Eliminating Indigenous Jurisdictions: Federalism, the Supreme Court of Canada, and Territorial Rationalities of Power

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On June 26, 2014, the Supreme Court of Canada released a judgment on Aboriginal title perceived by many commentators as fundamentally altering the political and juridical landscapes. The *Tsilhqot'in Nation v. British Columbia* (2014) decision, written by Chief Justice McLachlin on behalf of a unanimous court, has been heralded within media circles and legal commentaries as a "game changer" (see Bains, 2014; McCue, 2014) with "ground-shifting implications" (Borrows, 2015: 704). This perception stems, in part, from the fact that the court has, for the first time, recognized Aboriginal title under section 35(1)[1] of the *Constitution Act, 1982*, but also from the belief that the decision provides Indigenous peoples with greater measures of decision making and control over how their lands will be used in the face of governmental attempts at territorial expansion and exploitation. While it is certainly significant that the court has not only recognized an Aboriginal title claim but also continued the evidentiary guides established in prior title cases of the necessity of considering Aboriginal systems of law (*Delgamuukw v. British Columbia*, 1997),

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greater attention must be paid to the manner in which the decision is framed in the context of interjurisdictional immunity. In fact, when the decision is viewed within the context of settler-colonial power relations, it is apparent that the decision has, in actuality, further provided federal and provincial governments with greater license to *invade* Indigenous territories through the violent judicial elimination of alternate legal orders and Indigenous jurisdictions.

Since the release of judgments in the "*Van der Peet* trilogy"[2] concerning commercial fishing rights, the Supreme Court of Canada has acknowledged the importance of considering Aboriginal laws when engaging Aboriginal claims, particularly Aboriginal claims concerning rights to land and title. However, while the court has acknowledged the importance of engaging with Indigenous legal traditions, this acknowledgement appears to be little more than empty rhetoric. Not only do individual members of the court have great difficulty thinking beyond naturalized assumptions concerning Canadian federal and provincial "law," but more importantly, the court has also fundamentally undercut the strength of the Indigenous legal orders encrypted within the text of section 35(1) (Ladner and McCrossan, 2009). While the court has clearly recognized the value of considering Indigenous laws in relation to proving territorial exclusivity, these laws have, in actuality, been conceptually removed from judicial judgments concerning title. As will be discussed below, at the same time that the Supreme Court has recognized Aboriginal title under section 35, Indigenous laws concerning the ability to control territorial boundaries appear to provide little resistance against federal and provincial "incursions" into those very same territories.

This paper will provide a critical engagement with the text of the Supreme Court's *Tsilhqot'in Nation* decision by exposing the underlying logic embedded within the doctrines espoused by the court. The authors argue that the decision not only demonstrates a judicial inability to comprehend Indigenous legal traditions but also a continuing settler-colonial commitment to eliminate alternate legal orders and spaces of Indigenous jurisdiction. The paper will begin by outlining theories of settler colonialism and its underlying eliminatory logics. It will then briefly canvass prior common law jurisprudence concerning Aboriginal title and judicial representations of Indigenous legal orders before turning its attention to the *Tsilhqot'in Nation* decision itself. The paper will ultimately demonstrate that the decision displays a clear judicial orientation towards present jurisdictional divisions which conceptually exclude and undercut Indigenous legal orders and territorial responsibilities. In fact, the paper will not only illustrate the integrality of Indigenous territorial responsibilities and relationships within Indigenous legal orders but also the manner in which judicial reasoning serves to eliminate Indigenous laws, jurisdictions and territorial relationships in favour of the existing federal and provincial constitutional structure.

Abstract. This paper examines judicial reasoning in the area of Aboriginal title, paying particular attention to the Supreme Court of Canada's *Tsilhqot'in Nation* (2014) decision. While the decision has been heralded as a 'game-changer' within media circles and legal commentaries for its recognition of a claim to title under section 35(1) of the *Constitution Act, 1982*, the authors argue that the decision does not depart substantially from prior judicial logics predicated upon the production of Crown sovereignty and the denial of Indigenous legal orders. In fact, the authors argue that the decision displays a clear judicial orientation towards the present jurisdictional divisions of Canadian federalism which not only serves to eliminate Indigenous legal orders and territorial responsibilities, but also provides federal and provincial governments with enhanced powers of 'incursion' into Aboriginal title lands.

Résumé. Cet article examine le raisonnement judiciaire dans le domaine du titre ancestral, en accordant une attention particulière au jugement de la Cour suprême du Canada dans l'affaire de la Nation Tsilhqot'in (2014). Bien que la décision ait été présentée dans les cercles médiatiques et les commentaires juridiques comme ayant « changé la donne » en raison de sa reconnaissance d'une revendication au titre en vertu de l'article 35(1) de la Constitution canadienne, les auteurs avancent que la décision ne déroge pas substantiellement de la logique judiciaire antérieure reposant sur l'affirmation de la souveraineté de la Couronne et le refus des ordres juridiques autochtones. En fait, les auteurs soutiennent que la décision affiche une orientation juridique claire vers les partages actuels de compétences du fédéralisme canadien qui ne sert pas seulement à éliminer les ordres juridiques autochtones et les responsabilités territoriales, mais qui confère également aux gouvernements fédéral et provinciaux des pouvoirs élargis d'«incursion» dans les terres visées par un titre ancestral.

