Her Majesty's Justice Be Done: Métis Legal Mobilization and the Pitfalls to Indigenous Political Movement Building

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The movement by Indigenous peoples to litigate their ongoing disputes with Canada has grown sharply since the 1970s. This trend to channel Indigenous-settler conflict into Canadian courts has reached all Indigenous peoples to varying degrees. The Métis, like their kin and allies in other Indigenous nations, have long-standing grievances stemming from the devastating processes of land dispossession, erasure and termination wrought by settler colonization (Chartrand, 2008). Specifically for Métis people, legal mobilization is a key tool being deployed in the effort to seek remediation for the failed disbursement of land to Métis families after the passage of the *Manitoba Act 1870*. The Manitoba Métis Federation (MMF), having been made aware of possible failings in the disbursement of their lands as early as 1968, opened a new legal front in the form of the *MMF v. Canada (Attorney General) and Manitoba (Attorney General)*[1] in 1981 to press their grievances.

Important research has been conducted examining when and how governments and activists engage in legal mobilization.[2] Political scientists Peter Russell (1985, 1998) and Matt Hennigar (2007) have outlined well the strategic calculations involved in the federal and provincial governments' political deployment of legal resources as well as governments' political management of legal defeats and victories. There is also a body of scholarship on the effect that judgments have on Indigenous membership and

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kinship links within Native communities. Indeed the within-group politics stemming from the *Sawridge* case and the resulting scholarship examines well the complexities of returning Indigenous people disenfranchised by one of the sexist provisions of the *Indian Act* to First Nation communities (see Dick, 2006; *Sawridge Band v. Canada,* 1997). However, it is less clear what effect deploying litigation to achieve strategic goals has on specific relationships between different (but often related) Indigenous peoples.[3] This gap on *inter*-Indigenous politics is more pronounced in Métis scholarship where there have been few final appellate cases. While the Supreme Court's ruling in *MMF v. Canada* was seen by the MMF leadership as an important strategic victory, more needs to be known about the impact litigating the case had on Métis relationships with other Indigenous peoples. This paper will argue that the interaction between the MMF and Treaty 1 peoples seeking leave to intervene at the Manitoba Court of Appeal in *MMF v. Canada* illuminates the way litigating Indigenous-settler disputes can promote divisive, exclusionary, zero-sum political relationships between Indigenous peoples. In what follows I connect debates examining legal mobilization's contingent ability to bring about change with critical legal scholarship outlining the structural biases faced by Indigenous litigants in Canadian courts. Deploying these literatures to the interaction between the MMF and Treaty 1 peoples intervening at the Manitoba Court of Appeal elucidates that legal mobilization can result in framing Indigenous claims to the land as exclusionary, thereby further dividing the inter-Indigenous political landscape. These divisions are incentivised by the Supreme Court's explication of Aboriginal title whereby it is in the strategic interest of a single Indigenous people to be found by a judge to have title to the exclusion of their kin in shared Indigenous territories. By examining this dynamic I hope to emphasize the need for non-legal approaches to Métis political resistance to settler colonization that take into consideration political movement building with other Indigenous peoples.

The Anatomy of *MMF v. Canada*

In April of 1968 a gathering of Indigenous and non-Indigenous people was held in Winnipeg, Manitoba, styled the annual Indian and Métis Conference. This gathering was in the process of disbanding after the incorporation of the Manitoba Métis Federation on December 28, 1967. The delegates to this conference passed the following resolution: "Resolved: that the Manitoba Métis Federation continue its work of investigation into the Manitoba Métis land grant question" (Community Welfare Planning Council, 1968: 30). With these seemingly bland words the MMF became embroiled in a fight against Métis land dispossession with

Abstract. Indigenous peoples have, to varying degrees, turned to the courts to litigate their ongoing disputes with Canada's settler colonial governments. Scholars have examined well the ways courts are used for strategic political ends by a variety of Indigenous and non-Indigenous litigants and are laden with settler values and institutional logics that are foreign to Indigenous peoples. However, it is less clear what effect turning to the courts in pursuit of strategic goals has on specific relationships between Indigenous peoples. This gap is more pronounced in Métis scholarship where there have been few final appellate cases. This paper argues the interaction between the Manitoba Métis Federation and Treaty 1 peoples seeking leave to intervene at the Manitoba Court of Appeal in *MMF v. Canada* illuminates the way litigating Indigenous-settler disputes can advance divisive, exclusionary, zero-sum political relationships between Indigenous peoples. These fractious interactions serve to undermine the construction of a co-ordinated and related inter-Indigenous decolonizing politics.

Résumé. Les peuples autochtones se sont adressés, à des degrés divers, aux tribunaux pour régler leurs différends en cours avec les gouvernements coloniaux du Canada. Les universitaires ont examiné les façons dont les tribunaux sont sollicités à des fins de stratégies politiques par différents justiciables autochtones et non autochtones et sont empreints de valeurs coloniales et de logiques institutionnelles étrangères à celles des peuples autochtones. Les incidences qu'a le recours aux tribunaux dans la poursuite d'objectifs stratégiques sur les relations des peuples autochtones entre eux sont cependant moins claires. Cet écart est plus prononcé en ce qui concerne la littérature sur les Métis, dont peu de cas ont été portés en appel de dernière instance. Cet article soutient que l'interaction entre la Manitoba Metis Federation Inc. et les peuples du traité n^{o} 1 demandant l'autorisation d'intervenir à la Cour d'appel du Manitoba dans la cause MMF *c.* Canada éclaire la manière dont le règlement des litiges entre colonisateurs et Autochtones peut mener à des relations politiques conflictuelles, d'exclusion et à somme nulle entre les nations autochtones. Ces interactions acrimonieuses ont pour conséquence de saper la mise en place d'une politique interautochtone coordonnée et dépourvue de connotation coloniale.

legal as well as political dimensions before the organization's first birthday. It would not be until March 8, 2013, almost 45 years later that *MMF v. Canada* would finally come to a head at the Supreme Court of Canada. The effort to research and litigate the Métis lands question quickly became a complex process with duelling academic works on Métis land claims occupying significant amounts of space in Métis political consciousness, all the while imposing a burden on limited human and financial resources.

