# Our Home on Native Land: An Introspection into *Delgamuukw v. British Columbia* and its Aftermath

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**Abstract.** This paper critiques the dominant narrative of Canada as a fair and equitable nation and investigates how this narrative negatively affects Indigenous peoples in Canada. This research is important because it addresses the issue of Canada's liberalist definition of reconciliation. This paper demonstrates how the only way to move forward on reconciliation will be for Canada as a culture and a state to let go of this liberalist narrative and redefine reconciliation through continuous consultation with Indigenous peoples across Canada. This is done through a case study of the Indigenous land claim case *Delgamuukw v. Province of British Columbia* and its long term outcomes as demonstrated by movements occurring in Wet'suwet'en Nation territory today. In this paper, a different definition of reconciliation is put forth and is informed by the responses to the liberalist definition of reconciliation and the falsehood of the Canadian narrative communicated by Indigenous peoples — as seen by movements in Wet'suwet'en Nation. Lastly, several baseline suggestions are made to meet this more integrative model of reconciliation by requiring the Canadian government to make an entire systemic overhaul at all levels. In breaking down this discourse through the use of *Delgamuukw v. British Columbia* as a case study, this paper demonstrates how this definition of reconciliation and discourse is, in fact, harmful to Indigenous rights and the obtainment of reconciliation. This paper also presents a theoretical framework for how Canada, as a state, can take steps towards reconciliation.This framework is rooted in holding Canada accountable to their word and actions by integrating Indigenous legal orders with international law.

# Introduction

The overwhelmingly dominant narrative about Canadian identity is that all are equal before the law regardless of ethnicity, class, gender, or country of origin. After all, non-discriminatory equality is a right that is protected under the Charter of Rights and Freedoms (s. 15[1]). However, many cases pertaining to Indigenous rights— such as *Delgamuukw v. the Province of British Columbia*— illustrate that this liberalist, multicultural narrative is more an aspiration than a fact. In 1984, several Gitxsan and Wet'suwet'en chiefs— most famously the Gitxsan hereditary Chief Earl Muldoe, who bears the title Delgamuukw— jointly submitted a land claim to the Supreme Court of British Columbia as a way to protect their lands against unwelcomed resource extraction and appropriation. The claim asserted that 133 territories that amounted to 58,000 square kilometers of the interior of British Columbia were under the ownership and jurisdiction of the Gitxsan and Wet'suwet'en Nations (McCreary, 2014; Mills, 2000). This case arose out of repeated failed land claim negotiations between these nations and the province of British Columbia. The negotiations had been occurring because the traditional lands of the Gitxsan and Wet'suwet'en were (and still are) unceded and untreatied. Despite this fact, clear-cut logging took place on their lands without their consent to increase the economic power of Canada. The *Delgamuukw* case ended in 1997 with a monumental decision handed down by the Supreme Court of Canada in which no title was given to the Gitxsan or Wet'suwet'en peoples. Instead, the court ruled that a new trial must be held with more consideration of oral testimony (*Delgamuukw*).

In order to comprehend the importance of this case, one must understand the socio-historical basis in which this case is rooted. Unlike most of Canada, the province of British Columbia's colonial authorities never utilized treaties with Indigenous Peoples in order to establish a legally stable foundation for settlement (McCreary, 2014). Rather, British Columbia restricted Indigenous peoples' space to the confines of reserves, ignoring the question of Aboriginal title for over 200 years. Thus, the Crown acquired its title in what is now the province of British Columbia through its assertion of sovereignty via the sheer volume of settlers brought to British Columbia; therefore, the Crown has no legal jurisdiction or authority over the territory (Culhane, 1998; McCreart, 2014).

Generally, unless Indigenous nations have come to an agreement with the Crown under a treaty or have voluntarily ceded their lands (and therefore, given up all rights associated with those lands), the Crown has the fiduciary duty to protect these lands from settlers who desire to use this land as a homestead or otherwise. These uses include the practice of resource extraction, as established under the *Royal Proclamation of 1763*, which clearly states that all unceded lands and territories are to be protected by the Crown from the infringement of settlers, so long as such lands are deemed to be under the sovereignty of the Crown. In this case, sovereignty is defined as the normative claim to the right to govern a state rather than the actual right to have effective power over the

territory itself.

## Reconciliation Through Recognition

Since the 1990s, the Canadian government has been motivated to move forward with "reconciliation." This trajectory began with the development of the Royal Commission on Aboriginal People (RCAP) in 1991 and was finalized in 1996, a year prior to the final judgement in *Delgamuukw*. The RCAP was likely spurred by the Oka Crisis in 1990, in which Mohawk people on the Kanesatake Reserve (in what is now Quebec) were subjected to military force because they were working to protect their lands from the construction of a golf course. However, according to the government, this commission was mandated to investigate and determine solutions to the challenges that fell on the relationship between Indigenous peoples, the Canadian government, and Canadian society as a whole (Supply and Services Canada, 1996). Resulting from this commission, another was mandated by the Canadian government as part of the Indian Residential Schools Settlement Agreement— this commission was entitled the Truth and Reconciliation Commission (TRC), which had its final report published in 2015 (Library and Archives Canada, 2015).

