaty Settlement Lands¹⁷²

The total area of claim for the Toquaht treaty is not quantified in the treaty, and to my knowledge it has never been measured or surveyed by the Toquaht Nation.¹⁷³ What is quantified is the size of the land recognized as Toquaht lands in the treaty as well as those lands that are currently held on reserve for the Toquaht. The lands recognized under the MFA amount to 1293 hectares.¹⁷⁴ Toquaht Reserve lands amount to 196 hectares.¹⁷⁵ The Toquaht reserve lands will be converted into Treaty Settlement Lands when the Agreement takes effect, so in hectares the total amount of Toquaht Lands recognized by

¹⁷² Ibid, Appendix B-3.2(a). p.65. The treaty settlement lands are the shaded portions. The larger outlines refer to other more detailed maps that are included in the Agreement's appendices. Note that the map is scaled much larger in figure 2 and 3, giving the impression that a greater proportion of the claim area is granted in treaty settlement lands.

¹⁷³ This question was asked at a treaty update meeting (Ucluelet, July, 2007), and the treaty manager could not answer.

¹⁷⁴ *Supra* note 1, §2.1.1.c.ii.

¹⁷⁵ §2.1.1.c.i.

the MFA is 1489. If divided by 135, the number of people currently on the Toquaht band list, the number is 11.02. Now, if we divide the total land base of the province (95,000,000 hectares¹⁷⁶) by the total population of the province (4,263,784 in December of 2006¹⁷⁷ when the Agreement was signed) we see there is about 22.28 hectares per person. That is almost exactly double that which is ‘granted’ to the Toquaht under the Maa-nulth treaty. It therefore seems that even by the Province’s imperial “bottom line” formula of distributing treaty lands on the basis of population percentages, the province has struck a pretty good deal. This seems especially so when considering that J. Vickers recognized Aboriginal title over 200,000 hectares of the *Xeni Gwet’in* territory.¹⁷⁸ The *Xeni Gwet’in* are a tribe of 394 people, that works out to about 507 hectares per person.¹⁷⁹

My point in analyzing the land section is show how the treaty acts to remove the Maa-nulth people from a substantial portion of their home territory. The remaining 97% of the Toquaht land base—or Canada’s colonial plunder—is placed, with certainty and finality, in the unburdened hands of the crown. As if this were not enough, the Agreement contains many provisions that stipulate how the Maa-nulth are to hold their land. For example, the restrictions on the sale of Indian Lands under the *Indian Act* are removed,

¹⁷⁶ <http://www.gov.bc.ca/bcfacts/>

¹⁷⁷ <http://www.bcstats.gov.bc.ca/data/pop/pop/BCQrtPop.asp>

¹⁷⁸ Supra note 140. For quick overview of the case findings see Woodward & Co., *Decision Reached in Historical Land Claim Case: Tsilhqot’in Nation v. British Columbia, 2007 BCSC 1700*. Online: http://www.woodwardandcompany.com/william/newsrelease_long.pdf.

¹⁷⁹ Population count for *Xeni Gwet’in* was drawn from *First Peoples Language Map of British Columbia*. This website gives demographic information on the tribes in British Columbia. It’s focus is on languages, and acquiring a percapita account of how many people speak an Indigenous language. The *Xeni Gwet’in* data can be seen online: http://maps.fphlcc.ca/xeni_gwetin.

and the Federal authority over “lands reserved for Indians” created by s.91.24 of the Indian Act is dissolved. This is stated clearly in the general provisions of Chapter One:

There are no “Lands reserved for the Indians” within the meaning of the *Constitution Act, 1867* for any Maa-nulth First Nation and there are no “reserves” as defined in the *Indian Act* for any Maa-nulth First Nation and, for greater certainty, Maa-nulth First Nation Lands and Other Maa-nulth First Nation Lands are not “Lands reserved for the Indians” within the meaning of the *Constitution Act, 1867*, and are not “reserves” as defined in the *Indian Act*.¹⁸⁰

Instead, Maa-nulth Treaty lands are to be held pursuant to provincial legislation in fee simple under the BC *Land Act*.¹⁸¹ Thus, authority over Indian Lands will move from a federal head of power (s.91.24) to a provincial head of power (s.92.5).¹⁸² This land may be registered as indefeasible title under the provincial *Land Title Act* and opened for the possible sale to any willing buyer.¹⁸³ The Maa-nulth are free prohibit land sales but such restrictions will diminish the market value of the treaty lands. Considering the economically impoverished character of the Maa-nulth Nations who will be seeking out development dollars, the temptation to open Maa-nulth lands up for sale to the general public will likely be too great for the Maa-nulth to resist. The Nisga’a have recently opted to remove restrictions that disallowed individuals to sell land to non-Nisga’a citizens.¹⁸⁴ Some have applauded this move, claiming that private sellable property rights give the

¹⁸⁰ *Supra* note 1, §1.4.1

¹⁸¹ *Ibid*, §2.3.1. Cite BC land act.

¹⁸² For a critical assessment of the trend in Aboriginal politics of the US and Canada transfer authority from the central governments to the Provinces or States see generally J. Cornthassel and R. Witmer II, *Forced Federalism: Contemporary Challenges to Indigenous Nationhood* (Norman: University of Oklahoma Press, 2008).

¹⁸³ *Supra* note 1, §2.3.2.

¹⁸⁴ J. Quesnel, “Nisga’a Property Rights: Nisga’a pave the way,” *Globe and Mail*, July 15, 2009 online at: <http://www.theglobeandmail.com/news/opinions/property-rights-the-nisgaa-pave-the-way/article1209809/> on July 28, 2009.

Nisga'a and those who follow their lead a "ticket out of poverty,"¹⁸⁵ but, as noted earlier the results of this kind of policy are predicable. It is foreseeable that the majority of Maa-nulth people will be close to landless in a few generations.¹⁸⁶

Further, there are added restrictions the Maa-nulth face in holding their lands. For example, the provincial regulations pertaining to subsurface resource exploration, extraction and development continue to apply.¹⁸⁷ The Maa-nulth are also required to open their publically held lands to "other Canadians" for hunting, fishing and other recreational uses.¹⁸⁸ Adding further insult, the Maa-nulth are granted the opportunity to 'purchase' their own territory back, but only in areas within their original claim that are 'pre-approved' and purchased within the first fifteen years of the Treaty.¹⁸⁹

Governance and Jurisdiction:

The MFA sets up an incredibly complicated jurisdictional field for the Maa-nulth governments to legislate within. The reason it becomes so complicated is that it explicitly sets up Maa-nulth law to share the legal field with federal and provincial authority. Rather than simply allowing Maa-nulth law to pre-empt the operation provincial and federal legal frameworks, the MFA stipulates that the laws of these three parties operate concurrently. This is stated in General Provisions section of Chapter One:

Federal Law and Provincial Law apply to Maa-nulth First Nations, Maa-nulth-aht, Maa-nulth

¹⁸⁵ *Ibid.*

¹⁸⁶ See *Supra* note 54 for historical examples where Indigenous peoples have divested their land base.