Settler Colonialism and Eliminatory Rationalities of Power

When examining the organizing logics of settler-colonial societies, a wide array of scholarship has drawn inspiration from the work of Patrick Wolfe and his temporal displacement of the violent characteristics of settler colonialism (McCrossan, 2015: 21, note 4 at 36). According to Wolfe, settler-colonial societies are underpinned by potent and *persistent* "logics of elimination" (2006: 402) that function to remove and eliminate Indigenous peoples in order to expropriate and gain control of their territories. As Wolfe notes, "territoriality is settler colonialism's specific, irreducible element" (388). In Wolfe's estimation, this territorially persistent logic of elimination which "initially informed frontier killing [has] transmute[d] into different modalities, discourses and institutional formations as it undergirds the historical development and complexification of settler society" (402). In effect, Wolfe's treatment of settler colonialism as "a structure rather than an event" (390) offers a theoretical lens that should be of particular interest to political scientists as it provides an opening for considering the extent to which such eliminatory rationalities and territorial relations of power continue to manifest themselves within and across multiple institutional structures and contemporary discursive practices. Indeed, prominent works in the discipline of Canadian political science have tended to situate

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colonialism as either an event in the past (Cairns, 2000: 87, 189) or to completely excise any discussion of "colonialism" itself (Flanagan, 2000).[3]

In a somewhat related manner, the treatment of judicial decisions involving Aboriginal rights within the *Canadian Journal of Political Science* has focused little attention on how judicial interpretations relate to the eliminatory logics and "insatiable" desires for land (Wolfe, 2006: 395) that continue to sustain the development of settler-colonial societies. Instead, scholarship has primarily tended to either focus on cultural manifestations of power, such as the legitimacy of the Canadian Supreme Court (Murphy, 2001), and/or judicial interpretations of Indigenous culture and identity (see also Dick, 2009; Panagos, 2007). However, as the first case in which the Supreme Court has recognized an Aboriginal title claim under section 35, the *Tsilhqot'in Nation* judgment offers a particularly prescient moment to consider whether such eliminatory rationalities and territorial relations of power are visible, especially given the fact that the decision has been widely interpreted as strengthening the bargaining positions and decision-making authority of Indigenous peoples through enhanced consultative requirements surrounding how their lands will be utilized (Coates and Newman, 2014: 5–6). We aim to contribute to scholarship surrounding settler colonialism by both drawing attention to the eliminatory logics embedded within the court's decision and also the manner in which the court serves to strengthen the structure of Canadian federalism itself. Indeed, political scientists such as Radha Jhappan have long recognized that the federal and provincial divisions of power under sections 91 and 92 of the *Constitution Act, 1867* function as a "power-grid" that limit possibilities for Aboriginal self-government (Jhappan, 1995). Likewise, Christopher Alcantara and Adrienne Davidson have also noted that in the context of Aboriginal self-government, "the government of Canada prefers arrangements that respect the existing constitutional and legal orders of Canada" (2015: 554). We build upon this scholarship by not only drawing attention to the structuring effects of federalism within the cognitive frameworks of the judiciary, but also the manner in which the court itself functions as federalism's handmaiden by eliminating Indigenous legal orders and permitting federal and provincial incursions into Indigenous territories.[4]

Shifting Judicial Conceptions of Law and Legal Orders

Although we intend to demonstrate that the court has attempted to eliminate Indigenous legal orders under section 35, it should be noted that this attempt was not always evident. For instance, since as early as 1973, the Supreme Court of Canada acknowledged the structuring effect of Indigenous laws in relation to land. For instance, in the court's germinal

Calder judgment in which a majority of the court acknowledged the pre-existence of Aboriginal title, Justice Hall approvingly cited the *Worcester v. State of Georgia* decision (1832) in which Chief Justice Marshall of the United States Supreme Court famously acknowledged the sovereign and legal independence of Indigenous nations prior to European contact (*Calder v. British Columbia*, 1973: 383). However, while members of the court may have acknowledged the jurisdictional and political effects of Indigenous laws in *Calder*, it would not be until the mid-1990s that the Supreme Court of Canada would engage directly with the prior existence of Aboriginal laws under section 35 of the *Constitution Act, 1982*. For instance, the court once again drew upon legal developments in other settler societies in its *Van der Peet* decision when Chief Justice Lamer referenced the Australian High Court's *Mabo v. Queensland* judgment (1992), paying particular attention to *Mabo*'s emphasis on the originating effects of Aboriginal laws and customs (*R. v. Van der Peet*, 1996: para. 40). However, while Lamer initially seemed to present a vision of Aboriginal title as explicitly linked to the prior existence of Aboriginal laws, he would ultimately move away from this position and concede a far weaker form of legal recognition the following year when specifically considering the content of Aboriginal title under section 35(1).

For example, in the court's precedent-setting Aboriginal title decision in *Delgamuukw v. British Columbia* (1997), Lamer not only outlined the scope and meaning of Aboriginal title under section 35, but also legal tests for determining the existence of Aboriginal title itself. According to Lamer, as a self-generating or *sui generis* territorial interest, Aboriginal title can neither be described by referring to "the common law rules of real property or to the rules of property found in aboriginal legal systems … it must be understood by reference to both common law and aboriginal perspectives" (*Delgamuukw v. British Columbia,* 1997: para 112). While one might assume that Aboriginal perspectives in this context include Aboriginal understandings of inherent legal systems, this is not necessarily the case. Instead, Lamer outlines a vision of Aboriginal title which begins to move away from considerations of prior Indigenous legal regimes. According to Lamer, "the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law" (*Delgamuukw v. British Columbia,*1997: para 147). In effect, where Lamer's prior judgment had initially cited *Mabo*'s understanding of Aboriginal title as originating within Aboriginal legal systems with approval, by the time of *Delgamuukw*, Aboriginal title now appears to be sourced, first, in the common law and, second, within Aboriginal perspectives—perspectives which may, or may not, include the Aboriginal legal systems from which they originate.