Neither of these documents explicitly state what is meant by reconciliation (Filsfeder, 2010). However, it can be surmised from what has been implicitly stated by government officials — both elected and appointed — that the ultimate, aspirational goal of the Canadian government is to accommodate the "prior presence of [Indigenous] peoples with the assertion of Canadian Crown sovereignty" via what has been dubbed recognition politics (*Delgamuukw*). Canada's current Prime Minister, Justin Trudeau, defines reconciliation under his government to be based on "the recognition of rights, respect, co-operation, and partnership," (Government of Canada, 2016). In critical political theory (Culhane, 1998; Coulthard, 2014, 2007; Alfred & Corntassel, 2005; Neizen, 2003; Short, 2005), this is known as a liberalist view of reconciliation in which Indigenous claims are not viewed as requiring a governmental overhaul; rather, the state framework is not restructured because in the eyes of the state, the state is understood to be democratic and legitimate. Instead, all that is provided is greater 'recognition' of Indigenous peoples within the state (Short, 2005). This view of reconciliation is severely problematic as its notions of justice and fairness are comprised of asserting universalized values as a moral foundation for all. Instead, I propose that reconciliation should be individualized to a nation based on negotiations of what each nation may need as a result of the ongoing impacts that colonialism continues to have upon them. The form of reconciliation that the Canadian state perpetuates is rooted in colonial assimilative agendas and thus, must be rethought in order to meet the contemporary political needs and demands of Indigenous nations and sovereignty.

Many political theorists and legal scholars argue that recognition is not enough (Alfred & Corntassel, 2005; Coulthard, 2007; Neizen, 2003; Short, 2005). They argue that recognition is actually a perpetuation of colonialism; it is the recognition rather than the resolution of Indigenous peoples' rights issues that continue to subject Indigenous peoples to oppression. This makes the liberal state itself the ultimate and permanent barrier to change, development, and reconciliation (Short, 2005). Dene scholar Glen Coulthard states that the reproduction of colonial structures of dominance is reliant on forms of recognition that are either imposed or granted to Indigenous peoples by the colonial-state and society (2007). Cherokee scholar, Jeff Corntassel, and Kanien'kehá:ka scholar, Taiaiake Alfred, argue that the category of 'Indigenous' is a constructed identity that is shaped and lived in the politicized context of contemporary colonialism (2005). As such, it is not understood through Indigenous conceptions of their own people and culture but rather through that of the colonial state. Therefore, this imposition further works to subjugate Indigenous peoples by essentializing them to the point of being reductive stereotypes and objects. This turns them into convenient caricatures of their cultures; any recognition is not truly recognitive of anything other than what is held in the eye of the beholder, i.e. the Canadian state and society (Corntassel & Alfred, 2005).

In contrast to this colonial recognition-based sense of "reconciliation," I use "reconciliation" as the implementation and consistent application of Indigenous worldviews and legal order. This means that Indigenous perspectives on Peoplehood, for example, are considered equal to Western worldviews and legal systems within the context of Canadian society. This "nation-to-nation" paradigm allows Indigenous peoples to achieve full sovereignty over themselves, their lands, and their rights (Panagos, 2007; Hausler, 2012). Such reconciliation requires the full sovereignty of Indigenous nations over their land, people, and rights, which ultimately begins and continues with Indigenous peoples across Canada asserting their sovereignty in spite of colonial efforts from the Canadian state (Alfred & Corntassel, 2005; Coulthard, 2007; Coulthard, 2014). If these conditions are met, it is possible that a nation-to-nation relationship between Canada and Indigenous nations can exist. As Alfred and Corntassel have stated, this form of reconciliation does not begin with Canadian society as a whole or the Canadian government. Instead, it begins with the Indigenous individuals reclaiming their identity in terms of Peoplehood (2005).

Peoplehood, according to Alfred and Corntassel, involves the restoration of relationships to kin, community, and the land (2005). However, drawing on Fanon, Coulthard points out that cultural self-affirmation is "an important 'means' but 'not an ultimate end' of anticolonial struggle…" in a liberal, pluralist state context such as Canada (2014). This is because it influences the powers of the Canadian government to engage respectfully with Indigenous peoples in all state matters and to take steps towards reconciliation, while also allowing a reclamation and resurgence of self-identity, cultural identity, and cultural sovereignty. However, this does not end the colonial occupation of lands, peoples, and cultures. Peoplehood must also be achieved through the dismantling of internalized colonialism through this very same process. This demonstration of restoring peoplehood

is shown through the Unist'ot'en Camp movement in Wet'suwet'en territory which, as will be discussed later, uses direct action as a means to spark an anticolonial movement to start working towards the end of a post-colonial state. I posit that the way the Canadian government and its representatives approached Indigenous rights in Delgamuukw illustrates how the government and Canada — as a society and culture — presently nurture colonial attitudes and beliefs about reconciliation. This argument has been stated many times before; yet, in the contemporary context of Canada, it is significant to shed light on how the Canadian state's definition of reconciliation is not only inaccurate according to Indigenous and scholarly perspectives, but is also not being upheld. Moreover, it is important to draw attention to a framework to overhaul the current land claim system, bringing focus to the implementation of Indigenous worldviews and legal orders. This framework can allow space for growth and development towards reconciliation as defined above.