Keeping in mind that it is not the intention of this paper to outline the current state of the law on Métis people, it is worth providing a brief outline of the case and the Supreme Court's findings for the sake of context. The case itself focused on the disbursement of land negotiated by Assiniboia's (as Manitoba was known before July 1870) representatives to Canada in 1870. The MMF argued unsuccessfully at trial in 2007 that the land was not expeditiously provided and, as a result, Métis people were unable to access the full value of their land entitlements under the *Manitoba Act 1870,* and their land grant was not handled in a fashion

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consistent with the legal concept of the honour of the Crown. The MMF sought declaratory relief[4] to aid in their land claim negotiations with Canada and Manitoba. The trial judge did find that there was a delay in providing land to the Métis after the passage of the *Manitoba Act*; however, the act did not create a fiduciary duty nor was the honour of the Crown at stake (*MMF v. Canada*, 2013: para. 7–9). At the Manitoba Court of Appeal in 2010, Chief Justice Scott writing for a unanimous court upheld the trial findings while making several changes to the legal reasoning and logics deployed by the trial judge (see O'Toole, 2014). The Supreme Court ultimately held in 2013 that the Crown did not fulfil its responsibility to act honourably in distributing the land owed to the Métis after 1870 (*MMF v. Canada*, 2013: para. 97).

The MMF argued at the Supreme Court that because the Métis possess an Aboriginal interest in the land, disbursing the land promised in the *Manitoba Act 1870* was a federal fiduciary duty undertaken on behalf of the Métis (Teillet and Madden, 2013: 4). The court held "the relationship between the Métis and the Crown, viewed generally, is fiduciary in nature. However, not all dealings between parties in a fiduciary relationship are governed by fiduciary obligations" (*MMF v. Canada*, 2013: para. 48). While the *Manitoba Act 1870* did not create a fiduciary duty in the eyes of the court, the honour of the Crown was engaged in the agreement reached with the delegates sent from Louis Riel's provisional government. The government of Canada had promised to provide land to the Métis as quickly as possible in light of the government's and empire's plans to settle non-Indigenous peoples in Manitoba expeditiously. S.31 of the *Manitoba Act 1870* states that "it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents" (*Manitoba Act 1870*: s.31). Given that the promise made in s.31 was entrenched into the constitution, the Supreme Court found that "as a solemn constitutional obligation to the Métis people of Manitoba aimed at reconciling their Aboriginal interests with [Crown] sovereignty, *it engaged the honour of the Crown*. This required the government to act with diligence in pursuit of the fulfillment of the promise. On the findings of the trial judge, the Crown failed to do so and the obligation to the Métis children remained largely unfulfilled" (*MMF v. Canada*, 2013: para 9, emphasis added). Thus the Court granted a declaration "that the federal Crown failed to implement the land grant provision set out in s. 31 of the Manitoba Act, 1870 in accordance with the honour of the Crown" (para. 154; also see Teillet and Madden, 2013).

Unpacking the Courts and Legal Mobilization

Choosing to use Canadian courts to advance Indigenous resistance is never an easy decision for Indigenous peoples. Both Canada and the United States deploy(ed) deception, armed and forced removal, erasure and genocide in the service of establishing their settler states (Adams, 1989; Alfred, 2005; see Wolfe, 2006). Law-making power as well as the adjudication of those laws was and remains an integral part of the project of creating and maintaining a state comprised of settlers. However, there has long been a struggle by Indigenous peoples and others resisting state oppression to use settler legal discourses and institutions in a way that advances Indigenous material interests without reinforcing the structures of Indigenous oppression. Part of the difficulty of developing these strategic engagements has hinged on the question of whether legal mobilization can effect social change. More generally, the position that judges and courts cannot effect social change is articulated in Gerald Rosenberg's book, *The Hollow Hope: Can Courts Bring About Social Change?* (1991; also see Rosenberg, 1996). Rosenberg has argued cogently that not only can courts not bring about change in society, they also contribute a false hope that encourages activists to pour their limited resources into what he ultimately believes is a pipe dream.

This touched off a polite and generative exchange with Michael McCann who argues that no institution can single-handedly bring about large-scale change in a society (McCann, 1991, 1992, 1994). McCann states that Rosenberg's "analysis itself obscures the fact that discrete institutions are almost never solitary organs of change in our political system" (McCann, 1992: 727). McCann ultimately believes Rosenberg's "focus on courts as independent agents of change involves an unrealistic test that every branch would fail" (728). Instead, McCann approaches the question of social change through legal mobilization with an eye to the contingent nature of the task of affecting change through the courts. He situates this contingency within his analysis explicitly when he says:

> Growing out of learned conventions and long developing power relations, even highly innovative legal practices carry with them their own limitations, biases, and burdensome baggage. Legal "cultures provide symbols and ideas which can be manipulated by their members for strategic goals," agrees Sally Engle Merry, "but they also establish constraints on that manipulation." Hence the primary project of the legal mobilization model outlined [in McCann's book is]: to analyze the constitutive role of legal rights both as a strategic resource and as a constraint for collective efforts to transform or "reconstitute" relationships among social groups. (McCann, 1992: 7)

McCann is laying the important foundation for first appreciating that courts are embedded within state structures and that courts will be part of the

process that reproduce power relations in the interest of the state. Second, he is setting out the analytical possibility that activists' goals, no matter their value or innovative qualities, might not be able to be advanced through the courts.

Andrea Smith (2012), drawing on the orientation to legal mobilization offered by Kimberlé Crenshaw (1988), explores the contradictions faced by Indigenous anti-violence against women activists in their use of the courts. Smith argues the contradiction for activists lies in trying to fight colonial violence through the very same courts implicated in the historical and ongoing processes of settler colonization. Smith points out that an added complexity for activists resisting violence against Indigenous women is the immediacy of the issue at hand. Activists "must also address women who need *immediate* services, even if those services may come from a colonizing federal government or a tribal government that may perpetuate gender oppression" (Smith, 2012: 70, emphasis added). Thus Smith argues activists "are often presented with two dichotomous choices: short-term legal reform that addresses immediate needs but further invests us in the current colonial system or long-term anti-colonial organizing that attempts to avoid the political contradictions of short-term strategies but does not necessarily focus on immediate needs" (Smith, 2012: 70). Smith advocates Indigenous peoples deploy legal strategies for their effects and dispense with the "moral statements [those strategies] propose to make" (74). Smith and McCann seem to be approaching the question of legal mobilization from the similar position of delineating its potential for direct social change; however, Smith seems to be missing McCann's robust appreciation for legal mobilization's contingent nature and its secondary or indirect effects.