The tenuous existence of Indigenous laws within this legal framework is evident in Lamer's description of the ways in which Indigenous peoples might prove occupation of land. According to Lamer, proof of occupation may be established in the following manner:

> …the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples … As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. (*Delgamuukw v. British Columbia,* 1997: para. 148)

Moving from Justice Judson's previous acknowledgment in *Calder* of "the fact" that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries" (see *Calder v. British Columbia*, 1973: 328), Lamer has arrived at a position where Indigenous peoples are presented as perhaps no longer functioning as organized societies at the time sovereignty was asserted by the Crown.[5] In this regard, Lamer provides an opening for settler skepticism regarding the extent to which Indigenous peoples had laws governing relationships to land by failing to recognize that Indigenous laws are not simply elements of traditional practices, but that the practices themselves are governed by legal and political systems which derive from Indigenous relationships to, and responsibilities for, particular lands and territorial spaces.

Nevertheless, while Lamer suggests that Indigenous claimants need not focus exclusively on Indigenous laws to establish occupation of land, he does outline some possible ways that Indigenous peoples could prove exclusive occupation of land through reference to traditional laws. For Lamer, it is the existence of "trespass laws" which are highlighted as evidence of exclusivity (*Delgamuukw v. British Columbia*, 1997: para. 157). However, while members of the court have clearly recognized that Indigenous groups may have laws permitting other Indigenous groups to enter and reside within particular territorial boundaries (*Delgamuukw v. British Columbia*, 1997: para. 157), these laws appear to vanish in the context of settler-colonial intrusions. Indeed, this convenient elimination of Indigenous laws can be seen explicitly in the *Tsilhqot'in Nation* decision.

While the *Tsilhqot'in Nation* decision has been referred to as a game changer, particularly in relation to a perceived power held by Indigenous peoples to control how their lands will be used through enhanced consultative requirements, when the decision is viewed from within the prism of settler-colonial demands for land and territory, it becomes clear that those

laws hold little weight against the already established and taken-for-granted powers given to the federal and provincial governments under the Canadian constitution. For example, on the one hand, the decision clearly builds upon former Chief Justice Lamer's insistence in *Delgamuukw* that Aboriginal laws can be one way of demonstrating Aboriginal perspectives in relation to land and territory. As Chief Justice McLachlin notes in *Tsilhqot'in Nation*, "the Aboriginal perspective focuses on laws, practices, customs and traditions of the group" (*Tsilhqot'in Nation v. British* Columbia, 2014: para. 35). Continuing the discussion in *Delgamuukw* regarding the different ways in which occupancy could be established by Aboriginal groups (see *Tsilhqot'in Nation v. British Columbia*, 2014: para. 37), Chief Justice McLachlin underscores that while measures such as cultivation, housing construction and "consistent presence" on the land in question are perhaps sufficient indictors of occupation, they are not critical to its establishment. Rather, "the notion of occupation must also reflect the way of life of the Aboriginal people" (*Tsilhqot'in Nation v. British Columbia,* 2014: para. 38). In effect, it is the perspectives of Indigenous people—perspectives that include Indigenous laws and practices—which should be examined and taken into account alongside the perspective of common law understandings concerning evidence of land possession (*Tsilhqot'in Nation v. British Columbia,* 2014: para. 41).

According to McLachlin, the trial judge correctly concluded that the evidence supported the claim to title as the Tsilhqot'in Nation were found to have established occupation through "regular and exclusive" use of the land under dispute (*Tsilhqot'in Nation v. British Columbia,* 2014: para. 27). In McLachlin's estimation, the trial judge did not make an error when finding that the Tsilhqot'in Nation demonstrated the test of exclusivity by showing that "prior to the assertion of sovereignty, [the Tsilhqot'in] repelled other people from their land and demanded permission from outsiders who wished to pass over it" (*Tsilhqot'in Nation v. British Columbia,* 2014: 58). In effect, the courts recognized that the Tsilhqot'in had rules governing the surveillance and maintenance of their traditional territorial boundaries.

However, while Indigenous peoples might have the ability to control how their lands are utilized in a manner that reflects their traditional laws, this measure of control appears particularly permeable in relation to broader "Canadian" societal interests. As noted by McLachlin, one of the primary purposes of reconciliation expressed in *Delgamuukw* is that "Aboriginal interests" be reconciled with "the broader interests of society as a whole" (*Tsilhqot'in Nation v. British Columbia*, 2014: para. 82). Indeed, Lamer noted in *Delgamuukw* that a "broad" array of "compelling and substantial" objectives could justifiably infringe Aboriginal title in order to advance the goal of reconciliation:

> In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose [of reconciling Aboriginal peoples with Crown sovereignty] and, in principle, can justify the infringement of aboriginal title. (*Delgamuukw v. British* Columbia, 1997: para. 165)

Though McLachlin does attempt to restrain these objectives by stressing that "the Crown's fiduciary duty towards Aboriginal people" must be upheld (*Tsilhqot'in Nation v. British Columbia*, 2014: para. 84), the fact that these are presented in the context of justifying governmental "incursions," rather than "infringements," demonstrates the tenuous existence of Indigenous legal systems within the interpretive frameworks harnessed by the judiciary.