¹⁸⁷ *Supra* note 1, §4.1.2.

¹⁸⁸ *Ibid.*, §5.4.1

¹⁸⁹ *Ibid.*, §2.10.23

First Nation Citizens, Maa-nulth First Nation Public Institutions, Maa-nulth First Nation Corporations, Maa-nulth First Nation Governments, Maa-nulth First Nation Lands and Other Maa-nulth First Nation Lands.¹⁹⁰

We are told that this situation of formalized concurrency (recalling the legal pluralism insight that concurrently operative legal systems are always present) requires an elaboration of the precise nature of the relationship between these laws. Failure to do so would produce an inefficient, inharmonious and uncertain field of law. Therefore, the MFA sets a fairly clear priority framework that ensures the existing regulatory framework formalized in the Province is maintained under Maa-nulth law. The concern here is that the exercise of Maa-nulth jurisdiction is cut back, or rather modified, so as to be consistent with or subordinate to the administrative and regulatory norms of the Province. The harmonization provisions of the MFA thus have a domesticating effect on the Maa-nulth legal order and further act to entrench the Maa-nulth in the Crown's constitutional framework.

This domesticating affect is achieved in the Agreement in a number of ways. First, the MFA ensures that any laws developed by a Maa-nulth First Nation that are not authorized by the Agreement, or inconsistent or in conflict with it, are of no force or effect.¹⁹¹ Further, the Agreement generally prioritizes Provincial or Federal law over Maa-nulth law, such that when a conflict emerges between legal orders, the Maa-nulth law fails. In those areas where Maa-nulth law is prioritized, the Agreement circumscribes the scope of Maa-nulth law making authority, ensuring that all Maa-nulth law in accords with the standards of the province or federal government. To demonstrate, I have listed a few key

¹⁹⁰ *Ibid*, §1.5.1

¹⁹¹ *Ibid*, §1.18.10

provisions below. Most of the provisions are found in Chapter 13 titled Governance, however, I have also referenced a few of the general provisions of Chapter One, which is given interpretive priority over the rest of the Agreement.¹⁹²

Crown Law Prevails:

The provisions below are examples of situations where Crown Law (federal or provincial) prevails to the extent that it is identified to conflict with Maa-nulth law:

- In all areas where the Maa-nulth First Nation has no law making authority, or where the agreement explicitly prioritizes Federal or Provincial law in the event of conflict.¹⁹³
- Federal Law in relation to peace, order and good government, criminal law, human rights, and the protection of the health and safety of all Canadians, or other matters of overriding national importance.¹⁹⁴
- Family and Social Services for Maa-nulth citizens provided by Maa-nulth Institutions on Maa-nulth Lands.¹⁹⁵
- Health Services for Maa-nulth citizens provided by Maa-nulth Institutions on Maa-nulth Lands.¹⁹⁶
- Post Secondary Education of Maa-nulth on Maa-nulth lands.¹⁹⁷
- Public order, peace and safety on Maa-nulth Lands.¹⁹⁸
- Solemnization of marriages within BC by individuals designated by the Maa-nulth Government.¹⁹⁹
- Regulation, licensing and prohibition of businesses on Maa-nulth Lands, including the imposition of licences or other fees.²⁰⁰
- The design, construction, maintenance, repair and demolition of buildings and structures on Maa-nulth Lands, to the same extent as a BC municipal government.²⁰¹
- Public works on Maa-nulth Lands.²⁰²

¹⁹² *Ibid*, §1.15.1 states Except where this Agreement provides “notwithstanding any other provision of this Agreement”, a provision of this Chapter prevails to the extent of an inconsistency or Conflict with any other provision of this Agreement.

¹⁹³ *Ibid*, §1.8.5.

¹⁹⁴ *Ibid*, §1.8.7

¹⁹⁵ *Ibid*, §13.23.2

¹⁹⁶ *Ibid*, §13.22.3

¹⁹⁷ *Ibid*, §13.21.2

¹⁹⁸ *Ibid*, §13.25.3

¹⁹⁹ *Ibid*, §13.24.3

²⁰⁰ *Ibid*, §13.28.3

²⁰¹ *Ibid*, §13.30.5

²⁰² *Ibid*, §13.27.2

Maa-nulth Law Prevails

The Provisions below show areas where Maa-nulth law is given priority, as well as the related limitations placed on exercise of Maa-nulth law in those particular areas.

- The election, administration, management and operation of the Maa-nulth Government.²⁰³
 - Limitations*
 - Registration or incorporation of Maa-nulth public institutions under federal or provincial law;²⁰⁴
 - Registration or incorporation of Maa-nulth corporations under Federal or Provincial law;²⁰⁵
 - No authority to make laws in respect of labour relations or working conditions;²⁰⁶
 - Provide reasonable access to information held by Maa-nulth First Nation and Maa-nulth public institutions to Maa-nulth and non-Maa-nulth citizens;²⁰⁷
 - Make laws that provide persons other than the Maa-nulth Citizens of the applicable Maa-nulth First Nation with reasonable access to information in the care and control of the Maa-nulth government or Maa-nulth public institution regarding matters that directly and significantly affect those persons.²⁰⁸
 - Consult with non-Maa-nulth citizens concerning decisions made by a Maa-nulth First Nation public institution that directly affect them;²⁰⁹
 - Ensure non-Maa-nulth citizens have ability to participate in discussions and vote on decisions of a Maa-nulth First nation Public institution that directly and significantly affect them. Further, the Maa-nulth Government must establish the means of such participation at the same time that it creates a Public Institution that directly and significantly affects non-members.²¹⁰
- The assets of Maa-nulth , a Maa-nulth Public Institution or Maa-nulth Corporation on Maa-nulth lands.²¹¹
 - Limitations*
 - Maa-nulth cannot make laws regarding creditors rights or remedies.²¹²
- Adoption of Maa-nulth Children in BC.²¹³
 - limitations*
 - Maa-nulth adoption law must expressly provide that the best interests of the child are considered;²¹⁴
 - Maa-nulth government must provide Canada or BC with notice of all adoptions;²¹⁵

²⁰³ *Ibid*, §13.11.1

²⁰⁴ *Ibid*, §13.11.1-a.

²⁰⁵ *Ibid*, §13.11.1.-b.

²⁰⁶ *Ibid*, §13.11.2.

²⁰⁷ *Ibid*, §13.11.3.

²⁰⁸ *Ibid*, §13.11.4

²⁰⁹ *Ibid*,§ 13.6.6

²¹⁰ *Ibid*,§13.6.3

²¹¹ *Ibid*, §13.12.2

²¹² *Ibid*, §13.12.3.