While McCann also argues that legal mobilization is often deployed to realize direct effects of change like winning "short-term remedial relief for victims of injustice or to develop case law precedents capable of producing long-term institutional change" (McCann, 1992: 10), his analysis pays a great deal more attention to indirect effects of legal mobilization. McCann's approach examines the "effects and secondary tactical uses of official legal action in social struggle. Such indirect effects can matter for building a movement, generating public support for new rights claims and providing leverage to supplement other political tactics. Indeed, given the copious evidence demonstrating that judicial victories often produce uneven or negligible impacts on targeted social practices, such indirect effects and uses of litigation may be the most important of all for political struggles by most social movements" (10). In particular, it is McCann's attention to "building a movement" which seems relevant to this article's interest in the inter-Indigenous politics at play in the *MMF* case. He argues that one of his findings in his examination of equal pay for equal work legal mobilization is that it "catalyze[d] a formidable

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grass-roots campaign among women workers throughout the nation" (1992: 738). Indeed, other scholars have also noted the role played by legal mobilization in building a movement (for example, Crenshaw, 1988; Manfredi, 2004; Smith, 1999).

Building something resembling a broad Indigenous movement outside of legal mobilization, especially from the perspective of political organizations, has proved to be a long-standing challenge for Indigenous peoples. In her powerful and foundational work *Half-Breed,* Métis author and activist Maria Campbell describes some of the complexities in her community's relationships with First Nations peoples. She argues that one of the sources of friction between Métis and First Nations is that First Nations "had land and security, we had nothing. As Daddy put it, 'No pot to piss in or a window to throw it out.' … 'Mushooms' (grandfathers) and 'Kokums' (grandmothers) were good. They were prejudiced, but because we were kin they came to visit and our people treated them with respect" (1973: 25). In 1975, Métis scholar and activist Howard Adams argues that conflict between Indigenous peoples stemmed in part from racial discrimination and legal categories that keep Métis, status Indians, non-status Indians and Inuit separate. Adams believes that some Indigenous politicians internalize key racist images advanced by the state which undermine Indigenous political movement building. These images result in some Métis seeing themselves as superior to First Nations while some First Nations view themselves as the true and pure Indigenous peoples (1989: 145, 154). Significantly more work needs to be done to assess Adams' bold claim; however he is right that among political organizations there has existed a tense and competitive relationship for some time (see also Pitsula, 1997).

The same dynamic played out between Indigenous peoples during the patriation debates in the 1980s and the subsequent four First Ministers Conferences on Aboriginal Constitutional Matters. In this arena Métis, Status and non-Status Indians challenged each other for seats at the negotiating table (see Weinstein, 2007). Slightly more recently, in an unpublished paper, Métis lawyer and activist Paul Chartrand reflects on the community and political ties between First Nations and Métis communities and frames it this way: "There are many very close personal and community relations between First Nations and Métis people, but the relations between the political representative organizations are not close" (2007: 12). Chartrand argues that this problem is created by Métis and First Nations leaders paying attention to small and specific electoral constituencies that provide Indigenous leadership with their mandates rather than organizing around the struggles of colonialism that face all Indigenous peoples.

In light of the already frustrated process of Indigenous political movement building, what might the indirect effects of legal mobilization be for the Métis and their kin and allies in other Indigenous nations? It seems

that a key element to understanding this question is working through what McCann and others frame as "limitations, biases, and burdensome baggage" that originate in strategically mobilizing Her Majesty's courts. What follows in the next section is an examination of key biases, documented by critical legal scholars that stem from structural limitations imposed by legal institutions on Indigenous claimants. There is literature that suggests judges tie themselves in knots to find for the state even when logic is on the side of Indigenous litigants.[5] Thus, legal mobilization goals, regardless of how they are framed by creative mobilizers, are unlikely to result in victories for Indigenous peoples. Following this I argue that one of the indirect effects of legal mobilization for Indigenous peoples is that Indigenous peoples fight against one another even though their broader strategic interests would be to work together. It is essential to understand these dynamics in order to make informed decisions about whether one should strategically mobilize settler courts.

Lawyerly Critiques of the Courts

The Canadian legal system outside of Quebec is a British common law system. The common law uses precedents or *stare decisis* to ensure that like cases are decided similarly. Bell and Asch argue "according to the doctrine of *stare decisis* lower courts must follow like decisions of higher courts within the same judicial hierarchy to the extent that they apply to the case before them" (1997: 39). The rationale is that justice and fairness demand that all people are equal before the law, and similar circumstances be treated similarly thus eschewing, in theory, the application of the law in an uneven and arbitrary manner (39).

While asserting that they do not seek to eviscerate precedent, Bell and Asch level pointed critiques against its application to Indigenous litigation and call for a reconceptualization of the operation of precedent. They argue the interpretation of Indigenous cultures within legal institutions "relies on precedents which contain an approach to the analysis of culture which is out of date, biased and ethnocentric" which serves to place Indigenous peoples at "a tremendous disadvantage in litigation" (56). The deployment of cultural understandings of Indigenous peoples rooted in the nineteenth century concept of *terra nullius* as the court's default position when adjudicating Indigenous rights to land, title, and jurisdiction over land unfairly structures the legal playing field (see Asch, 2002).[6] Precedent imposes British discourses of civilization on Indigenous litigants whereby the absence of European characteristics of society denote a corresponding absence of civilized Indigenous peoples. The courts have insisted that it falls to Indigenous peoples to engage in the expensive and humiliating process of refuting that the Crown was a superior entity to inferior Indigenous societies. This sets

up an orientation to litigation whereby the equivalency between settler and Indigenous peoples was somehow in doubt (Bell and Asch, 1997: 72). The result is that the legal system itself is oriented towards perpetuating the Canadian state's civilizing myth. As Bell and Asch point out, questioning the magic of the Crown's assertion of sovereignty would be the more logical activity for the courts; however, that would call into question the vast body of legal decisions on land transfers within which the courts, as a branch of government, are implicated.

John Borrows has identified a similar problem with the primacy of Crown sovereignty. In a style similar to that of Bell and Asch, Borrows states "failure to question the Crown's assertions of underlying title and sovereignty (while strictly scrutinizing Aboriginal assertions) appears to create a bias in the law in favour of non-Aboriginal groups who rely on Crown assertions in Canada" (Borrows, 2001: 39). While Borrows critiques the assertion of Crown sovereignty, he ultimately offers an optimistic view of the future of Canada's legal system stemming from the independence of the judicial branch of government in general and that of judges in particular. He argues that it is well within a judge's range of powers to question Crown sovereignty and the history of that assertion over Indigenous territories. He argues that "Canadian courts are separate and autonomous from the Crown and the legislature, and do not function as the servants of the Queen or Parliament" (44). This allows courts to interrogate and even invalidate (45) the fashion by which the Crown asserts its power.