In fact, McLachlin's use of the term "incursion" throughout the text of the decision (*Tsilhqot'in Nation v. British Columbia*, 2014: para. 2, 76, 83–88) seems particularly significant. As Michael McCrossan has noted, this is the first instance where the court has used the term "incursion" in either an Aboriginal title case, or an Aboriginal rights case, under section 35 (2013: 177). It is perhaps significant that a related place where the term can also be found is in the Supreme Court Factum submitted on behalf of the appellant, Roger William, where Tsilhqot'in forms of territorial control are described: "The Tsilhqot'in people exclusively controlled the lands at issue in this appeal before 1846 and long after, and they fiercely defended their land from incursion by other First Nations and from unauthorized entry by settlers and traders" (2013: 1).

In effect, McLachlin's use of the term "incursion" throughout the decision should be read as a clear signal that Indigenous powers to control territorial boundaries are effectively insignificant in the face of settler-colonial demands for territory (McCrossan, 2013). As Patrick Wolfe perceptively noted, "settler colonizers come to stay: invasion is a structure not an event" (2006: 388). McLachlin's framework thus ensures that settler incursions into Aboriginal title lands can legitimately proceed into the foreseeable future as long as they are consistent with broader settler-colonial economic and territorial interests.[6] Moreover, while recognizing that Aboriginal laws can demonstrate exclusivity, the court ultimately noted that provincial governments continue to possess the power to "regulate" and "manage" forests located within Aboriginal title lands (*Tsilhqot'in Nation v. British Columbia,* 2014: para. 147–51). This framing of Canadian federalism gives no indication of the authority of the Tsilhqot'in to regulate and manage forests located within their territories under Tsilhqot'in law. Instead, as will be discussed below, the *Tsilhqot'in Nation* decision ultimately demonstrates a committed judicial preference

and orientation towards both the present federal structure and the territorial boundaries established through practices of settler-colonialism in a manner which serves to undermine the strength of pre-existing Indigenous laws and territorial responsibilities.

Understanding Indigenous Legal Orders

It is spurious to assume that Indigenous peoples exist without the ability to regulate and manage their territories according to their own laws or without a sense of "peace, order, and good government." Indigenous peoples have always had organized territories and both laws and political orders to provide governance within those territories. The problem, however, is that progressive colonial and Canadian governmental officials and lawmakers have often either ignored Indigenous territories and legal systems, or proven themselves incapable of fully comprehending "the Indigenous" as emerging from different intellectual and political traditions (Alfred, 1995; Ladner, 2003b). As a result, Indigenous legal systems, territories and political orders have been cast aside and the legitimacy of the Canadian state's territorial claims and assertions of sovereignty remain unquestioned.[7]

Those trained in disciplines such as political science and law often have a tendency to view the law and government from within the confines of Western-Eurocentric thought which presents both law and government as the hierarchical structures, systems, or institutions in which power is vested in individuals and authority is legitimately wielded (Barsh, 1986). While institutions that have developed out of Western-Eurocentric thought may be territorial in nature, in the sense that their legitimacy is bound to a particular territory, they are also non-territorial in the sense that they did not emerge as a reflection of—or through—a relationship with that territory. Rather, Western-Eurocentric political institutions and legal systems, such as those derived from Canada's own British common law inheritances, have often been transplanted through colonial expansion (Russell, 2006).

Indigenous legal orders, on the other hand, exist as—and were created through—a relationship with both a specific territory and other nations within that territory. As scholars such as James (Sakej) Henderson have noted, Indigenous legal orders are intricately tied to Indigenous languages which encompass and reflect a peoples understanding of, relationship to and experience with their territories (1995; see also Borrows, 2010b). As such, understanding the relationship between Indigenous law and territory is essential if Western-Eurocentric thinkers are to truly understand Indigenous legal orders. This relationship has also been recognized by Henderson et al. who have argued that "how Aboriginal languages and law appropriate space and attach responsibilities to it also reveals their ecological consciousness" (2000: 409). Thus, the land and the relationships of

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humans and other beings in that territory exist at the centre of Indigenous philosophies, languages, laws and legal orders. Leroy Little Bear has made similar assertions based upon Kainai philosophy which poses the earth as mother, or a relationship which makes it such that "the Earth cannot be separated from the actual being of Indians" (2000: 78). In effect, Indigenous legal orders are inextricably tied to territory; they do not function simply as a means of boundary protection against incursions.

These different traditions have also been discussed by Kiera L. Ladner and Michael McCrossan who have noted that Indigenous legal orders "are not based on declarations of Crown sovereignty, [or] claims of absolute ownership … Rather, they were intentionally constructed … as a means of maintaining peace and friendship among all beings" (2009: 265). Indigenous legal and political orders did not assume a right to assert claims of sovereignty, ownership or jurisdiction over the beings that shared the territory. Rather, the very notion of sovereignty is anathema to Indigenous peoples as is the idea that power could be vested in a single individual or a hierarchical system (Alfred, 1999: 55–58; see also Henderson, 1995; Ladner, 2001b).