To demonstrate this, I will discuss the many facets of *Delgamuukw* through four sections. I begin by discussing the argument and evidence delivered by the Gitxsan and Wet'suwet'en peoples in *Delgamuukw* and how this argument serves to disrupt colonial sovereignty by framing the relationship of Indigeneity to the Canadian state in a nation-to-nation paradigm (Panagos, 2007; Niezen, 2003; Short, 2005). I seek to illustrate how Indigenous peoples conceptualize and actively implement their unique form of nation-to-nation reconciliation and self-recognition in order to dismantle currently existing colonial systems and paradigms. Following this, I discuss the arguments presented by the Crown and how these arguments act to naturalize colonial ideologies and essentialize Indigenous peoples as a whole, therefore laying the foundation for the judgements made. This discussion will further demonstrate that the Canadian state, culture, and its representatives understand reconciliation in a very narrow scope that limits the potential for growth and development of Crown-Indigenous relations. This narrow definition harbours real and harmful colonial attitudes and perpetuates colonial actions. In the third section, I will analyze the final judgement passed down in the Supreme Court of Canada by Chief Justice Lamer and what this reveals about the status of reconciliation in Canada through its framing of Indigeneity in terms of a citizen-state paradigm, which is ultimately reductionist of Indigenous rights as a whole (Panagos, 2007; Coulthard, 2007; Elliot, 1998; Short, 2005). I aim to illustrate the degree of harm that the state's definition of reconciliation presents to the obtainment of Indigenous rights by favouring colonial agendas and processes. In the final section, I will discuss how the position and approaches in *Delgamuukw* has stymied progress on all types of reconciliation while simultaneously giving space to Indigenous resurgence and survivance strategies based in Indigenous sovereignty. This is exemplified by the Unist'ot'en camp in British Columbia, which will act to place pressure on the Canadian state to work towards actual nation-to-nation relations and take one step closer to reconciliation as defined above (McCreary & Turner, 2019). Despite hundreds of years of ongoing oppression within Canada, Indigenous peoples maintain agency and sovereignty over their lands, which allows for nation-to-nation-based reconciliation. This

model of reconciliation actively challenges colonial powers by demanding a systemic overhaul and refuses state recognition unless it is on their terms. This section comes full-circle by analysing the plaintiffs argument. Indigenous sovereignty exists in Canada, will always exist in this country, and is no longer awaiting state-sanctioned recognition because self-recognition of sovereignty is more than enough.

# Methodology

Through a close reading of the *Delgamuukw* case, academic sources, and poli-legal sources, certain patterns of reasoning become apparent and illustrate how the Canadian government maintains ethnocentric and Euro-centric beliefs of cultural superiority. The analysis in this paper is very similar to previous scholars through the primary focus on the Crown and the judgements, while also trying to demonstrate the broader implications of such arguments and outcomes. The analysis is also similar because it attempts to demonstrate the autonomy and agency of the Gitxsan and Wet'suwet'en peoples throughout the case, as well as in current events in Unist'ot'en. Although relevant researchers have heavily influenced this research and the trajectory of this paper, this analysis differs in its direct connection between *Delgamuukw* and current events in the Wet'suwet'en territory with the TransCanada pipeline. Moreover, this analysis goes beyond a surface critique of the evidence and judgements made by the Crown and Chief Justice by connecting this to the broader Canadian culture. Lastly, implications and connections to reconciliation are drawn by assessing critiques of *Delgamuukw* and discussions on the TransCanada GasLink pipeline.

I read the case through several different lenses, all of which expand beyond the surface of the arguments and judgments in order to critique the judicial and governmental systems as a whole. Firstly, I read the case as an anthropology student; by taking this case as an opportunity to learn, I was able to look at the information presented to me as a sample of larger trends that have occurred in a series of instances and not as an isolated event. Anthropology teaches us that nothing in culture is isolated— it is all interconnected. What happened over a hundred years ago can continue to have impacts on the culture and the people living today. By digging deeper into the cultural values that are highlighted in the research and the case itself, it becomes evident how these cultural values (which are often thought by many in Canada to be only existent in the Indian residential schools era) are still nurtured by the Canadian state and by Canadian people.

Furthermore, I read the case as a Canadian citizen who, as any Canadian citizen does, holds the right to critique a flawed system. By reading it as a Canadian citizen, especially one of Euro-settler descent, this comes with certain biases. In being conscious of these biases, I aimed to have a more critical lens that simultaneously allowed me to

show the love I have for this country, while also conveying the many disappointments I have with the handling of the case. I have focused on how the government, academics, and First Nations differ on their definitions and views of reconciliation. With the use of this case, I ask what can be learned about the government and Canada's stance on reconciliation as a whole, demonstrated by the arguments and judgements made. I show how this stance is maintained and enacted through attitudes and actions that run contrary to and effectively halt reconciliation, as to be defined in this paper.

The reasoning for choosing the *Delgamuukw* case is threefold. First and foremost, this case has direct consequences within contemporary issues that are ongoing on the lands of Wet'suwet'en peoples, who are one of the plaintiffs in this case. Moreover, the case itself, as well as its contemporary consequences, demonstrate the two conceptualizations of reconciliation that exist within Canada and the ongoing tensions between them. Lastly, this case lays out the most contemporary test for Aboriginal Title that exists within the legal history of Canada, as well as the currently existing test for its infringement.

## The Case of the Gitxsan and the Wet'suwet'en

Land claims in Canada are embedded within a complex colonial history from not only within its border but from other colonial nations that came before it. The complexities of a vast colonial history are integral to Canada as a state, and have shaped the mindset and direction of Canadian culture. This results in the assumptions that underlie such cases to be rooted in deep-seated colonial presumptions about the evolution of cultures, what it means to be civil and "savage" (read: "Indigenous"), and what it means to be considered human. The *Delgamuukw* case and its content are guided by several foundational questions, all of which have been asked during any case to do with Aboriginal title/rights since the eighteenth-century to the present. According to Culhane (1998), these questions are: did the Indigenous peoples in question own and manage their lands and resources before Europeans arrived? If so, have those property rights been extinguished by law at some point in history, or have they continued into the present? If unextinguished Aboriginal rights continue to exist into the present, what are they? Lastly, if unextinguished Aboriginal rights continue to exist, how can they lawfully be extinguished and/or justifiably contravened? The reasons behind why these questions are asked involves the history of Crown sovereignty, and how it fits into the claim put forth by the Indigenous Nations.