On its face this appears to offer a promising future for Indigenous peoples strategically deploying legal argumentation to deconstruct settler colonial myths like the supremacy of Crown sovereignty. However, Borrows does not distinguish between courts as independent from the Crown, and courts as agents exercising Crown power. This distinction brings to the fore *the power to decide* as the locus of judicial power. As David E. Smith has argued "the Crown is the organizing force behind the executive, legislature, administration, and judiciary in both the federal and provincial spheres of government" (1995: x). The power to decide on a case is power the Crown has agreed to delegate to a judge. So while judges are independent from the Crown and other branches of government, they exercise a particular brand of power from an Indigenous litigant's perspective. This point is probably best captured by Viscount Haldane's description of the constitutional relationship between the Crown and the Judicial Committee of the Privy Council (JCPC) (on which he sat) to the Attorney General of the Irish Free State in 1923.

> It is a long-standing constitutional anomaly that we … giv[e] advice to His Majesty, but in a judicial spirit … We are really Judges, but in form and in name we are the Committee of the Privy Council. The Sovereign … always acts on the report which we make. Our report is made public …

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> it is delivered in printed form … In substance what takes place is strictly a judicial proceeding. (Quoted in Smith, 1995: 141)

The point here is that the Committee's power stems from the willingness of the sovereign to act upon the advice of the Crown's law lords. This perhaps most clearly links the origins of judges' powers to the Crown. The invalidation of Crown sovereignty may undercut the legitimacy of the power that judges exercise. This subtle point can both consciously and subconsciously shape one's view of the institution that supplies one's power. The suggestion here is that the structural biases in the courts identified by Asch, Bell and Borrows may be reinforced by the interpellation of judges within Crown power. This would significantly constrain the transformative potential Borrows locates in judicial independence.

This is not to say Borrows' point about the potential to invalidate Crown power is incorrect. Kent McNeil has argued convincingly that there is legal precedent for courts challenging Crown sovereignty. He points out that the JCPC invalidated Crown sovereignty in Matabeleland in *Staples v. The Queen* (1999: 3). At issue in the case was whether or not the Crown had gained sovereignty over this African territory by settlement or by a Royal charter. Asserting sovereignty through settlement would have been a readily recognized legal option that seventeenth, eighteenth and nineteenth century jurists could have used to legitimize the expansion of Crown sovereignty to new territories.[7] Even as late as 1899 British courts were quick to insist on a Crown interest in the land being robust. Matabeleland had a Royal charter but no history of robust settlement. The JCPC found that a Royal charter cannot be used to advance Crown sovereignty in the absence of clear claims to settlement. This issue came to a rather dramatic head in an exchange between one of the Law Lords and counsel. McNeil quotes the exchange to be:

> **The Lord Chancellor**: Have you ever heard of sovereignty being insisted upon by reason of such a grant [the Royal charter]. It is new to me that such a thing was ever heard of.
> **Staples' Counsel**: I ask you to look at the terms of the grant.
> **The Lord Chancellor**: The terms of the grant cannot do what you assume it can do, namely give jurisdiction of sovereignty over a place Her Majesty has no authority in. (Quoted in McNeil, 1999:3)

McNeil's analysis tells us Borrows is both correct and insightful that courts can and do question the Crown's assertion(s) of sovereignty. The problem, however, is that despite these glimmers of hope for strategic mobilization, judges have not acted on the numerous opportunities to use their independence to challenge underlying claims and historical myths of Crown sovereignty in what is now Canada. Instead, judges have chosen to leave these

biases intact in the Crown's favour. Indeed, in the Supreme Court's decision in *Sparrow* the court set out explicitly that "while British policy towards the native population was based on respect for their right to occupy their traditional lands … 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" (*R. v. Sparrow*: para 45). This established the court's orientation that "existence of Crown sovereignty over indigenous peoples was legally unassailable" (Slattery, 2005: 434). While not conclusive evidence, it does suggest that the courts, which derive their power from the Crown, may be shaping the identities of jurists to protect the shoddy legitimacy of the broader settler state.

The important contributions here of Asch, Bell, Borrows and McNeil are all to say that, in McCann's words, there are "biases and burdensome baggage" that help explain why Indigenous peoples not only need to be concerned about providing legitimacy to the institutions and myths of their oppressors through litigation, but also that the structures of litigation *per se* are skewed against Indigenous claimants, thereby significantly reducing the opportunities to litigate strategically. These also appear to be the constraints that Sally Engle Merry believes limit the extent to which legal symbols and, importantly for the purpose of this paper, institutions, can be manipulated by creative litigants (as quoted in McCann, 1992: 7). Further, in the Canadian context, Peter Russell has argued final appellate courts have tried to be generous in constructing Aboriginal rights but "have always held back from questioning the legitimacy of the full sovereign power of the settler state over the Aboriginal peoples" (1998: 274–75). McNeil has been equally concerned that "regardless of the strengths of legal arguments in favour of Indigenous peoples, there are limits to how far the courts in … Canada are willing to go to correct the injustices caused by colonialism and [land] dispossession." What seems most at play in judicial reasoning is "the extent to which Indigenous rights can be reconciled with the history of British settlement without disturbing the current political and economic power structure" (2004: 300–01). Taken together, these scholars are suggesting that Indigenous peoples face courts where the capacity for deploying legal strategy is markedly reduced. Thus, what one would reasonably assume counts in the court, namely the ability of Indigenous litigants to use existing legal precedent as well as the rules and logic of argumentation to persuade a judge actually counts for very little. What matters in reality are considerations exogenous to the case and court, namely, the impact to the settler status quo should a judges use their independence to eviscerate the settler legal magic used to create Canada.

All of this is to say that there are well-argued reasons that the structure of the law goes to great lengths to find for the settler status quo. As Jeremy Patzer (2013) has pointed out, courts can produce precedents that seem like

victories at first only to manifest violently (and intractably) in new cases. Patzer notes this is particularly true for Métis people who do not have a body of case law stretching back many decades to inform the debate about whether or not to move a dispute into the courts. Beyond these political concerns, new attention is being paid to the deeply troubling racialized logics at play in fields of juridical power. As Métis scholar Chris Andersen has eloquently pointed out in his analysis of the *Powely* decision, juridical institutions import deeply problematic racalized notions of Métis identity, which are then "stripped of their juridically non-relevant complexity, sprinkled with a juridically authoritative 'pixie dust' that grants them an apparently natural, timeless solidity, and then deployed back into other fields as well as their own" (Andersen, 2014: 67–68).