Nevertheless, as the *Tsilhqot'in Nation* decision acknowledges, laws against incursions were not absent. Indigenous nations had elaborate understandings of territorial relations. Generally speaking, this translated into laws about such matters as land use, boundaries and in some cases even an understanding of boundaries as somewhat permeable whereby peoples from other nations could be provided specific responsibilities in another's territory as long as the laws of the nation governing that territory were respected. As such, it was not territorial "exclusivity" that was privileged, but rather *responsibility* as it is the absence of rights and the presence of an underlying philosophy of responsibilities that remains central within Indigenous traditions. Though Indigenous ontologies and axiologies may not be cognizable within Western-Eurocentric legal traditions or philosophies (Rigney, 1999), it is not sufficient to suggest that the court's recognition of Indigenous laws should be limited to affirming exclusive occupation.

Indigenous legal traditions should not be interpreted narrowly or understood as mere customs that left no one in control of unorganized spaces. Law is not just a matter of boundaries or about a peoples' ability to defend a territory against the incursions of others. Within an Indigenous legal paradigm, law and governance are about a nation fulfilling its responsibilities within its territory. Indigenous legal orders are inherently different than Western-Eurocentric legal traditions such that while one uses law's "magic" words to proclaim sovereignty over land (Borrows, 1999; see also McCrossan, 2015: 27), the other views law as inextricably tied to the land and as creating relational responsibilities for both the land and collectivities. Indigenous laws and legal orders are dynamic and responsive, reflecting the complexity of Indigenous nations and their relationships

among all beings—both human and non-human—in their territories (Ladner, 2003a; Napoleon, 2013: 230).

After numerous decades of colonial/state oppression, territorial dispossession, and repeated attempts at regime replacement, that relational and reciprocal understanding of Indigenous legal orders has been nearly severed from collective memories and lived responsibilities. However, many of the stories, ceremonies and songs in which a nation's laws are encrypted and/or codified still exist. In communities, both urban and reserve across this country, many are working to bring new life to Indigenous legal and political orders and are following in the footsteps of those that have been heeding their nation's laws, territorial responsibilities and sovereignty since colonization began. In fact, many are working to reaffirm responsibilities, renew legal and political orders, and facilitate resurgence (Coulthard, 2014; Simpson, 2011).

Though they are not exactly as they once were, Indigenous legal orders are not shapeless ghosts from some pre-colonial mythical past. For some, they are a lived reality that has never frayed. For others, they represent knowledge and responsibilities that are being renewed and reinterpreted in the contemporary context. As John Borrows has cogently argued, "Law is a deliberative cultural phenomenon that engages the past in light of subsequent normative interpretations. Indigenous legal traditions should not be measured primarily as expressions of past historical events, but rather as contemporary normative frameworks for peace and order" (2010a: 70; see also Napoleon, 2013). In effect, Indigenous laws and legal orders are not remnants from the past whose only utility is providing for evidence of the continued exclusive occupation of a specific territory in a land claim, or as a defense of a nation's Aboriginal or treaty rights within their own territory. Indigenous political traditions and legal orders provide for the governance of Indigenous territories both past and present (Borrows, 2010a: 59–106). Thus, in the case of the Tsilhqot'in Nation, they continue to provide the inherent responsibility—or jurisdictional authority in a Western-Eurocentric sense—of the Tsilhqot'in to regulate and manage forests located within their territories under Tshilhqot'in law. As many Indigenous legal scholars have noted, Indigenous nations have the responsibility to deal with both the historic and contemporary realities of their nations through the renewal of Indigenous laws and legal orders (Napoleon, 2013: 243–44).

However, much like the court's treatment of Indigenous legal and political orders, this responsibility might not be cognizable in Western legal thought (Williams, 1990) given that the court continues to demonstrate a committed judicial preference and orientation towards both the present federal structure and the territorial boundaries established through practices of settler-colonialism. In fact, it is the framing of jurisdiction or political responsibility as Canadian federalism that necessarily precludes the inherent authority of Indigenous nations, laws and legal orders. At times the court

seemingly appears to be operating under the assumption that Indigenous legal and political orders could not have existed, and cannot exist today, without first being "recognized and affirmed" by the state. Given that such recognition would bring into question the assumed legitimacy of the colonial regime, even if such laws are cognizable, the court continues to perpetuate the myth that without settler-colonial governments, no one would be regulating or governing vast areas of the country. However, it is important to note that Indigenous responsibility is not vested in the jurisdictional claims of Canadian governments or in section 35 of the *Constitution Act, 1982*. The authority of Indigenous law and legal orders predate the arrival of settler laws and federal/provincial legal orders. Indigenous responsibilities for land have existed since Indigenous peoples constructed their legal and political orders within and in relation to their territories.

Sustaining the Present: Legal Violence and Established Jurisdictional Divisions

The inability on the part of members of the judiciary to recognize that Indigenous laws do more than simply maintain the confluence of territorial boundaries can be seen clearly in the court's treatment of the legislative powers possessed by provincial governments. In fact, not only does the *Tsilhqot'in Nation* decision demonstrate the judicial permeability of Indigenous laws in relation to "valid" governmental incursions, but also the "collapsing" of Indigenous jurisdictional space in relation to areas of provincial jurisdiction (McCrossan, 2015). For instance, one of the questions entertained by the lower courts in the case concerned whether or not provincial laws of general application, such as British Columbia's *Forest Act*, applied to lands held under Aboriginal title. It is in the process of engaging with this question that Chief Justice McLachlin not only removes Indigenous laws from judicial consideration but also demonstrates a clear commitment to maintaining the authority of existing federal/provincial jurisdictional divisions.