The Crown obtained sovereignty through the sheer number of settlers that were imposed upon Indigenous lands in Canada. The Crown justified this through the doctrine of *Terra Nullius*, which states that if land is not being used "appropriately," according to European standards, then it is "nobody's land." Therefore, the land can become the possession of the state through mere occupation (Lindqvist, 2007). Therefore, in or-

der to disprove Crown sovereignty — or rather, to prove ownership —the Gitxsan and Wet'suwet'en Nations must demonstrate their "civility" according to European cultural and societal expectations and standards. The aforementioned questions are shaped by years of colonialism and rely on the nature of how one defines Indigeneity in relation to the Canadian state. These questions are informed by ethnocentric and Euro-centric ideals about other peoples in the world— namely those who are Indigenous to the lands being colonized— in order to justify the colonial intent and actions of the state. Moreover, these questions reflect the current nature of colonialism in Canada and how the colonial history and colonial present are inextricably inseparable.

Against this colonial foundation, Gitxsan hereditary chief Earl Muldoe Delgamuukw states:

> "The challenge for this court is to hear this evidence, in all its complexity, in all its elaboration, as the articulation of a way of looking at the world which pre-dates the Canadian Constitution by many thousands of years…" (Earl Muldoe's opening statement as seen in Culhane, 1998).

From this quote, it is made clear that although the goal of the trial is the obtainment of sovereignty and jurisdiction over the land, Delgamuukw understands that it is the worldview and cultural systems of the Gitxsan and Wet'suwet'en people that are on trial. Moreover, the response of the Crown to these evidentiary facts is demonstrative of how Canada views Indigenous worldviews, culture systems, and peoples— the oral histories given as evidence by the plaintiffs are representative of such aspects. In this section, I will discuss how the question of whether or not Indigenous peoples owned their lands and resources before Europeans arrived shapes this case and is fundamentally problematic in its suppositions. Alongside this discussion, I will discuss the evidentiary factums composed in the case of the Gitxsan and the Wet'suwet'en.

The primary evidence provided by the Gitxsan and the Wet'suwet'en peoples to support their claim to having and continuing to live in an organized society which has borders, laws, concepts of ownership and jurisdiction was based on the oral traditions of their respective cultures. The names of these oral traditions for the Gitxsan and the Wet'suwet'en peoples are, respectively, *adaawk* and *kungax* (Culhane, 1998; McCreary, 2016). These oral histories were presented by chiefs and Elders since the rights to perform specific *adaawk* and *kungax* are inherited and upheld by such individuals and House groups once they take possession of a given territory that these *adaawk* and *kungax* discuss (Culhane, 1998). As such, these oral traditions are an integral part of their governance system that primarily takes place via a feasting complex in which these oral histories are validated or rebutted by the people as a whole (Culhane, 1998; McCreary, 2016; Mills, 1994; Daly, 2003). Therefore, these traditions serve as a sort of peer-reviewed documentation of a house's and a people's history and rights within the larger complex of the nation.

To illustrate, when a Chief and his House would hold a feast to mark an event of some importance, such as the transfer of ownership over a piece of property, the guests at the feast act as witnesses to the transaction or event. In the role of being witnesses, the guests would watch and listen to the performance of the *adaawk* or *kungax* at the feast. If persuaded that the law has been followed, the witnesses validate the event by accepting the offerings of food and gifts presented by the host Chief/House. However, if they are in disagreement with the performance, they make their objections known through delivering a speech to explain their position and further, they do not accept the offerings of food or anything else from the host that could be construed as validating the event or transaction (Mills, 1994, p. 35-38; Daly, 2003, p. 170-173). As such, the oral histories not only provide evidence in the form of historical records about how the Houses' and Clans' occupation, ownership, and jurisdiction over the land was enacted but through the presentation, the Gitxsan and Wet'suwet'en demonstrated before the courts how they governed, and continue to govern, their peoples.

With this being the primary evidence in support of their claim, they had one major obstacle to overcome, which was that the Crown claimed that oral histories should be inadmissible before the court under the "Hearsay Rule" (Culhane, 1998; *Delgamuukw*). Oral histories are traditionally defined as something that an individual heard from a secondary source, such as an individual privy to the original conversation. According to the Crown, oral histories are deemed as hearsay, which is understood as being reliant on the word and experiences of the deceased, who are not available for cross-examination in this case (Culhane, 1998). After the plaintiffs explained to Chief Justice McEachern of the British Columbia Supreme Court that oral traditions are not to be taken in a literal, simplistic understanding but are instead to be understood as the demonstration of a worldview and cultural system, the Chief Justice allowed for *adaawk* and *kungax* to be submitted as evidence on the condition that they are told and retold consistently, thus lending them a certain "enhanced trustworthiness" (Culhane, 1998). The Chief Justice stated that he would accordingly weigh the importance of the oral evidence at the end of the trial, which meant that the plaintiffs had no indication of how he viewed oral history evidence until his Reasons for Judgements (Culhane, 1998).