The Inter-Indigenous Risks of Litigation

The preceding section argued there are structural biases within Canadian courts that limit their legal mobilization utility. But there is a perhaps more insidious reason to reject Indigenous legal mobilization: courts' indirect power to divide Indigenous peoples rather than contribute to Indigenous movement building. By examining the way different Indigenous peoples interact through a single court case one can better see the way courts divide the Indigenous political landscape. The *MMF v. Canada* case serves as an interesting avenue through which to investigate these dynamics. My analysis will focus on the interaction between the MMF and Treaty 1 peoples that played out in the Manitoba Court of Appeal. Treaty 1 peoples sought but were denied intervener status using shared counsel for their collective representation at the Manitoba Court of Appeal. This group included Brokenhead Ojibway Nation, Fort Alexander (Sagkeen First Nation), Long Plain First Nation, Peguis First Nation, Roseau River Anishinabe First Nation, Sandy Bay First Nation and Swan Lake First Nation (Kempton and Wolfe, 2008b; see also Kempton and Wolfe, 2008c). They sought to intervene collectively as the signatory nations to Treaty 1. The application to intervene was the first attempt that Treaty 1 peoples made to intervene in the court case, not having done so at trial before the Court of Queen's Bench. Interveners must satisfy to the Manitoba Court of Appeal that they have an interest in the subject matter under consideration and a reasonable likelihood that they will "make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties" (Berger and Aldridge, 2008: para 8, iii). The Manitoba Court of Appeal includes provisions in its practices that demand a prospective intervener show more than the possibility of one's rights being "affected by the precedential value of a case"

(para 7). The Court will not allow an intervention if it is likely to cause an injustice to the parties or undue delay in the progression of the case.

While the hearing at the Court of Appeal was the first time Treaty 1 peoples sought intervener status, it was not the last. Treaty 1 peoples also sought and were granted intervener status at the Supreme Court along with the Assembly of First Nations, Métis Nation of Alberta, Métis Nation of Ontario, the Métis National Council and the attorneys general of Alberta and Saskatchewan. The following analysis focuses exclusively on the first intervention attempt at the Manitoba Court of Appeal for several reasons. First, the interaction at the Court of Appeal involved a focused exchange between the MMF and Treaty 1 peoples localized to issues stemming from living together in the same space for many generations. At the Supreme Court on the other hand, the variety and range of interveners meant that there were many and varied interests, conversations and considerations at play. Limiting my analysis to the focused, local conversations at the Court of Appeal seizes upon a unique opportunity to examine inter-Indigenous politics within a tightly bounded institutional as well as geographic context. Second, and relatedly, given the dearth of scholarship on Métis use of the courts for political purposes, it seems wise to build the literature from just such a focused place and then expand to comparative institutional analysis. Finally, dealing with the particularities of rules and practices of two different courts requires one to be sensitive to the nuances of institutional differences. Such a sensitivity leads to an important research trajectory on questions of Indigenous legal mobilization, but also sits beyond the scope of this article.

At the Court of Appeal Treaty 1 peoples argued they ought to be allowed to intervene for several reasons. If the MMF were to be successful in the case and achieve the subsequent goal of a negotiated Métis land grant, the most likely place for disbursement of this potential land would be from Crown holdings (Kempton and Wolfe, 2008b: 5). There is little unoccupied Crown land within the geographic area that constitutes Treaty 1. Further, Treaty 1 peoples have outstanding treaty land entitlement claims of their own. Thus for every hectare of land given to a potentially successful Métis land claim, there is one hectare less to fulfil the land entitlements of Treaty 1 peoples (5). They also wished that some of the trial judge's historical narrative be declared non-binding. Specifically, they were concerned about the narrative relating to the assertion of Crown sovereignty, extinguishment provisions of the Selkirk Treaty in 1817 and the extinguishment of Aboriginal title generally within Treaty 1 territory. They argued that the trial judge could not have made findings of fact on these types of questions because information was not entered into evidence by Treaty 1 peoples who are the keepers of this knowledge.

The motion to intervene contained several arguments that would have raised considerable indignation among the MMF litigants. Treaty 1 peoples

offered that the Crown had no right to grant *any* land *or* rights to the Métis in 1870 without full consultation with, and accommodation of, Treaty 1 peoples. Finally "to cure this invalidity the Canadian and Manitoba governments must today consult with and accommodate the Treaty 1 First Nations in respect of their Aboriginal title, lights [sic] or Treaty rights that might be affected by any future negotiations between the Crown and the Métis in Manitoba" (6). On this point Treaty 1 peoples posited in their brief that "neither the Métis community, nor the federal or provincial government considered the interests of Treaty 1 First Nations in these proceedings" (para 6).

This choice of language positions the Métis with the federal and provincial governments in a collective lack of concern for the interests of First Nations peoples. This frames the Métis not as an Indigenous people agitating for their dispossessed land and rights but rather as part of a cadre of settler interests seeking to dispossess First Nations peoples. It is worth pointing out also that the phrase "these proceedings," while probably perfunctory for Treaty 1 peoples' counsel, emphasizes the contemporary role played by Métis political actors undermining First Nations' struggles. Said differently, even though Treaty 1 peoples alleged that their interests were not taken into consideration during the machinations of the 1870 Red River Resistance, the statements made in their application to intervene suggest that a Métis lack of concern for First Nations is as much a contemporary problem as it is a historical one.