According to Chief Justice McLachlin, in the broadest sense, provincial laws of general application do indeed apply to Aboriginal title lands (*Tsilhqot'in Nation v. British Columbia,* 2014: para. 101). This is because as a constitutionally entrenched division of power under section 92(13), provincial governments have the ability to regulate land located within their territorial boundaries. While provincial governments still have to recognize applicable constitutional limits, such as any justification requirements stemming from section 35, the power of provincial governments to regulate Aboriginal title lands under McLachlin's framework proves to be quite immense. For instance, McLachlin "predicts," rather matter-of-factly, that provincial laws "aimed at protecting the environment or assuring the

continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right" (*Tsilhqot'in Nation v. British Columbia,* 2014: para.105). It is here that one can begin to see the direct removal of Indigenous laws within McLachlin's reasoning. There is no indication that there might be alternate laws existing within provincial territorial boundaries that also aim to protect the environment or ensure forestry health. Instead, it is the legislative powers flowing from existing "watertight" or jurisdictional divisions which are naturalized and taken as a given. Regardless as to the degree of Indigenous consent to the establishment of existing provincial boundaries—or what alternate legal orders might have been effaced in the process of that establishment—the fact that Indigenous lands currently reside within the boundaries claimed by provincial governments is enough to assume provincial legislative authority.

Moreover, the fact that McLachlin also suggests that provincial laws of general application would likely not interfere with preferred Aboriginal ways of exercising rights is equally troubling. McLachlin has clearly followed the trajectory established by the Lamer Court of separating Aboriginal laws from Aboriginal practices (McCrossan, 2013: 168–69). There is no suggestion that Aboriginal methods for exercising rights on Aboriginal title lands might themselves by governed by Aboriginal legal orders. Instead, McLachlin has simply acknowledged the exercise of rights rather than the prior existence of rules governing the manner in which those rights are exercised. However, had McLachlin engaged with the existence of alternate legal systems functioning within provincial territorial boundaries, it is unlikely that her claim of non-interference could withstand scrutiny. That is to say, had McLachlin engaged with the legal orders governing the practice and exercise of those rights, she would have then had to confront the existence of a prior legal regime operating within provincial jurisdiction and territorial space. Such confrontation, however, is undesirable as it would lead to the conclusion that a plurality of legal meanings and equally legitimate interpretations existed alongside the jurisdiction not only granted to provincial governments but also the very constitutional area over which the judiciary has authority to interpret and scrutinize.

As legal theorists such as Robert Cover have recognized, judicial interpretations are intimately connected to violent forms of suppression and the displacement of alternate legal traditions.

> Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest … The only way in which the employment of force is not revealed as a naked

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> jurispathic act is through the judge's elaboration of the institutional privilege of force—that is, jurisdiction. (1983: 53–54)

From this perspective, the law—or Eurocentric law to be precise—does not simply function as an objective or impartial bundle of rules but is intimately entwined with forms of violence resulting from judicial interpretations. In fact, this attempt to maintain established imaginings of legal order through the effective displacement and elimination of Indigenous laws can be seen in the *Tsilhqot'in Nation* decision where there is both a clear privileging of what counts as law and of the actors permitted to bring it into existence. For instance, Chief Justice McLachlin notes that upon the finding or establishment of Aboriginal title, the lands under dispute are no longer "vested" in the Crown but rather in the Aboriginal group (*Tsilhqot'in Nation v. British Columbia,* 2014: para. 115). This appears promising as it suggests that Aboriginal peoples obtain a "beneficial interest" and measure of control over Aboriginal title lands outside the purview of the Crown. However, while acknowledging that the *Forest Act* no longer applies to Tsilhqot'in lands given the establishment of Aboriginal title, Chief Justice McLachlin bluntly stated an "obvious" point: "I add the obvious—it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints" (*Tsilhqot'in Nation v. British Columbia,* 2014: para. 116). In other words, in the same decision in which Aboriginal title is not only recognized for the first time under section 35, but also Aboriginal control of title lands, the power of provincial governments to legislate, manage and bring those lands under their jurisdiction is never far removed from judicial consideration.

This judicial privileging of provincial jurisdictional powers can be seen clearly in McLachlin's description of the legal system operating within traditional Aboriginal territories in situations where Aboriginal title has not been established or recognized by the court. McLachlin's ruminations on land and law are expressed as follows:

> Can the legislature have intended that the vast areas of the province that are potentially subject to Aboriginal title be immune from forestry regulation? And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain? During this period, Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land's use … It seems clear from the historical record and the record in this case that in this evolving context, the British Columbia legislature proceeded on the basis that lands under claim remain "Crown land" under the *Forest Act*, at least until Aboriginal title is recognized by a court or an agreement. To proceed otherwise would have left no one in charge of the forests that cover hundreds of thousands

> of hectares and represent a resource of enormous value. (*Tsilhqot'in Nation v. British Columbia,* 2014: para. 113–14)

It is here that one can clearly witness the displacement of Indigenous laws and the privileging of provincial jurisdiction within McLachlin's interpretive framework. By suggesting that "vast areas" of the province would not only go unregulated in the absence of the *Forest Act* but that Indigenous peoples also have "no legal right" to manage those areas prior to the establishment of Aboriginal title, McLachlin has effectively removed Indigenous legal traditions from the landscape and obliterated their strength in relation to present areas of provincial jurisdiction. To specify that in the absence of the *Forest Act* no one would be left in charge of managing vast areas of forest completely fails to acknowledge the existence of Indigenous laws and territorial responsibilities. More specifically, this passage from McLachlin's decision not only demonstrates the restrictive structuring effect of federalism within the mindset of the judiciary but also a form of discursive violence which eliminates Indigenous legal orders from the very territories in which they originated in favour of an imposed space of settler-colonial jurisdiction.