To overcome this first hurdle, a number of chiefs, Elders, and Gitxsan and Wet'suwet'en peoples, along with an additional thirty-eight expert witnesses testified in the trial (Culhane, 1998). As previously mentioned, these were the chiefs and the Elders who performed the *adaawk* and *kungax*. This is because it is the responsibility of the chiefs and Elders to learn and transmit these oral traditions and therefore, have earned a level of respect, credibility and admiration in their communities (Culhane, 1998). These oral traditions include things such as laws, legends, cosmology, and histories of the Houses and clans (Mills, 1994).

With the delivery of the claim and the evidence before the court, the Gitxsan and Wet'suwet'en specifically stated that each of their respective nations are self-defining and

self-governing and, as such, their Aboriginal Title is demarcated by the feast complex, within which the *adaawk* and *kungax* take place, detailing a number of compositional elements of their collective, national identities such as language, laws, landholding systems, spirituality, and territorial boundaries (Panagos, 2007). The Gitxsan and Wet'suwet'en asked the courts to attentively listen to and understand them on their own terms, which created a context for non-Indigenous people to learn about and develop an understanding of Indigenous cultures on their terms instead of in relation to or in comparison with that of Euro-Canadian cultures.

This created a distinct space in Canadian law for Indigenous peoples to challenge colonial ideals about what is considered "evidence" or "valid" while dismissing the "common sense" narrative, which rejects and puts up resistance to what is not already known to it. In this way, forcing the court to understand them on their terms worked as an enactment to challenge "common sense" on the national stage. Furthermore, by pursuing a space within Canadian law, the Gitxsan and Wet'suwet'en demonstrated their recognition that Canada too is a self-governing and self-defining nation that is on equal footing with them and therefore, holds the same moral status. This approach highlights how using this perspective as a foundation for relationships in the context of reconciliation would be beneficial as it is based on true equality and respect between and within nations. The Gitxsan and Wet'suwet'en argued that they are the rightful owners, in the Western sense of the word, of their territories and that the Canadian government has no right to their lands in any capacity.

In addition to oral traditions, the Gitxsan and Wet'suwet'en employed expert witnesses to bolster their evidence. These expert witnesses were primarily anthropologists, geographers, ethnohistorians, and archaeologists. It is important to note that prior to *Delgamuukw*, expert witness testimony by Elders and Chiefs in their own languages as expert witnesses had been so minimal that it was practically unheard of as it was more common to employ anthropologists who had interviewed Elders and Chiefs as witnesses and would thus translate and analyze the oral histories for the court (Culhane, 1998; McCreary, 2016). In employing these scientists as a secondary form of evidence, the *Delgamuukw* plaintiffs assured the courts that their oral histories were accurate and stood up to scientific scrutiny. The primary scholarly expert witnesses on behalf of the plaintiffs were Dr. Richard Daly and Dr. Antonia Mills (Culhane, 1998). Both Daly and Mills are anthropologists who have done extensive work with Daly studying the Gitxsan and Wet'suwet'en Nations, and Mills studying the Wet'suwet'en economy, cosmologies, and kinship (Daly, 2003; Mills 1994). These experts took the stand to testify and submitted expert opinion reports based on rigorous ethnographic research to the court in order to bolster the evidence of ownership and jurisdiction.

In looking at the case from the perspective of the plaintiff, it becomes clear that multiple definitions exist as to what reconciliation should look like and how to get there. In this case, the plaintiffs maintain— through the method and type of evidence presented—

that reconciliation is the treatment of Indigenous nations as sovereign peoples who have valid and equal legal orders to that belonging to the colonial state (Culhane, 1998; Mills, 2000). Thus, the only way to truly obtain reconciliation is by treating such peoples and their legal orders, and other cultural systems, as being on the same level as those belonging to the Canadian peoples rather than below. Through this employment of a nation-to-nation paradigm, the plaintiffs actively demonstrate how they define reconciliation and its employment while simultaneously developing a space for it to take place,which also allows space for Canada to either uphold the definition of reconciliation set forth by Indigenous peoples or to maintain their narrow, liberalist definition that acts to oppress, subdue, and harm the prospect of reconciliation and the rights of Indigenous peoples.

## The Case of the Crown

With the Gitxsan and Wet'suwet'en acting as the plaintiffs (i.e, having the onus of proof on their shoulders), the Crown—who was acting on behalf of Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada—was responsible for acting as the defendant. In acting as the defendant, the Crown has the responsibility for rebutting and contesting the evidence given by the plaintiffs (Culhane, 1998). In this section, I will discuss the case presented by the Crown, including their case's foundation, their evidentiary factums and witnesses, as well as their cross-examination of the plaintiffs and their witnesses. I will also discuss the implications that underlie the Crown's case, how their case acts to naturalize colonial narratives while simultaneously essentializing Indigenous cultures, and how the Crown demonstrates how surface level the Canadian definition of reconciliation is by naturalizing the colonial narratives and essentializing Indigenous cultures.

The Crown's goal in this case was made clear when they asked the court for a declaration that the Gitxsan and Wet'suwet'en nations, the plaintiffs, have no right, title or interest in and to the claim area and its resources (Culhane, 1998). Representing the province of B.C., the Crown continued by stating that if they had any rights, as found by the court, and if there were any damages to be paid, it was the responsibility of the federal government, not the provincial government, to pay these damages. The Crown, in representation of the federal government, stated that some of the costs should be paid by the province. Despite these differences, the overall foundation of the Crown's case is composed of the following argument.