Adding to this, Treaty 1 peoples argued in their notice of motion that the *Manitoba Act 1870* provided 240 acres of land per Métis child, whereas Treaty 1 provided only 160 acres per family of five, working out to be 32 acres per person. They suggested that these smaller land allotments were unfair: "Treaty 1 First Nations are and were entitled to be treated fairly with respect to the allotment of land by the Crown" (5). As Pitsula (1997) has argued, Indigenous political organizations have long used differentials in government financial allocations between Métis and First Nations as leverage to extract additional resources from the state. These differentials and the attempt to parlay them into additional resources have also frustrated Indigenous political movement building. However, in the *MMF* case this dynamic is formalized within legal argumentation to position the Métis as competitors for finite resources rather than as subjects of the same programme of dispossession. As Howard Adams (1989) points out, colonial authorities deploy differences in particularities of oppression to obscure the common plight of all Indigenous peoples from each other. Adams believes that colonial oppressors encouraged Indigenous peoples to focus on their local problems as singular ends. This prevents Indigenous people from critically connecting their oppression to that of other Indigenous peoples in Canada (154–55). Imposed distinctions between Indigenous peoples, operationalized through inclusions and

exclusions in the oppressive measures contained in the *Indian Act* (as just one example), also serve to particularize Indigenous oppression. The concern in *MMF* is that Indigenous peoples seem to be both perpetuating and exacerbating this divided landscape through their legal strategies. The result, to reflect on McCann's indirect effects of legal mobilization, is that this engagement within the Court of Appeal is contributing to the difficulty of building a broad Indigenous political movement.

However, by seeking to discard parts of the trial judge's findings, Treaty 1 peoples were offering something the MMF should have wanted. The trial judge created a judicial history in his reasons that set up the context of the 1870 Red River Resistance.[8] The trial judge stated that after 1763 "Britain gained sovereignty over all of Canada which would have included the area not covered by the grant, but which ultimately became Manitoba" (Kempton and Wolfe, 2008a: para 28). The trial judge also found that Lord Selkirk had extinguished the Indian title two miles back from either side of the Red River in 1817 (2008a). In a fashion similar to what Patzer was concerned about, Treaty 1 peoples experienced collateral violence through the MMF's pursuit of this case. That is to say, Treaty 1 peoples were not the intended targets of the MMF's legal strategies, but all the same, Treaty 1 interests were threatened by issues not directly linked to the MMF's case. Where Patzer was concerned with the way diverse Métis communities must contend with intractable precedents, one can see here that other Indigenous peoples experience collateral violence in what is a Métis focused court case. Treaty 1 peoples and the Métis have an obvious interest in challenging such an ethnocentric historical narrative. Both First Nations' and Métis' interests are implicated in the trial judge's pro-state view of northern plains history. But counsel for the MMF argued that no court would ever look on the trial judge's historical narrative as binding on future cases. The MMF argued in their response "those comments are a mere recounting of the historical narrative, or of the conventional understanding at the time. The comments are *obiter dicta*, and they are plainly not binding on anyone" (Berger and Aldridge, 2008: para 10).

It does not help the MMF to have such blatantly pro-settler interpretations of history connected, even as background, to their claims. As the preceding section has pointed out, such interpretations of the past are patently ethnocentric in their construction of Indigenous peoples, and serve as feats of judicial-historical magic in the service of Crown sovereignty. In the decision dismissing the application to intervene, the Court of Appeal held that the MMF was correct that the trial judge's "conventional historical background" would not be binding on future cases and that to examine them would result in "additional costs and further delay," and therefore injustice, to the present parties (*MMF v. Canada*, 2008: para 13 and 19). However, this application to intervene is not important for the reasons of its denial.

Rather, it brings to light the broader indirect effects of legal mobilization for Indigenous peoples. In a troubling fashion the MMF's decision to defend the recounting as inconsequential and/or "the conventional understanding at the time" positions the Métis as defenders of the ethnocentric history that serves to dispossess them *and* their relations in Treaty 1 Nations of land and territory. At the very least, this is a clear moment for judicial co-ordination among all the Indigenous litigants because the resulting narrative benefited neither the Métis nor Treaty 1 peoples.

For their part, the MMF responded on the whole to Treaty 1 peoples by using the rules of the court to undermine the application to intervene. They argued that Treaty 1 peoples did not have an interest in the issues under appeal, that their intervention would unduly add to the time and cost of the case and that they would not make a useful contribution to the litigation (Berger and Aldridge, 2008). Speaking directly to the question of the right to provide a grant of land in the *Manitoba Act 1870* the MMF argued "whatever the rights and titles of the First Nations people may have been in 1869 and 1870, they clearly did not create any constitutional impediment to Parliament enacting the *Manitoba Act*, and in particular sections 31 and 32 thereof" (para 16). They went on to add "finally, if the Applicants' point had any merit, it would apply not just to sections 31 and 32, but to section 30 and all of the other legislation authorizing land grants to settlers and others. It is quite beyond the pale for the Applicants, in the guise of an intervention in this appeal, to seek to argue in effect that the entire land system of Manitoba is 'invalid'" (para 20). It is a great oddity that in these interactions with people who should be natural allies by virtue of being subjects of the same processes of settler colonization, the Métis come to be the unlikely defenders of the land tenure system which dispossessed them and their kin in Treaty 1 peoples.

Canada and Manitoba also argued against Treaty 1 intervention. Each order of government used a different argumentation strategy to arrive at the same conclusion. In a troubling way, Canada's and Manitoba's agreement with the MMF did position the MMF to seem happy to work with the common oppressor of all Indigenous peoples to cut out a competing Indigenous interest for a single slice of land. The court dismissed the application stating that adding Treaty 1 peoples as interveners would unduly add to the length and cost of the case without providing a new unique perspective and their presence as interveners would likely change the nature of the litigation before the court (*MMF v. Canada,* 2008: para. 18–21). However, the relevance of studying this interaction between Métis and First Nations peoples is not found in the reasons for denying the application to intervene, but rather for what it says about how Métis and other Indigenous peoples agitate against their dispossession and continued oppression within the settler colonial state. It seems the MMF did not construct the arguments of their case with the common oppression of all Indigenous peoples in

mind. To that end Treaty 1 peoples had a point when they argued no party is taking into consideration the interests of Treaty 1 peoples. Instead the MMF deployed legal strategies in a fashion designed to advance Métis interests in a zero-sum framework where land becomes a single, indivisible resource for which multiple Indigenous peoples must compete.

Similarly, neither are Treaty 1 peoples helping in their intervention in the *MMF* case. They constructed their arguments in a confrontational fashion aligning the Métis with their common oppressors while pitting themselves against the Métis for access to land that is exclusively understood as indivisible. The result is that in a single court case there is a fight on two fronts. Métis and First Nations peoples against the state and First Nations peoples against the Métis. The crux here is that this engagement misses the way the Métis *and* Treaty 1 peoples have been dispossessed by the same processes of settler colonialism. Intervening in this fashion only contributes mistrust and animosity between Indigenous nations making the building of a movement more difficult than it already is. This helps to entrench competitive political relationships among Indigenous peoples within a formal institution of the settler state. In the final estimation, both sides' arguments are not conducive to collaboration or co-ordination in a struggle that has gripped and devastated both First Nations and Métis communities.