²¹³ *Ibid*, §13.15.2

²¹⁴ *Ibid*, §13.15.3-a

²¹⁵ *Ibid*, §13.15.3-b

- Establish standards comparable under Provincial Law.²¹⁶
- Maa-nulth law does not apply to children adopted under the *Adoption Act*.²¹⁷
- Both of the child's parents to the application of Maa-nulth law consent.²¹⁸
- If the child is under the guardianship of a Family Services Act Director, that Director must consent to the adoption.²¹⁹ This Guardian will apply Maa-nulth adoption law in deciding on consent unless it is determined under provincial law that it is in the best interests of the child to withhold consent;²²⁰
- A court, deciding under provincial law, may waive the FSA Directorial consent requirement.²²¹
- Child Protection Services with respect to Maa-nulth Children and non-Maa-nulth Children (subject to agreement between the Maa-nulth Government and BC).²²²
 - Limitations*
 - Maa-nulth child protection law must expressly provide that the best interests of the child are considered;²²³
 - Establish standards comparable under Provincial Law;²²⁴
 - Provide for reporting, in accordance with Provincial law.²²⁵
- K – 12 education for Maa-nulth Citizens or provided by a Maa-nulth Institution on Maa-nulth Lands, and home education of Maa-nulth Citizens on Maa-nulth Land.²²⁶
 - Limitations*
 - Establish curriculum, exams and other standards similar to the Province;²²⁷
 - Require that teachers are certified in accordance with Provincial law.²²⁸

These provisions speak for themselves and need little analysis to show that they are designed to maintain the legal status quo of the province. In many of the areas where Maa-nulth governments have law making authority recognized, it operates subordinate to Provincial or Federal law. Those areas where Maa-nulth law is recognized supreme, that

²¹⁶ *Ibid*, §13.15.3-c.

²¹⁷ *Ibid*, §13.15.4.a

²¹⁸ *Ibid*, §13.15.4.a

²¹⁹ *Ibid*, §13.15.4.a

²²⁰ *Ibid*, §13.15.5-d.

²²¹ *Ibid*, §13.15.4-c

²²² *Ibid*, §13.16.2

²²³ *Ibid*, §13.15.3-a

²²⁴ *Ibid*, §13.15.3-c

²²⁵ *Ibid*, §13.16.3-c

²²⁶ *Ibid*, §13.20.1

²²⁷ *Ibid*, § 13.20.2-a

²²⁸ *Ibid*, §13.20.2-b

power is limited in a manner that binds its operation to provincial or federal administrative norms.

Within the tight parameters noted above, Maa-nulth First Nations will face limitations within its own constitutional framework in developing their law. Any legislative initiative of a Maa-nulth First Nation must be must be generated by a government formed under a constitution that satisfies the 16 provisions found in §.13.3.1. These provisions ensure that Maa-nulth First Nations constitute themselves in accordance with the norms of a western liberal democracy. Each Maa-nulth constitution must be consistent with the Agreement and provide for a democratic government,²²⁹ democratic accountability through elections held at least every 5 years, processes for removal of office holders, standards of financial administration similar to those generally accepted by Canadian governments, conflict of interest rules similar to those generally accepted by Canadian Governments, the recognition of rights and freedoms of its Maa-nulth-haht and Maa-nulth First Nations Citizens etc. What is more, §.1.3.2. incorporates by reference the *Canadian Charter of Rights and Freedoms*, ensuring that its provisions apply to each Maa-nulth First Nation government in respect of all matters within their Authority.

²²⁹ The principle of representative democracy was stretched somewhat, and allowed for the appointment of Hereditary authority in s.13.3.2, but s.13.3.3 ensures that the majority of office holders are elected into their position. For an interesting article on how the norm of democracy is engaged by the west as part of a civilizational discourse that legitimates contemporary forms of western hegemony, see D. Scott, *The Norms of Democracy: Thinking Sovereignty Through*, (Unpublished paper presented at the University of Victoria, Colloquium on Social, Political, and Legal Theory) March 6, 2009 online:

http://law.uvic.ca/demcon/victoria_colloquium/documents/NormsofSelfDetermination.pdf

Specifically, on page 14 of this essay, Scott writes: “In the post-Cold War world “democracy” has gradually come to assume in international law the status of a fundamental human right; there has been an accelerating trend to entrench democracy as a *prescriptive* principle and value, and to make it a procedural *criterion* by which states are offered—or denied—recognition as suitable members of the international community of states. In short, democracy has become the new global “standard” of the international system.”

The final limitation I will mention here is the fact that the Maa-nulth do not have an institution established to review the legality of Maa-nulth government action. S§13.3.2-o states that the Maa-nulth must establish processes for appealing the administrative decisions of the Maa-nulth government or public institution. The Maa-nulth may create an administrative appeal board, but the judicial authority to review Maa-nulth law is vested in the Supreme Court of British Columbia. In fact, the Agreement makes it clear that the Maa-nulth Government does not possess the authority to create a court for any purposes.²³⁰

Maa-nulth Agency and the Endorsement of the MFA

My sense is that the above analysis of the pre-amble, land and jurisdiction effectively show that the MFA advances an imperial mode of relationship. Without question, it draws the colonial plunder of the Maa-nulth into the state structure. They lose more than 95% of their homelands, and probably a higher percentage of their jurisdiction. The question that now calls for an answer relates to agency. Specifically, why did an overwhelming percentage of the Maa-nulth people actively endorse this treaty? Again, recall the point that imperialism is multifarious. It works not only through the application of blunt force but also by channelling subaltern agency through more informal dynamics. In this section I turn to the issue of indigenous subjectivity, and how imperial dynamics have reformed it in such a way that the MFA is viewed as acceptable.

²³⁰ *Supra* note 1, §13.33.8

The problem is that the Agreement comes to us after many years pursuing emancipation within the state institutions. This pursuit has been intense, and has absorbed significant amount of our resources and demanded the steadfast attention of many of our political leaders. This journey has led us deep into the liberal state's rights framework and has fundamentally altered the way we understand ourselves and our relationship to the world. We have been pursuing these rights vigorously since 1973 and in my view this chase has taken us a long way from home. When we finally grasp the emancipatory precepts, we find something different from what we thought we were chasing. Being overcommitted to the chase, and left with little in our hands to take home, we are compelled to press on and make more of our efforts. To justify ourselves, we also tend to exaggerate the utility of the rights we hold. This is the dynamic I like to call the bait and switch of post-colonial liberalism. We are baited onto a path chasing what look to be emancipatory precepts that seem to change form at the very moment we take hold of them. Instead of finding liberation from colonial rule, we find ourselves as liberalized Aboriginal Canadians. Thus, emancipation remains illusive while the pursuit embeds us deeper within an imperial story. From this new storied foundation, the contemporary indigenous subject is formed, from which it becomes difficult to identify the imperial dynamics alive in the Treaty Process and more generally of the Aboriginal rights paradigm.