The first point of argument was based on the level of organization that the societies of the Gitxsan and Wet'suwet'en held. The Crown argued that these Indigenous nations were minimally organized prior to the arrival of Europeans and as such, they held no concept of property law or government that could be viewed as equal to or deserving

of respect by Canadian colonial law (Culhane, 1998; *Delgamuukw*). This argument is clearly in line with the test developed in 1919 by the Privy Council in the case of *Re: Southern Rhodesia* in which the Crown claimed that since these Indigenous peoples were so minimally organized in comparison to European settlers, they did not deserve rights to their lands and resources. This view of peoples being too low on an abstractly conceptualized and racially biased scale of organization is based on the Eurocentric belief that Europeans are the pinnacle of civilization to the point of alienating and disrespecting all other humans. Once used to justify conquest, it is still being upheld as a narrative in courts to justify the mistreatment of Indigenous ancestors, as well as contemporary Indigenous peoples. The underlying evolutionary ideology that is seen in this argument has historically been a cornerstone in other Indigenous rights and land claims cases such as the *St. Catherines Milling and Lumber Co v R* (1888), *Chippewas of Sarnia v Canada* (2000), and *R v Marshall* (1999).

In case this nakedly colonial argument was rejected, the Crown had a backup plan. The Crown argued that the only lands that should be recognized by the courts to hold an Aboriginal title were those that had village sites on them, as these were the only tracts of land that could have been used and occupied to any real extent (Culhane, 1998). This argument continues on a path of presenting the colonial narrative as the only objective fact. This acts to support a Western notion of property and evidence by stating that the hunting grounds and access routes that rest outside the village sites were used only in sporadic incidence and by anyone who found themselves wandering in that region (*Delgamuukw*). Meaning that, according to the Crown, that these areas do not exclusively belong to the Gitxsan and Wet'suwet'en as no management, ownership, consistent occupation or use was ever exercised over these tracts of land (*Delgamuukw*). Despite evidence given by the Gitxsan and Wet'suwet'en that points to the contrary, the Crown argued that no one ever travelled far from the village sites and therefore, no ancestors ever occupied these lands, which conveniently continue to be under lease to a multinational forestry company who were harvesting 3 million cubic metres of timber during the time of the trial (McCreary, 2016; Mills, 2000).

This particular aspect of the Crown's case demonstrates how intertwined private corporations and Canadian sovereignty are (McCreary & Turner, 2019). The Crown is not only acting to protect the political interest of maintaining sovereignty in this region, but also the economic interest as it is this resource extraction that continues to feed into and bolster the power of the Canadian government. That land is extrinsically valuable to the Canadian government only because it is gaining money from investors, such as forestry companies. If there was no money to be made off the land, the Crown would likely have little to no interest in maintaining their sovereignty there to the extent that they are in this case. This suggests that the Crown denigrated an entire peoples and stated that they have no rights to this land in order to lay claim for the sake of profit. However, this land is intrinsically valuable to the Gitxsan and Wet'suwet'en peoples because it is where their ancestors, their culture, and their people belong. It is their land regardless of

how "occupied" it may seem to outsiders.

The third point of the Crown's argument was that any semblance of law and governance that the Gitxsan and Wet'suwet'en had only existed due to the commencement of the fur trade (Culhane, 1998; Asch, 1999). In other words, the Crown suggested that the systems that the Gitxsan and Wet'suwet'en peoples have, regardless of how primal they may seem to the colonial eye, arose out of interactions with Europeans. As with much of their arguments, the Crown bases this on colonial historical record in which Captain James Cook meets with Ahousat Chief Maquinna in 1774. This meeting is the first recorded meeting between Europeans and First Nations people in what is now known as British Columbia and states that the Indigenous peoples of the region held no laws or semblance of civility, as defined by a European colonial.

The Crown also used records from 1822 written by a Hudson's Bay Company trader named William Brown, in which he described the social organization of the Gitxsan and Wet'suwet'en peoples (Culhane, 1998). He describes it as a House and Clan social structure. The Crown states that according to these writings ranging across 48 years, the First Nations peoples of this region had become sufficiently acculturated that they were no longer a "truly aboriginal society" (Culhane, 1998; *Delgamuukw*). This is important as the time frame for legitimate extinguishment of Indigenous rights in British Columbia ended in 1871. According to the Crown's argument, Indigenous peoples were sufficiently acculturated to the point where they no longer held the rights privy to "truly aboriginal societ[ies]" since acculturation was sufficient evidence for implicit extinguishment (*Delgamuukw*).

In essence, the Crown states that even if a form of Aboriginal Title or rights were held by the Gitxsan and Wet'suwet'en peoples, these have been extinguished through the simple assertion of British sovereignty and the assumed acceptance of Indigenous peoples to the imposition of colonial law, as demonstrated by the fact that the Gitxsan and Wet'suwet'en peoples filed a claim to the courts (Culhane, 1998). In doing so, the Crown also makes the supposition that the *Royal Proclamation of 1763* is not applicable to British Columbia since through the assertion of British sovereignty, via the use of colonial laws, a clear intention was made to extinguish the rights of Indigenous peoples (Culhane, 1998; Foster, 1992). The supposition of inapplicability and acceptance by the Crown is problematic as it views the Gitxsan and Wet'suwet'en claim as an acceptance and abidance to colonial rule when it is quite the opposite. As stated in the previous section, the Gitxsan and Wet'suwet'en did not go to court because they conceded to being ruled; rather, they stated in their claim that it is because they are each self-defining and self-governing nations. Moreover, through the demonstration of their case, the Gitxsan and Wet'suwet'en illustrated to the courts their articulation of what it means to be Indigenous within a colonial state and what they hope for it to become: a nation-to-nation relationship rather than colonial subordination.