This exclusionary and imposed jurisdictional space leaves little room for Indigenous legal orders to flourish and sustain ongoing territorial responsibilities outside Crown powers of surveillance and control. For instance, one doctrine that has developed to resolve disputes in cases where federal and provincial governments potentially hold concurrent jurisdiction is the notion of "interjurisdictional immunity." According to McLachlin, this doctrine requires courts to ask the following two questions when considering whether provincial governments have acted outside their jurisdiction: "First, does the provincial legislation touch on a protected core of federal power? And second, would application of the provincial law significantly trammel or impair the federal power?" (*Tsilhqot'in Nation v. British Columbia,* 2014: para.131). While the trial judge found that the application of the doctrine made the *Forest Act* inapplicable to Aboriginal title lands as it infringed upon federal jurisdiction under section 91(24) (*Tsilhqot'in Nation v. British Columbia,* 2014: para.132), McLachlin arrives at an altogether different conclusion. In McLachlin's view, the constitutional division of powers must also be read alongside section 35(1). When this is done and the division of powers is considered alongside the constitutional entrenchment of Aboriginal and treaty rights, the doctrine of interjurisdictional immunity is found to carry little weight. According to McLachlin, section 35 acts as a limit on both federal and provincial governments such that "neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group"

(*Tsilhqot'in Nation v. British Columbia*, 2014: para. 139). McLachlin found that since the doctrine of interjurisdictional immunity does not apply in the context of Aboriginal title lands under section 35, both federal and provincial governments retain legislative powers—particularly powers of provincial governments to pass laws of general application—as long as they do not unduly infringe Aboriginal rights under section 35. In effect, as John Borrows has noted, "the Supreme Court made new law and wrote that interjurisdictional immunity does not apply when considering the application of provincial laws to Aboriginal title lands" (2015: 735).

While it is certainly significant that the court has recognized that section 35(1) places limitations on both levels of government, it is important to pause to consider to what degree Indigenous legal orders have room to operate within this framework. While governments are not permitted to legislate in any way that "meaningfully diminish" Aboriginal or treaty rights, there is never any doubt within McLachlin's framework that federal and provincial governments continue to possess the ability to legislate for and regulate Aboriginal title lands. In fact, on multiple occasions, McLachlin invokes the notion that section 91(24) is a manifestation of the "core of the federal power over 'Indians'" (*Tsilhqot'in Nation v. British Columbia,* 2014: para. 132; see also para. 140). At other times, McLachlin vacillates between referring to the section as either an indication of a core federal power or a core federal "jurisdiction" (*Tsilhqot'in Nation v. British Columbia*, 2014: para. 148) *over* "Indians." Rather than view section 91(24) as entrenching the Crown's historic treaty responsibilities and ongoing partnerships with Indigenous nations as exemplified in the Royal Proclamation of 1763 (Russell, 2006: 47–49), McLachlin has instead interpreted the section as cementing a clear hierarchical relationship between Aboriginal peoples and the Crown—or a relationship in which the federal government is represented at the apex wielding Crown prerogatives and legislative powers over Aboriginal peoples.

This understanding of an ongoing relationship of domination seems to stem, in part, from McLachlin's understanding of history. For instance, in her section labeled "historic backdrop," McLachlin notes the following regarding treaties conducted between Indigenous peoples and the Crown: "Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their claim to land in exchange for reservations and other promises" (*Tsilhqot'in Nation v. British Columbia,* 2014: para. 4). Though she does acknowledge that the context in British Columbia is slightly different from the rest of Canada, there is no suggestion here that Indigenous peoples retained an ongoing connection to and responsibilities for particular territories. Instead, Indigenous peoples are presented as simply "giving up" claims to land in favour of "reservation" boundaries—boundaries that in many cases were demarcated and determined solely by settler-colonial interests and desires for land (Venne, 1997:

197; see also Harris, 2002). By representing Indigenous peoples as voluntarily residing within the legal and territorial boundaries of Canada, prior claims to land and sovereignty are thus rendered as unproblematic and merged within an already existing and established jurisdictional framework. In effect, McLachlin's decision represents Aboriginal rights through the prism of existing state structures and jurisdictional divisions. By prioritizing present jurisdictional divisions and representing them as both natural and consensual, McLachlin is not only able to sidestep unsettling questions concerning the legitimacy of the colonial processes through which those divisions were established and maintained but also ultimately undercut the existence of Aboriginal legal orders inscribed within the text of section 35. While a majority of legal scholars may have initially viewed the entrenchment of Aboriginal and treaty rights in 1982 as shielding Aboriginal legal systems and rights to governance from federal and provincial encroachment (Ladner and McCrossan, 2009), McLachlin seems to be operating under the assumption that Aboriginal land claims, laws, governing structures and jurisdictional understandings can all be justifiably infringed in the name of broader "public interest" concerns and/or necessary settler-colonial "incursions."