A clear example of this obstacle is found, for instance, in the way that my generation has a strong consciousness of aboriginal rights but a very thin understanding of their inherent foundations. This problem is evidenced by asking young educated indigenous

people about the source of their Aboriginal rights. You will find young people reference *Sparrow*, *Van der Peet*, or *Delgamuukw* more quickly than the social/spiritual/legal traditions of their people. In light of our current situation, this is understandable.²³¹ We grow up subject to the various modes of ideological dissemination in settler societies and have allowed those societies' political/legal institutions to enclose our claims. With two generations of our imagination formed by this hegemonic story of western liberal imperialism, we find it progressively more difficult to conceive as viable the task of constituting ourselves in accordance with the norms generated by our own communities.

Most of us fail to recognize what is at stake in this exchange because we have been raised under the rule of settler agents and their political and educational institutions. We have not experienced our stories as constitutive in a politico-institutional sense. Equally troubling is the fact that we are also losing a detailed memory of the time when our politics were grounded in our own stories. As a result, imperial rule is becoming normalized and unreflexively absorbed by the indigenous subject just as it is in the settler subject. This process effectively reforms the contours of our ethical constitution and sensibilities in a manner that tends to cohere with the liberal imperial story that the MFA so forcefully joins us up with. Our current demands for justice are spoken from this subject position and are coloured by imperialism. Our emancipatory strivings thus tend to be fed back into the imperial project rather than thickening the pathways toward our normative traditions.

²³¹ For the citations of these cases see *supra* note 140.

If, at the time of the vote, the Maa-nulth people held to the views declared in the Nuu-chah-nulth *Hawiih* Declaration, believing that they were the rightful owners of the land, and continue to possess lawmaking authority and jurisdiction over it, then the MFA surely would not have been accepted. The idea of agreeing to extinguish more than 95% of their territory would have been outright rejected. Instead, the *Hawiih* Declaration went unmentioned after the negotiators initialled the Agreement.²³² Instead, we praised our negotiators for ‘getting us’ an extra 293 hectares of land on top of what was offered in the 2001 Nuu-chah-nulth Agreement In Principle and 1293 hectares more than we currently hold in Reserves.²³³ To focus on the *Hawiih* declaration at this point was to let ourselves be distracted from the gains our negotiators made in at the Treaty Table. If the MFA was to be accepted by the Maa-nulth people, it had to be framed as improving on something, and it certainly was not an improvement on the position advanced in the *Hawiih* declaration. The proponents of the Agreement, whom I will call collectively the “treaty team” made an important rhetorical move to discuss the MFA in terms of how it could improve on our existing material conditions and provide for increased opportunity.

²³² I came to know of this document through an argument I had with a Treaty Manager at a Treaty Update meeting held in Victoria in 2001. At this meeting, questions were addressing the details of the treaty in a manner that few understood or were interested in. Soon the discussion moved to issues of language and the discussion stayed on that topic until it closed with a general question period. My question was, how could they, as negotiators, be proceeding in negotiations when our people were so uninformed as to what is at stake in negotiations? Initially they tried to evade the answer until finally with aggression she said, “because your Ha’wiih said so.” Then I asked, does he own the land? To this she answered “yes”. I asked to see the document, and she told of a Ha’wiih Declaration. It took me three months to hunt a copy of this document down.

²³³ Toquaht Band Council Meeting. November, 06. There were unable to answer how much value had been added to our land base. The Agreement in Principle suggested an offer of 1000 hectares of land to the Toquaht, as compared to the 1293 offered in the Final Agreement. For the land provisions see the Nuu-chah-nulth Agreement in Principle, 2001. Accessible online at: <http://www.ainc-inac.gc.ca/al/ldc/ccl/agr/bc1/ntcaip/ntcaip-eng.asp#chp3>.

The treaty team was able to achieve this with a two step strategy. First, they had to limit the scope of possible opportunities for improvement. On this point they repeatedly told us that we had only three ways forward. First, we could carry on as we currently were under the Indian Act; second, we could go to Court and litigate our rights; and finally we could vote to approve the MFA. Beyond these three options there was no better world possible. There was no community discussion as to whether this was actually the case. One graphic titled “A Road Map to the Future” that was repeatedly shown to us at these meetings visually depicts these three options.²³⁴ I have included it below:

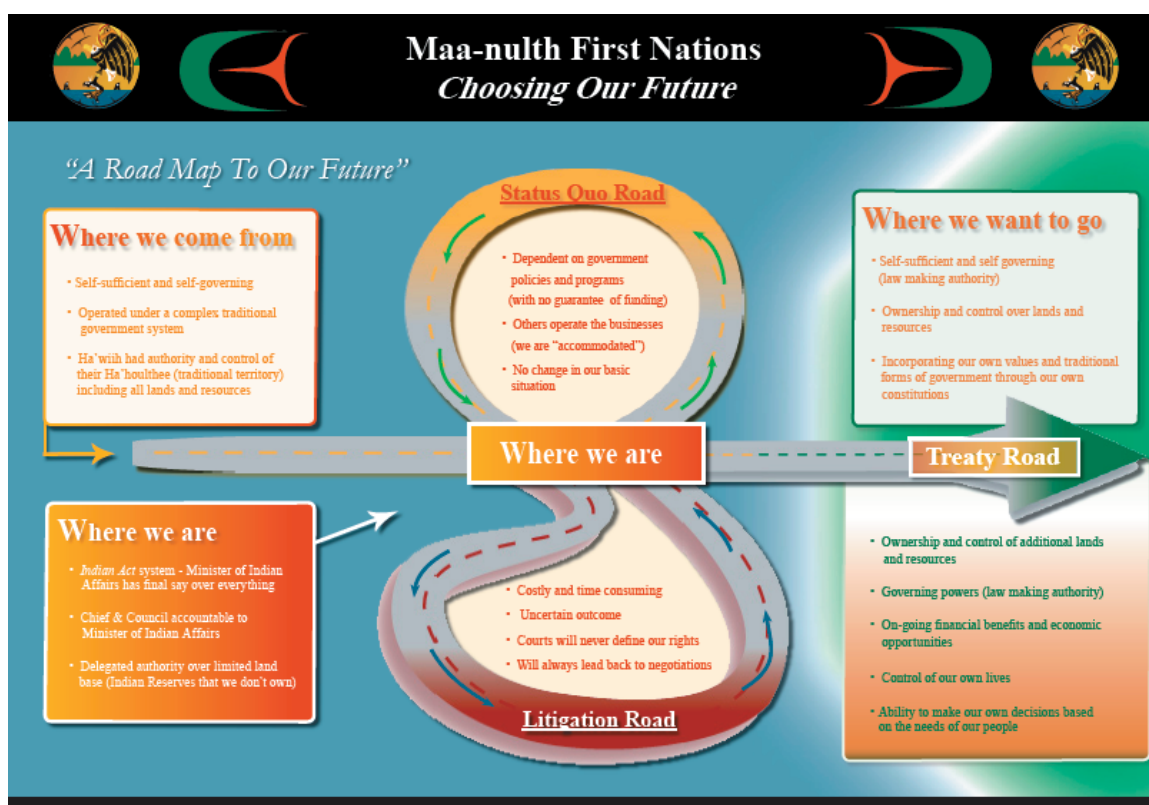


Figure 4: Choosing our Future

²³⁴ Maa-Nulth Treaty Society, “*Choosing your Future, the First Nations,*” online: http://maanulth.ca/downloads/Roadmap-Brochure_FINAL.pdf.