In continuing the colonial narrative that essentializes Indigenous peoples as primeval, nomadic, unorganized groupings, the Crown states that from the point of 1822 onwards, the Gitxsan and Wet'suwet'en no longer resembled their ancestors and therefore, hold no rights to the land since they were now "civilized" by settlers. Culhane posits that this argument presented by the Crown, in conjunction with those above, is highly problematic due to its reductive and ethnocentric nature as it only considers the points of view of settler-colonial traders and agents and further suggests that the lived experiences of people have no legitimate place in the framework of Canadian law (1998). This demonstrates the narrow lens through which the Canada nation views history, as the Crown, who is a representative of the elected government and the Canadian people, seldom takes into consideration the probability that some colonial figures were wrong and biased. Furthermore, it acts to illustrate how the government denigrates those whom they view as their subordinates and ultimately as their enemies, since it is the Indigenous peoples who threaten the colonial sovereignty that the Canadian government so desperately grasps onto to maintain their facade of liberalism.

The argument of the Crown is ultimately paradoxical in nature as it creates a hypocritical juxtaposition of Canadian values, most evidently in the comparison of the plaintiffs' case and the Crown's case. Ultimately, the evidence put forth by the Crown argues that the plaintiffs were so "low on the scale of social organization" (read: "primitive," different, and inferior) in comparison to European societies (read: "civilized" societies) that they are not to be recognized by the law. As Culhane (1998) and Mills (1994, 2000) points out, this is in spite of evidence given in support of the Gitxsan and Wet'suwet'en, which demonstrates that the plaintiffs meet all conditions set by the questions before the court to understand the regulatory laws and concepts of private property. Culhane (1998) points out that this causes a conflict between Canada, as a culture, maintaining that it is a multicultural nation based on ideologies of acceptance, tolerance, and equality and that these very values are paramount to the governance of the nation. However, in direct contradiction to these values, the Crown argues that the Gitxsan and Wet'suwet'en are not, and never were, in fact, equal to Euro-Canadians and therefore do not deserve the rights that their claim makes.

Moreover, the argument posed by the Crown is in direct contradiction to the way that the government frames reconciliation as it denies recognition of the validity of and respect to the plaintiffs' respective cultures and their worldview while simultaneously denying them any rights that would be associated with such recognition. The government purports that reconciliation is to accommodate the "prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty" but through the demonstration of the Crown's argument, it becomes evident that what is truly meant by this statement is that Crown sovereignty comes first, and the rights and "accommodation" of Indigenous peoples comes second (*Delgamuukw*). As for the definition that has been put forth in this paper in which reconciliation is a nation-to-nation relationship between Indigenous nations and with Canada, this argument acts to disrupt any such rela-

tionship since it refuses to recognize Indigenous nations on an equal footing with Canada by claiming that any semblance of governance that the Gitxsan and Wet'suwet'en have is due to contact with European settlers and not because they were "civil" enough to have such systems prior to contact.

Ultimately, only if we accept the argument put forth by the Crown in which Europeans and Indigenous peoples are naturally different and unequal human beings will the Crown's argument make sense when presented within a system that supposedly maintains a liberalist ideology. The categorization of humans based on race by the Crown reveals them, as well as Canada as a culture, people, and democracy, as fundamentally racist. Through stating that all humans are equal while simultaneously constructing them as being unequal, the Crown and government acts to racialize, categorize, and denigrate Indigenous peoples under the presumption of ethno- and Eurocentrism. Therefore, the Crown presents a deep-rooted belief that some people are just more deserving of equality than others. Thus, the Crown's argument demonstrates not only how colonial, Eurocentric, and racist ideologies are maintained by the Canadian government, along with how these ideologies interact with law and the economy, but also how they are reproduced in a society and the harmful consequences.

## Supreme Court of Canada Judgements

On December 11, 1997, the final judgement for the *Delagmuukw* case was passed down from the bench of the Supreme Court of Canada. The ultimate decision was that an entirely new trial needed to be heard since McEachern, the Provincial Supreme Court Justice, erred in his judgement that Indigenous rights and title had been extinguished in the province of British Columbia prior to 1871 – which is in alignment with the argument presented by the Crown. In more detail, the judgements made regarding the presence of Aboriginal Title and the validity of oral histories by McEachern does not hold true to standards put forth in *Van der Peet* – another Indigenous rights trial which set forth the determinants for what are Indigenous rights (*Delgamuukw*).

Moreover, the content of and test for Aboriginal title had been determined, and the Gitxsan and Wet'suwet'en adjusted their claims accordingly (*Delgamuukw*). In this section, I will be analyzing the three most important questions answered in the ruling. What is the content of Aboriginal Title? How does one test for Aboriginal title? Lastly, what justifies its infringement? Following this analysis, I will illustrate what this judgement reveals about reconciliation in Canada by contemplating how it frames Indigeneity and Indigenous rights.

## Content of Aboriginal Title

In this monumental ruling, the Supreme Court of Canada outlined the content of Aboriginal title, as well as a test to determine its presence. Justice Lamer defined Aboriginal title as "a right to the land itself" (*Delgamuukw*). Similarly, Aboriginal title was found to be more than a sum of other Aboriginal rights as Lamer stated that Aboriginal title is a collective interest in the land that arises from both prior occupation and prior existence of Indigenous law and governance systems, which allows for exclusive use and occupation of the land for a variety of purposes (*Delgamuukw*). In essence, the characteristics of Aboriginal title are as follows: it is a collective right, exclusive, inalienable, and contains an inherent limit. I will define and address the issues of each of these individually.