Conclusion

It is perhaps telling that in Chief Justice McLachlin's discussion of the interests that could justify incursions on Aboriginal title lands, she not only underlined the exploitative and extractive objectives delineated in *Delgamuukw* above, but also the statement concerning "the settlement of foreign populations to support those aims" (*Tsilhqot'in Nation v. British Columbia*, 2014: para. 83). In the context of justifiable incursions, this added emphasis is a clear signal of the invasive nature of federal and provincial economic interests. For when this emphasizing is taken into account, the *Tsilhqot'in Nation* decision looks less like a game changer and more like a continuation of settler-colonial desires to obtain, settle and exploit Indigenous territories for economic gain (McCrossan, 2015).

Throughout the decision these desires are further sustained and supported by a judicial privileging of Canadian federalism which leaves little room for Indigenous jurisdictions as Indigenous peoples are denied the opportunity to act as autonomous or even co-autonomous sovereign authorities on their own lands. While the court has acknowledged the usefulness of engaging with Indigenous laws in the context of proving claims to historical exclusivity, those laws hold little weight against the existing jurisdictional powers of provincial governments to legislate, manage and exploit lands within their assumed territorial space. In effect, a clear judicial orientation towards the present jurisdictional boundaries established

through settler-colonialism has served to exclude and deny Indigenous legal orders and territorial responsibilities. This judicial orientation not only demonstrates the structuring effect of Canadian federalism in relation to naturalized constitutional powers under sections 91 and 92 of the *Constitution Act, 1867*, but also the continued judicial denial of Indigenous legal orders and jurisdictional responsibilities (Ladner, 2005).

However, while the court may be trying to find a way to manage Indigenous claims to territory and jurisdictional responsibility without detracting from the penetrating force of Crown sovereignty, Indigenous peoples continue to confront the state and its claims over their lands. In the aftermath of *Tsilhqot'in Nation*, Indigenous peoples have recognized potential opportunities created by the decision and are increasingly asserting their sovereignty and exercising their legal responsibilities within their traditional territories. In fact, on March 19, 2015, the Tsilhqot'in once again asserted their nation's responsibility to govern within its territory by affirming the 1989 *Nemiah Declaration* (Tsilhqot'in Nation, 2015). Given that it was this very declaration that produced the legal battles which led to *Tsilhqot'in Nation,* it is reasonable to conclude that the Supreme Court's reification of Canadian federalism is not going to stop Indigenous nations from exercising their laws and responsibilities for their territories. It will be interesting to see how governments respond to Indigenous "incursions" into assumed federal and provincial jurisdictional space and the extent to which they are willing to fully adopt both section 35 and the principle of "free, prior and informed consent" contained in the United Nations Declaration on the Rights of Indigenous Peoples.[8] It will also be interesting to see whether the court can reorient itself towards the promise of section 35 and the encryption of Indigenous legal orders and jurisdictions, or whether it will continue to give federal and provincial governments license and violent legitimacy to justify incursions into Indigenous territories and sustain existing jurisdictional divisions.

Endnotes

1 Section 35(1) of the *Constitution Act, 1982* reads as follows: "The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed" (*Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (UK)*, c 11).

2 The "Van der Peet trilogy" refers to three cases concerning Aboriginal commercial fishing rights which were heard together at the Supreme Court of Canada on November 27–29, 1995 (*R. v. Van der Peet*, 1996; *R. v. Gladstone*, 1996; *R. v. Smokehouse*, 1996).

3 However, there are some important exceptions in the field (see Alfred, 1999; Coulthard, 2014: 7). Much like Stephen Harper's 2008 apology to former students of Indian residential schools (Ladner and McCrossan, 2014), the word "colonialism" is notably absent from Flanagan's text (for a similar omission, see Flanagan et al., 2010). Though colonization is discussed by Flanagan, it is primarily used in relation to the past actions of British and European powers (Flanagan, 2000: 40–43, 53, 119).

4 While John Borrows' (2015) article was published after our initial submission, we also build upon his argument concerning the jurisdictional implications of presumed Crown sovereignty. However, while we both touch upon issues of interjurisdictional immunity, our contribution lies on recognizing both the structuring effects of federalism and the manner in which the judiciary continue to deploy settler-colonial logics of elimination to ultimately sustain that structure.

5 Indeed, as anthropologists such as Michael Asch have noted, "it is not possible for societies to exist that are not 'organized' or are only 'partially organized.' … [T]he notion that a society could exist that was not organized is virtually a contradiction in terms for, in itself, the definition of society assumes organization" (2000: 128).

6 While we recognize that incursions will not be justified "if they would substantially deprive future generations of the benefit of the land" (*Tsilhqot'in Nation v. British Columbia*, 2014: para. 86), our concern here is with the selective removal of Indigenous laws in favour of the authority of federal and provincial governments.

7 While some may argue that constitutions drafted and signed by First Nations such as the Nisga'a and Yukon First Nations recognize Indigenous legal systems, it is important to note that such constitutions can also be understood as a form of *delegated* authority (see Ladner, 2001a).

8 Prime Minister Justin Trudeau has said that the government will "fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples" (Trudeau, 2016).

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