The second step was to convince voters that the Treaty was the best of these three options. They would remind us that the Indian Act was paternalistic and had been proven to keep our people in poverty. Authority under the Indian Act was delegated, and the Minister of Indian Affairs had the final say on all Indian Act Band affairs. They would dismiss rights litigation on the basis of the uncertain results produced there and point to the fact that the courts had continually stated that aboriginal rights were inherently political and directed the parties to settle their differences through negotiation. The dynamics of Aboriginal Rights Litigation were remote to most of our people, who knew the names of the big cases but very little of their details. Thus, the possibilities and potential that Aboriginal Rights litigation represented were unimaginable to most voters, so dismissing this option was relatively easy. Simply noting that Aboriginal rights litigation was expensive and produced uncertain results, and would lead back to negotiations, seemed to be enough to make the Treaty route seem more appealing.

Most public discussion of the MFA revolved around how it improved on our existing circumstance under the *Indian Act*. This comparator, of course, was more proximate to the voters everyday experience and convincing people that the MFA was better than the Indian Act would require a bit more rhetorical effort. Fortunately for the Treaty Team, the *Indian Act* had set the bar pretty low. Also to the Treaty Team's benefit was the fact that the MFA is drafted in the dry, and complicated language of contract and legislation. I don't know of anyone, beyond the most senior analysts and negotiators, who even read the Agreement and beyond generalities knew what was at stake with its provisions.

Maa-nulth voters would therefore depend on the Treaty Team to inform them of the Agreement's significance. The final helping hand for the Treaty Team I will mention here came from the Federal and Provincial negotiation staff. The Maa-nulth treaty teams would receive help from the provincial and federal negotiating teams to craft persuasive consultation materials to explain the Agreement.²³⁵

The opportunities for advancement represented in treaty were repeated to us at many meetings, and in the two months leading up to the vote, Maa-nulth members received a barrage of treaty promotion pamphlets and brochures by mail least twice a week.²³⁶ We were also reading positive reports of the treaty in the *Hashilsah*, a Nuu-chah-nulth newspaper sent to most Nuu-chah-nulth people free of charge.²³⁷ The general message was that the MFA presented us with the means to take hold of our lives and create a better future for our people. One update brochure summed up the treaty in this way:

The treaty was created through intense negotiations over a period of 13 years. We were guided through those negotiations with principles that came from our strong history, from our leaders and families of yesterday, and from our members of today. Our ancestors never gave up fighting for recognition of our place in our homelands, and we continued to carry that torch through this modern-day process. The treaty is an option for change that is available to us today; an opportunity to use the tools in the treaty to create a better world for our future generations. At this point it is useful to think of the treaty as a toolbox rather than the ultimate answer to our problems.²³⁸

²³⁵ I was informed of this fact by the Toquaht Chief Anne Mack (then she was the cultural coordinator). I asked her who was drafting the update bulletins we were receiving by mail, and she told me it was the Province. These bulletins can be accessed on the Maa-nulth Treaty Society's website at: http://maanulth.ca/whats_new.asp.

²³⁶ Some of these mailouts came direct from our Bands, drafted by the in house communication team. A number of them came direct from the Maa-nulth Treaty Society and are accessible on their website at: http://maanulth.ca/whats_new.asp. Each of these publications were mailed out to potential Maa-nulth voters.

²³⁷ The official policy of the Hashilsah is to present uncontentious news. It is produced by the Nuu-chah-nulth Tribal Council, which is accountable to the Nuu-chah-nulth governments and not the people directly. The paper is reviewed by the Vice President of the Nuu-chah-nulth Tribal Council before it is mailed out to ensure that there is no content that criticizes Band governments. There were many references to the Maa-nulth Final Agreement as the vote approached (between December 2006 and December 2007). Each reference was either neutral or positive about the it.

²³⁸ Supra note 236.

The advantages it presented over the current system were made clear in many more colourful charts. An example of one titled “Before and After Treaty” is included below.²³⁹

Life under the Indian Act	Life under Treaty
Dependent on Government DIA controls everything in our lives “from birth to death”	Independent Maa-nulth First nations Governments are independent of government, control our own lives
Governed entirely by the Indian Act Indian Act defines Band Council and their Powers Band Council has delegated authorities; report to Minister of Indian Affairs	Governed by First Nation Constitution First Nations’ systems of government (under Constitutions), can include elected and hereditary Maa-nulth Governments makes laws Governments are accountable to the people
Health Canada and DIA Services Continued reduction in benefits (e.g. medical, dental, education, child care, etc.)	Maa-nulth First Nations Services Same level of existing services plus ability to expand services to meet needs of members
Government imposed solutions Government imposes solutions upon us that have little to do with who we are	First Nation community driven solutions Maa-nulth governments develop our own solutions based on our culture and values

Figure 5: Before and After Treaty

In relation to the land question, instead of informing voters how much land was being modified out of existence, we were simply told that the Agreement increased our landholdings well beyond what we hold in reserves. By approving the Agreement, we would become “one of the largest land owners in the lucrative Pacific Rim region of Vancouver Island.”²⁴⁰ Instead of being told about the risks inherent to holding land under

²³⁹ Maa-nulth Treaty Society, *Before and After Treaty*, online at: http://www.maanulth.ca/downloads/before_after_treaty.pdf.

²⁴⁰ this quote is drawn from a BC Government Media Room, Maa-nulth First Nations Final Agreement (9 December, 2006) video coverage online at: http://www.mediaroom.gov.bc.ca/video/06dec9_pgc_maanulth_agreement.htm.

the provincial *Land Act*, we were told of how we were being liberated from the constrictions DIAND policy placed on the usage of Indian lands. One Maa-nulth brochure summaries this point in the following manner:

The treaty lands and resources available under the Final Agreement are almost 12 times greater in size than the total amount of existing Indian Reserves. Equally important, we will not face the onerous bureaucratic hurdles to social and economic development that we did under the Indian Act system, a system that required federal government approvals in order for us to proceed with any developments on Reserve lands. Under the Indian Act system, much-needed improvements in Maa-nulth communities often failed to come about. This burdensome approval process will be rendered a thing of the past if the majority of members vote in favour of the treaty.²⁴¹

These types of messages consistently an repeated. Individuals would be reminded that under the *Indian Act*, the Federal Government owns their land and they have nothing. While existing aboriginal rights were constitutionally protected, they were proclaimed as uncertain and representing opportunities of accommodation and consultation rather than control.