Val Napoleon has argued "litigation for aboriginal peoples is like a two-edged sword that cuts internally into the aboriginal communities and externally into the legal relationship between aboriginal people and the state" (Daly and Napoleon, 2003: 114). Speaking about her work on the *Delgamuukw* case, Napoleon explains that the cut into communities seems to manifest in a reduced capacity to manage internal conflict through a complex process of first abbreviating dynamic and interrelated kinship institutions into something intelligible to settler courts, and then organizing around those re-articulated institutions (119–20). What the *MMF* case suggests is that while Napoleon's insights into the indirect effects of *Delgamuukw* case are helpful, there is also a third cut that is occurring *between* Indigenous peoples. The resulting fracture through the Indigenous political world undermines broader Indigenous political unity. As Bonita Lawrence (2004) has eloquently argued, there is a long and painful history of the settler state dividing the Indigenous world, not the least through the power to make laws. The litigation of Indigenous disputes with the state provides Indigenous litigants the opportunity to exacerbate those divisions.

The forgoing analysis is not to say that co-ordination across distinct but related interests cannot be achieved in the legal arena. Christopher Manfredi has examined these types of co-ordinated legal strategies in civil society. While his analysis provides hope for Indigenous legal mobilization, it is

important to remember that inter-Indigenous politics are concerned with land in a way civil society is not.

Political Co-ordination and the Incentives to Exclude

In his book on the Women's Legal Education and Action Fund (LEAF), Manfredi (2004) examines in detail the organization's interventions in the courts to advance women's rights after the advent of the 1982 *Canadian Charter of Rights and Freedoms*. He documents the way LEAF's arguments have been embraced by judges in the rendering of decisions. However, for my purposes here, his discussion of the co-ordination between different social movements seems most helpful. LEAF forged productive legal alliances with disparate social groups like the Canadian Civil Liberties Association (CCLA), DisAbled Women's Network, Equality for Gays and Lesbians Everywhere (EGALE) and others. Though on some cases these organizations may find themselves opposing LEAF, on the whole the strategic partnerships and coalitions bolstered LEAF's arguments through co-ordinated legal argumentation. The strength of this approach is that LEAF's submissions were viewed by the court as carrying more weight than that of just a single organization or social group (Manfredi, 2004: 30).

These types of alliances and partnerships require the management of complex and contradictory views across social movement groups. For example, in the *Butler* case dealing with the distinction between pornography and obscenity, LEAF argued that "'pornography amounts to a practice of sex discrimination against individual women and women as a group'" and used gay male material to support their position (as quoted in Manfredi, 2004: 76). However Manfredi argues that this caused significant friction within the feminist movement especially among lesbian activists. When the *Little Sisters* case (2000) came before the Supreme Court, LEAF argued that the court should reframe its view of lesbian erotica to see it as emancipatory, not as harmful obscenity, for a particular group of women. Winnipeg lawyer and LGBT rights activist Karen Busby co-authored the factum for LEAF "to reconcile the apparent tension between its *Little Sisters* position and the argument advanced in *Butler*" (Manfredi, 2004: 80). Manfredi states "LEAF had to focus on lesbian material for the simple reason that it had offered gay male material as examples of harmful obscenity in *Butler*" (80). However from a strategic perspective "the intervention, [in *Little Sisters*] … was as much about healing wounds within the feminist movement as it was about achieving a particular legal objective" (81). The legal nuances of the cases aside, the point for this article is that strategic legal co-ordination and collaboration requires a deft hand to manage distinct interests and goals; however, when done well it

seems to contribute greater strategic currency for litigants and their allies while also helping to build a broad movement. In *MMF v. Canada,* though, it appears that the case brought by the MMF was itself uncoordinated and the intervention application and the response were reactionary, inflammatory and divisive. The case and the intervention contributed ill will to an already fractured Indigenous political landscape.

One cannot, however, simply import the successes and strategies used by LEAF to bolster inter-Indigenous legal mobilization. LEAF differs in important ways from the struggle of Indigenous peoples inside and outside the legal system. As Manfredi discusses, "LEAF did not emerge in explicit opposition to the state … Its founding document was a report commissioned by the federally funded Canadian Advisory Council on the Status of Women" (33). Further LEAF has through its history included the Crown in right of Canada and the Crown in right of several provinces as allies. As discussed above, Indigenous peoples, by the very fact of being Indigenous in a settler state, challenge the foundation of the Crown's legitimacy claims. Indeed, the coalition and partnerships in which LEAF is engaged are, for the most part, non-threatening to the ontology of the settler state. EGALE, or even the CCLA are not intervening in the courts for the purpose of deconstructing the narrative of the state as it pertains to the state's inherent legitimacy. Further, organizations like LEAF are not litigating from a place seeking to reclaim, define or shore up an interest in the land, and thus the questions of land are equally irrelevant to governments in their responses to LEAF.

While *MMF v. Canada* sought to strengthen the Métis' strategic negotiating position, it was also about relationships to, and interests in, the land. Putting aside the legal understandings of Métis title, land is a complicating factor that incentivizes zero-sum relationships between Indigenous litigants. In *Delgamuukw* Chief Justice Lamer defined "aboriginal [sic] title in terms of the right to exclusive use and occupation of the land" (*Delgamuukw,* 1997: para 155). He further rationalized his decision by saying "were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one Aboriginal nation to have Aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it" (para. 155). This is less of an absurdity in the world of Indigenous politics where Métis people engaged in sophisticated processes of treaty making with the other Indigenous peoples sharing the same territory (Gaudry, 2014). Chief Justice Lamer's views here are more of an indication of his contrived effort to reconcile Indigenous peoples with the Crown and in the process make Aboriginal rights intelligible to the common law.

In an effort to accommodate a type of shared territory, Lamer found that there could be a finding of "shared exclusivity (*Delgamuukw,* 1997:

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para. 158). This would be "the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's" (para. 158). Lamer noted two important caveats to shared title. First that even in shared title cases there may be limits to the title of one band that also shape, and probably circumscribe, the way a second band uses the lands claimed (para. 158). This sets up a dynamic whereby it is always better to be the exclusive titleholder. Adding another Indigenous people to a title claim contributes an added level of uncertainty. It may not be clear what the presence of a shared or competing claim will do to the range of power that title will confer. Given this risk, it is likely a safer strategy to try to undermine the shared or competing claim to maximize the benefit of a favourable finding by the courts.