Possibly of more persuasive importance than the information packages was the atmosphere of celebration that the treaty team was able to generate. On one occasion there was an open invitation to any Maa-nulth voter to fly on board a private jet up to the Nass Valley to observe the Nisga'a Lisims government in action.²⁴² The event was couched in ceremony and produced a great deal of excitement and trust between voters and the treaty team. On another occasion, the Toquaht people were offered travel dollars (to cover hotel, meals and transport costs) to come out to our traditional territory for a

²⁴¹ Maa-nulth Treaty Society, "Maa-nulth Final Agreement Overview", online: http://maanulth.ca/downloads/Maanulth_Treaty_Overview_booklet.pdf.

²⁴² The significance of the the Nisga'a Lisims is that it was established under the only other modern Treaty signed in BC. For information on this Government, see their very informative website at: <http://www.nisgaalisims.ca/?q=welcome>. BC chartered a jet to fly any Maa-nulth voter to the Nass Valley on September 24-27th, 2007.

barbecue and beach party.²⁴³ For this event they chartered a float plane and flew members over the potential treaty lands. The talk here was all about the freedom, jobs and endless potential that would come with the treaty. This talk would continue at the Maa-nulth Youth Forum, where young people were told not to fear taxation, as it would produce more responsible citizens and make their governments more accountable to them.²⁴⁴ The Toquaht had access to treaty money to host cultural events, and held camp-outs on the land where people would re-engage with tradition by, for example, learning how to smoke fish.²⁴⁵

Faced with the consistent and intense dissemination of such information and the celebratory mood that surrounded the proposed Agreement, those of us who criticized the Agreement were often understood as uninformed, delusional and blindly contentious. We were often portrayed as wedded to the *Indian Act*.²⁴⁶ One Ucluelet Band member spoke at the Maa-nulth Youth Forum about how in his alcoholic days, he objected to the Treaty.²⁴⁷ With his sobriety came sound reason (and a job with the Team) and he was now able to see the benefits and opportunities that the Agreement represented. Those who continued to ask questions and remained critical would frustrate the Treaty Teams. Of us, the Treaty

²⁴⁴ Taxation was the central topic of the youth forum hosted on July 13 and 14, 2007. The Maa-nulth have a DVD that highlights discussions. An outline of the topics covered can be seen online at: http://www.maanulth.ca/downloads/Youth_Forum_DVD_August15_2007.pdf. Four of the nine topics outlined have to do with Taxation. Interestingly, the eligible voting age for the Agreement is 16 (§28.2.7). I do not know what strategy or theory was involved in dropping the voting age two years below the provincial and federal norm. What is clear is that the Treaty Team had to get their message to the young.

²⁴⁵ In the Final two months before the Agreement, the Maa-nulth were granted \$250,000

²⁴⁶ Huu-ay-aht band member wrote a critique of the Maa-nulth treaty which was presented to Toquaht Band members at a meeting in August, 2007. In the next Toquaht news letter mailed to Toquaht membership, Anne Mack dismissed Dennis's opinion, simply characterizing him as wedded to the oppression of the *Indian Act*. For a copy of Dennis's critique see D. Dennis, "An Open Letter Huu-ay-aht Regarding the Maanulth Final Agreement (24July 2007) online: <http://www.cathedralgrove.eu/media/03-1-dennis.pdf>.

²⁴⁷ Evan Touchie, speech given at the Maa-nulth Youth Forum.

team would say things like “...you can lead a horse to water but you can’t make ‘em drink”.²⁴⁸

On July 29th, the Huu-ay-aht would vote and as expected they were overwhelmingly in favour of the Agreement. The Huu-ay-aht voted ahead of the other four Bands because they had strong support for the Agreement in Principle, and were the most confident of the Maa-nulth Bands. 272 of 303 (90%) eligible Huu-ay-aht voters endorsed the MFA. On October 20th, 2007, the remaining four tribes voted to approve the Agreement with 79.6% of all Maa-nulth votes cast were in favour of the Agreement. 68% of all eligible voters (including those who did not vote) said ‘yes’ to the agreement.²⁴⁹

Conclusion

My aim with this chapter is to demonstrate that the MFA is an imperial instrument. It exemplifies a new and more alluring chapter of softened imperialism aimed at strengthening state control of indigenous lands and domesticating indigenous peoples by liberalizing their modes of political and social order. I argued that the MFA facilitates the absorption of Canada’s colonial plunder into the state’s fold by recognizing an unthreatening and liberalized set of Maa-nulth rights over a small portion of their ancestral territories and social institutions and extinguishing the rest. This Agreement thus recognizes the Maa-nulth as a self-governing juristic community, as a member of the pluralist communities operating in the Canadian state. However, the juristic authority

²⁴⁸ I have been told this by two members of the Toquaht Treaty Communications Team (Kirsten Johnsen and Lisa Morgan), before they knew that I was one of these horses that refused to drink from the poisonous stream.

²⁴⁹ Voting Summary, October 21st, 2007 online at http://maanulth.ca/voting_info.asp.

recognized is negotiated with Canada within a field of power imbalances that are reflected in the provisions of the MFA. What is produced with the MFA is an devise that domesticates Maa-nulth juridical authority in a manner that facilitates the Canada's imperial prerogative of controlling and exploiting Maa-nulth people and their ancestral homelands. The Agreement thus constitutes the Maa-nulth in the spirit and the substance of imperialism. Furthermore, and more problematic the Agreement lends democratic legitimacy to imperial relations.

While I believe the thesis above to be true, I know that it is not the entire story. There are many other factors at play that contribute to the result, and as previously stated, I understand social dynamics at play to be incredibly complex. Tully reminds us that imperialism has been revealed historically to “comprise diffuse and ‘interactive’ and often ‘eccentric’ (reactive) forms of governance that respond to diverse forms of resistance and collaboration of imperialised peoples in localised, ad-hoc, and unpredictable ways.”²⁵⁰ My aim was to highlight what I believe to be the preeminent threads of imperialism that run through the Agreement.

²⁵⁰ J. Tully, *Lineages of Empire*, *supra* note 99, at 9.

Conclusion: Thickening Totems and Thinning Imperialisms

In closing, I come back to where I began with this thesis. I opened by stating that I wanted this thesis to encourage us to engage our totemic traditions deeply in practice. I proposed that these practices would equip us to address the problems of imperial domination that permeate our worlds. I have tried to achieve this goal in a number of ways. First, I suggested that we look critically at our practices problematization and action—the way that we criticize—with an understanding that our thoughts and actions are embedded in a web of relationships that we are ethically responsible to. I used this logic to suggest that the ethics driving us toward emancipation and freedom are best conceived as relational ethics applicable to us here, now and in every step we take forward from here. For me, and for the Maa-nulth generally speaking, our relational ethics remind us that everything is connected. *Heshook-hish tsalwalk* is the Nuu-chah-nulth phrase for this concept and it directs us to seek balanced and harmonious relations with all of life. Achieving this balance requires that we embody *eesok* and touch all of our relations with respect.

My next move was to speak about legal pluralism. My general point here was to have us conceive of legal traditions as plural and multiple. The inference here is that in any given field, there are a series of legal traditions that relate to one another. The Maa-nulth Nations, of course, are one of these. Canada's is another. After this, I sought characterize the nature of the relationship these legal traditions have with each other. I characterized the relationship as inherently imperial and assimilative. The Maa-nulth are aware of this,

and sought to ameliorate their imperial conditions with the *Maa-nulth Final Agreement*. My chapter on imperialism and on the MFA make the case that this Agreement has only further embedded us in an imperial mode of relationship. This is a relationship that is inherently disrespectful and serves to perpetuate the imbalances that imperial dominion has created on Great Turtle Island.

My view is that engaging in treaty negotiations has drawn us away from a commitment to balance and respectful practices. Treaty has been a manifestation of what, in chapter 2, I called a ‘convention complex’. By processing our claim through the BC Treaty Commission, our claim was domesticated, and what emerges from negotiations looks nothing like that which we initially claimed with the *Ha’wiih Declaration*—that is a claim to full jurisdiction over themselves and their ancestral homelands. The primary justification for accepting the MFA is that we have no real alternatives. Yes, the MFA is imperial, but so is life under the Indian Act and so are the results from litigation. I accept this point to be true, but these three alternatives do not exhaust our fields of possibility. To believe that is to give purchase to the shallow legal centralist notion that all law springs from a single validating source—the state. Alternatives are with us, today being lived by many of us. One of those alternatives for the Maa-nulth is their totemic tradition.

As Maa-nulth people, we have a longstanding tradition of carving totem poles. These poles play a cohesive role in our communities, and are understood as sacred and symbolic tangible representations of the histories that have created our present world. These totems would be carved in honour of the *hawilth* (hereditary chiefs) and would symbolize the

stories that authorize authority. They would also bind the chief to principles of generosity and respect—principles we understand as necessary to maintain the delicate balances of the world. These poles would be ceremonially erected outside of the leader’s longhouse, and would be explained to the community. Songs would be sung about the event, and the totem’s story would be reflected back to the community. The totem would live out a natural life, decaying with the elements and making room for new totems to represent the stories of later *hawilth* and *ha’houlthee* (their chiefly territory). This process allowed the principles and values associated with the totem to evolve, not freezing at any particular historical point, while still being responsible to and respectful of the histories that produced them.

In closing, I want to make the case for a concerted thickening of these totemic practices as a response to the problems of imperialism raised in the previous chapters. I use the word thicken rather regeneration to avoid suggesting that these totemic traditions are dormant.²⁵¹ To my ear, a regeneration/dormancy thesis implies that you are giving life to something that substantially speaking does not currently have it. I am beginning to think that this conception turns our attention away from the world we know and experience toward what we see as a past. This thesis is often presented as a call to authenticity—to embody an essential indigenous identity. The irony, of course, is that this call is intended to draws us away from the world know—a world we can now authenticate—to

²⁵¹ Regeneration is a prominent theme in Taiaiake Alfred’s work. See generally *Wasa*se*; Pease, Power, Righteousness both cited at *supra* note 21 and G.R. Alfred, *Heeding the Voices of our Ancestors: Kahanawake Mohawk Politics and the rise of Native Nationalism* (Toronto: Oxford University Press, 1995). In the opening pages of *Wasa*se*, makes a clear call to regeneration: “We are separated from the sources of our goodness and power: from each other, our cultures and our lands. These connections must be restored” at 20.

be reconstituted by what is necessarily a fictionalized world of the past, constructed out of our best recollections of a time when we lived free. At this late stage of imperial expansion, this is a daunting and impossible project. If it is correct, then it seems, modernity has forever cursed us to live out depressed inauthentic lives nostalgically, always in reaction to imperial dominion.

My sense, is that the regeneration/dormancy thesis, is not correct. At least not entirely. The totemic practices spoken of above are still with us, alive in our actual experience. However, they seem emaciated, deprived of much of their constitutive power. Few of us are aware of the stories these poles represent, and where we do have awareness of the stories, they are often likened to folklore, since we stand before them now substantially as subjects rationalized by modern liberal ideology. They are constitutive for us as Aesop's fables or Jesus' parables often are for the modern liberal subject. That is to say, they are often rationalized through and into the enlightened story of liberal constitutionalism. They can be relied upon to inform our moral values, commitments and daily decisions, so long as we continue to "give to Caesar, what is Caesar's"—to quote words the Bible attributes to Jesus.²⁵² We are free to believe what we want, so long as we give to the imperial ruler what it asks of us. Cesar was asking for taxes but in our case the empire asks for much more. I have tried to argue that we are being asked to give up our history and graft us on to the homogenous empty time of modernity. Many years of colonial rule have done much to break us from this history and contemporary

²⁵² Mathew 22.21, *Holly Bible*, ver. New International (Grand Rapids: Zondervan 1984).

treaty negotiations further loosen the ties that remain. Here, I want to say that our hold on those histories can be strengthened through a thickening of our totemic traditions.

In the legal/political lexicon of the west, this may be conceived of as a thickening of indigenous constitutionalism. Peter Hogg quoted Cheffins and Tucker to say that a constitution is ““a mirror reflecting the national soul”” and states that it ““must recognize and protect the values of a nation””.²⁵³ Similar to the totem, constitutions are thought to serve a cohesive function by embodying societies collective values and reinforcing those values in the citizenry through its administrative arms of the courts legislatures, and other delegated agencies. I think it would be helpful for us, as indigenous people, to think of the settler’s constitution as a particular kind of totem. Thinking as such will deepen our understanding of legal plurality and help us to decenter our understanding of the Canadian constitution and bring a much to it a much needed thinning.

Totemism is a concept that Emile Durkheim, a founding father of the western sociology, used to describe what he believed to be a primitive religion practiced by certain tribes residing in central Australia.²⁵⁴ Durkheim asserted that religion was a social phenomenon, representing nothing more than the collective values that bound a group together as a society. The specific rites and roles mandated by a religion were arbitrary manifestations of a deeper collective conscience that provided the group with a sense of

²⁵³ P.W. Hogg, *Constitutional Law of Canada, Student Edition* (Scarborough, On.: Carswell, 2003) at 1.