Secondly, Lamer offered that "if Aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish Aboriginal rights short of title … [however] this does not entitle *anyone* to the land itself" (para. 159, emphasis added). This exacerbates the dynamic of the first caveat. In the event there are competing claims to a single piece of land, Lamer opens the possibility that none of the Indigenous parties will be granted title to it, further incentivizing the desire to secure a finding of exclusivity. Lamer's findings in *Delgamuukw* set the stage for Treaty 1 peoples to not only contend with each other to gain exclusive title, but also with the Métis. Thus where Manfredi correctly noted that organizations like LEAF do not challenge the legitimacy of the state, they also are not wrapped up in complex and multilateral claims to land made by multiple Indigenous peoples. It is in these battles for land where the rewards for deploying zero-sum strategies to show exclusivity are richest.

Conclusion

Michael McCann offered an important and contingent response to Gerald Rosenberg's gloomy assessment of the power of courts to create change. Indeed, it is McCann's appreciation for legal mobilization's indirect effects that provides his analysis so much cogency. However, this article has argued that Indigenous peoples are not realizing an indirect movement building effect from their legal mobilization. Instead, because of the larger structures and biases inherent in using courts, the indirect effect that accrues to Indigenous peoples is an exacerbation of the struggle to build a co-ordinated Indigenous decolonizing movement. To conclude that Indigenous peoples ought not undertake legal action to ameliorate the conditions of oppression under which they find themselves, particularly for Indigenous

women, comes from a place of privilege. However, the critiques levelled by critical legal thinkers on the shortcomings of strategic Indigenous legal mobilization suggest that the goals of mobilization cannot be achieved in Canada at this time. Well-documented structural biases coupled with a steadfast, and in some cases illogical, unwillingness on the part of judges to confront those biases, significantly curtail the strategic options for Indigenous litigants in Canadian courts. Add to this the potential for exclusionary conflict between Indigenous peoples illustrated by the interaction between Métis and Treaty 1 peoples in *MMF*, and one is left with an institution toxic to inter-Indigenous collaboration that cannot help but find for the settler status quo. The best strategy is not to deploy courts in Indigenous struggles seeking strategic ends. The courts cannot be manipulated to produce specific outcomes to the exclusion of others. Attempting to do so not only risks collateral violence against other Métis people, but other Indigenous peoples as well.

Nor should the response be to funnel Indigenous peoples into the political institutions of a common Canadian community like citizenship, elections, federalism and Parliament in the style advocated by Alan Cairns (2005). Like the courts, these institutions have been equally unwilling to interrogate and deconstruct their ethnocentric foundations and logics (Alfred et al., 2007). Rather there is work to be done from inside inter-Indigenous politics to divest our nations of divisive, exclusionary, zero-sum political conflicts. There is a pressing need to show in inter-Indigenous formal and informal politics that we can build strategies of common concern. An important step in this process would be to recentre Indigenous politics along lines of relationality. Combining the important insights on Métis peoplehood and its rootedness in "historic relationality with other [Indigenous] peoples" offered by Chris Andersen (2014: 130), with the work being done on Indigenous kinship examined from within Indigenous worldviews[9] by Indigenous scholars like Brenda Macdougall (2010), Rob Innes (2013), Jennifer Adese (2014) and Adam Gaudry (2014), we can build a political movement attuned not only to the way our struggles are related, but also to the way those who struggle are related *to each other*.

If Métis and other Indigenous peoples can come to see themselves as related targets of a unified process of domination, and craft political strategies outside the institutions of the state as such, then there may be value in revisiting the courts as a political tool of resistance. Under those conditions Manfredi's advice about the care needed in managing legal co-ordination could form the foundation on which to build strong inter-Indigenous legal strategies that provide an indirect benefit to the movement building process. However, as long as Indigenous peoples continue to snipe at one another for resources, the courts ought not be part of the Métis political toolkit.

Notes

1 Hereafter either *MMF v. Canada* 2013 or *MMF v. Canada* 2008.

2 Legal mobilization is a difficult term to define (see Manfredi, 2005: xi). Michael McCann relies on Frances Zemans definition that "the law is … mobilized when a desire or want is translated into a demand as an assertion of one's rights. At the same time that the legitimacy of one's claim is grounded in rules of law, the demand contains an implicit threat to use the power of the state on one's own behalf" (Zemans, 1983: 700). This threat, and the attendant notion of "law," is often analyzed imprecisely by legal scholars. For a discussion of this problem as it pertains to Métis peoplehood and identity, see Andersen (2014: 61–62). See also Zemans (1983: 700–01). In this paper, I am primarily concerned with the threat as it is operationalized in Canadian settler courts. Thus it is the institutional rules, practices and, importantly, the judges presiding over the operationalization of the threat by Indigenous litigants, as Zemans frames it, in Canadian settler courts that is the primary focus of the pages that follow.

3 A strategic end is distinct from an emergency. Indigenous people and communities, particularly women and children, who find themselves facing the immediacy of violence against themselves should use any and every means to get to a place of safety. It is incumbent upon other Indigenous people and communities to support them. This is not to say that legal mobilization cannot occur in emergency situations, but rather that attaining precedent change or wider material benefits for Indigenous peoples are not the reasons for the mobilization.

4 A form of remedy whereby a judge provides legal clarity on the points at law without awarding damages (Harrison, 1921: 359) The MMF wished to use this declaration to strengthen its hand in its negotiations with the governments of Canada and Manitoba.

5 By Indigenous litigants I mean both Indigenous communities hiring lawyers as well as Indigenous lawyers working within the courts on behalf of Indigenous communities.

6 Bell and Asch work through the way the *Delgamuukw* decision relies on precedents stemming from *Re Southern Rhodesia* and *Baker Lake* as well as outdated analytical frameworks (2014: 62–64).

7 The others being "inheritance from another sovereign, conquest, cession by international treaty" (McNeil, 1999: 3).

8 See Arthur Ray (2011) and Darren O'Toole (2010) for the complexities of judicial histories and expert testimony.

9 Here the important work on the Michif concept of *wahkootowin* provides what I think could be a foundation for such a project. *Wahkootowin* encompasses a worldview of complex relationships between Indigenous people and families as well as the interpersonal responsibilities that flow from those relationships.

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