²⁵⁴ I was introduced to Durkheim in an undergraduate sociological theory course. His work on Totemism is found in *The Elementary Forms of Religious Life* Trans. by Karen E. Fields (New York: Free Press, 1995).

solidarity, ensuring that all of society's constituent parts functioned in a manner that sustained the whole. Durkheim writes:

For we know today that a religion does not necessarily imply symbols and rites, properly speaking, or temples and priests. This whole exterior apparatus is only the superficial part. Essentially, it is nothing other than a body of collective beliefs and practices endowed with a certain authority.²⁵⁵

This authority is ascribed through a process of totemization. The values would be attached to symbolic objects that would then be elevated to a sacred status wherefrom they would reflect back to the group the values and principles that define them as a collective. These totemic values form the normative backdrop for the social structure by providing the root justification and rationalization of the numerous rites and roles held by various group members. Absent this sanctified symbolism, Durkheim believed that the collective values would lack an effective mode of dissemination and they would lose their hold on the individual consciousness. People would lose sight of that which binds them together and fail to recognize their place in society. This fragmented state is what Durkheim referred to as anomie—a state of social dislocation, where collective norms no longer control the actions of individuals in the society.

While I do not accept the entirety of Durkheim's analysis, as he was oblivious to matters of power and accepted an evolutionary social development thesis, I do believe his insights relating of the cohesive functions of sacred symbols to be compelling.²⁵⁶

Durkheim would forcefully disagree with me here, but I believe these insights are

²⁵⁵ R. R. Bellah, *Emile Durkheim: On Morality and Society, Selected Writings*. (Chicago: The University of Chicago Press, 1973) at 51.

²⁵⁶ Durkheim believed that totemic religious traditions to be repressive of individuality and the true freedom that modern liberal society made possible for human beings.

particularly helpful when thinking about western constitutionalism. He would disagree because he believed western societies were liberating themselves from their totemic pasts, and the “rites and prejudices” previously imposed upon them by religion were “swept away in the natural course of things”.²⁵⁷

Durkheim believe that “as societies become more voluminous and spread over vaster territories, their traditions and practices in order to adapt to the diversity of situations, and constantly changing circumstances, are compelled to maintain a state of plasticity and instability.” The normative order created in totemic societies, according to Durkheim, were to rigid to bring cohesion to modern society. He suggested that modern society would organize itself around a principle of radical individualism, since society could not demand that diverse citizens uphold the same values. With the rights and prejudices of religion swept away, Durkheim argued that

there remains nothing that men may love and honour in common, apart from man himself. This is why man has become a god for man, and it is why he can no longer turn to other gods without being untrue to himself. And just as each of us embodies something of humanity, so each individual mind has within it something of the divine, and thereby finds itself marked by a characteristic which renders it sacred and inviolable to others.²⁵⁸

I do not think that modern society is as free as Durkheim imagined. My sense is that liberal democracies have simply reformulated their principles and presented them as capable of binding multiple religions, races, and cultures together so long as they come together first as individuals. These liberal principles, in turn, must attach to certain symbols, or totems if I may, that are elevated to an authoritative position where they reflect back to society a thin, but firmly rooted set of values that now define their

²⁵⁷ E. Durkheim, *Durkheim on Religion: A selection of Readings with Bibliographies*, Durkheim, W.S.F. Pickering ed. (London: Routledge1975) at 67.

²⁵⁸ Ibid.

collective. As these totem do their work, we begin to see ourselves and the world through a lens of liberal individualism. The old totems are still with us, but our practiced engagement with them is thinned by virtue of the liberal values we are coming to embody. The primary totem reflecting these values back to us is, I posit, the Constitution.

Recall Cheffins and Tucker's statement that a constitution mirrors the soul of a nation. One of the objects of a constitution is to articulate the principles a society agrees to be bound by—it provides the cohesive function in a democracy that the religious symbols provided for in a theocracy. The constitution becomes a totemic embodiment of the nation's collective conscience, reflecting back to the people the values that hold them together as a nation. The sacred status of this totem is based not on a cosmological theology that delegates authority downward from the sovereign gods to the ordained heads of power, but on a rationalized constitutional theory that delegates authority upward from the sovereign and free citizens to the government and technicians of civil society. In Canada, it is the judiciary, as opposed to the priesthood, that accrues the responsibility of elaborating, rationalizing and affirming constitutional values and principles and sanctioning the rites and roles of governments and citizens.

The problem with the west's totemic tradition lay in three related features of the west's totemic tradition. The first is obvious. The foundational values embedded in this totem were generated by the 1867 western world. This was a society that was openly racist and thoroughly committed to the Darwinian ideologies of social evolution and the Hobbesian premise that indigenous society was without rational law, and existed in a brutish state of

nature. These principles are at the core of we may call the great Totem of 1867. This totem was imposed on our lands without our collaboration or consent to settle on top of our totems with the stated intention of obliterating the constitutive power of preexisting indigenous totems. And this totem stands there today, much as it did in 1867, reflecting back to us the modern racist vision with, for example, s.91.24.

That flawed values have been totemized is not a problem of significance. This problem is not unique to the Canada, and we should expect find flaws in all totems at any given moment. In the Maa-nulth totemic tradition, stories of our flaws are often embedded in the totems with our tricksters and myth creatures. The problem arises when these flaws are etched into a totem that does not disintegrate. This is the second and more problematic feature of the western totemic theory. It is also the principle difference between the western and indigenous totemic traditions. Our totems were carved into trees that were cut off from their organic life source. Their journey back to the earth, through decay, began before the carver dug into the wood with her knife. The liberal totem is carved into living tree that, in theory, never dies. The liberal totem does change, loosing a branch here and there and growing others to account for changing conditions and new revelations. Since the post war period, many of the branches growing off s.91.24 have been pruned off. In 1982, s.35 grew sprung out. The roots of the original totem remain in tact, and continue to deliver the lifeblood of a flawed modernity to the ends of is that principles of a flawed modernity lay at the root of this totem, and continue to poison its development.

The third difference is that this totem exists only in abstract form, presenting a disembodied field of symbols that are divorced from ethical practices and our every day lives. We cannot touch this totem with our hands. We train lawyers, judges and academics to analyze and interpret it for us. We elect politicians to implement it. The community thus finds themselves in a space where they are not attentive to the imperial history that informs this totem nor responsible for its further development.

If we understand our lives to be fully enclosed by this liberal constitutional tradition, then I have painted a bleak picture. I do not believe that this is the case. I think it is possible to direct more of our attention away from this liberal totem, away from the distractions of s.35 and contemporary treaty making and toward the totemic traditions embedded in our own histories in our homelands. We can learn from Skate, that the best defence is to simply turn away from our adversary. As we turn our attention away for the liberal totem, its grip on us will lessen. If we turn to our totemic traditions with focused practice, engaging seriously the their constitutive capacity will expand.

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