In the ruling that Aboriginal Title is a collective right, Chief Justice Lamer states that "Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation" (*Delgamuukw*). This collective nature of title is due to the fact that an Aboriginal Nation has a public character since the Nation represents its community of people and as such, the people as a whole have a say over the land (Elliot, 1998). However, one major difference is that the Province's title originates in the Crown, whereas Aboriginal Title is an allodial form of title (land ownership through occupancy and defense of the land) since it is based in common law as an inter-societal link. Ultimately, the collective right makes sense since it vests the right to the land in question in all members of the Nation making such claims.

In Lamer's definition of Aboriginal Title, he states "aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes…" (*Delgamuukw*). This definition is integral for two reasons: 1) those who hold Aboriginal Title potentially have a powerful and constitutionally protected means of protecting their lands from outside interference, including from the Crown and corporations, however, this has stringent limits, as will be seen in the test for infringement; 2) exclusivity raises important questions in regard to overlapping Aboriginal title claims. Territorial boundaries often overlap and often include the interpretations of evidence from different Indigenous Nations. This acts to pit Indigenous Nations in competition with one another over territories that they share solely because of the restraints of a colonial system (Elliot, 1998).

The feature of inalienability means that the lands subject to title "cannot be transferred, sold, or surrendered to anyone other than the Crown" (*Delgamuukw*). In the broadest sense, this means that any and all transfers or sales of Aboriginal lands are outlawed. However, in a more realistic sense, this only outlaws sales to those who are not members of the Aboriginal nation (Elliot, 1998). In essence, a nation that holds title cannot alienate the land to another entity outside this title in such a way as to permanently sever the lands from their territory – at least not without having to surrender their title to the Crown in

the first place (*Delgamuukw*; Elliot, 1998). Although this implies that the Crown should need the consent of the respective Indigenous Nation(s) to perform acts such as resource extraction, this is not the case (McCreary, 2016; McCreary & Turner, 2019).

Based on the concern of maintaining the lands for future generations, an Indigenous Nation's ability to use and manage the land pursuant to title is restricted by an inherent limit. Lamer states that an inherent limit means "lands so held [by title] cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands" (*Delgamuukw*). However, Lamer emphasizes that this inherent limit in no way restricts the land to traditional uses as this would impose a "legal straightjacket" (*Delgamuukw*). For example, some of these additional uses of the lands could include the exploitation of any minerals on the lands, including gas and oil reserves (*Delgamuukw*). The inherent limit, as defined by the Supreme Court, is the land attachment qualification in which the land must be maintained in such a way as to be able to be used by future generations (*Delgamuukw*; Elliot, 1998).

One of the examples that Lamer uses to explain what breaking an inherent limit is "if occupation is established with reference to the use of the land as a hunting ground, the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it)" (*Delgamuukw*). In this explanation, Lamer gives two possible accounts of what is meant by "inherent limit." With the first approach, Lamer qualifies the inherent limit historically through the imposition of a safeguard for the original relationship that an Indigenous nation held, and hold, with their territories (Elliot, 1998). In the second approach, Lamer essentializes Indigenous nations to the position of stewards of the land by barring any activities that effectively destroy the land or any bond the Indigenous people may have for future generations (Elliot, 1998). In critiquing Lamer, Elliot (1998) states that the inherent limit is problematic as it acts to impose the exact legal straightjacket Lamer attempts to avoid as it qualifies the only suitable uses of the land as those that are "frozen" in time while limiting Aboriginal title holders from making decisions that would ultimately benefit them both in the present and in the future. Ultimately, the largest issue with this characterization of Aboriginal Title is the uncertainty that it breeds, which may force Indigenous nations to surrender their lands to the Crown to transfer their titles to European-style titles in order to avoid such uncertainties.

## Test for Aboriginal Title

According to Lamer, in order to prove Aboriginal title, the land must have been occupied prior to Canada's assertion of sovereignty; the occupation must have been exclusive at sovereignty; and if present occupation is relied on as proof of pre-sovereignty occupation,

there must be continuity between present and pre-sovereignty occupation (*Delgamuukw*). Lamer chose the time of Crown sovereignty for several reasons. First, Aboriginal title arises out of prior occupation of the land. Second, Aboriginal title does not raise the problem of distinguishing between distinctive, integral Aboriginal practices, customs and traditions, and those influenced or introduced by contact. Third, the time of sovereignty is a lot clearer than that of first contact (*Delgamuukw*). All of these reasons are fair and understandable and ultimately benefit the Indigenous peoples in litigation as it allows for more integration of the Indigenous perspective and Indigenous histories (Hausler, 2005).

As for making his second point about exclusive occupation at time of sovereignty, Lamer states that this flows from the principle of exclusivity in the content of Aboriginal title. However, as previously stated, this is problematic since boundaries of territories often overlap (Mills, 1994). To mitigate against this fact, Lamer notes that the context of Indigenous societies at the time of Crown sovereignty must be taken into account (*Delgamuukw*). Although he does not clarify how this would be done, it can be surmised that this would be through the proper integration and weighing of oral histories and the like. Throughout his clarification of his third and final criteria, Lamer does not define what would qualify as evidence for linking present and prior occupation. Understandably, this could change on a case-by-case basis. Moreover, when present occupation is relied upon as evidence, Lamer notes that although continuity is required, an "unbroken chain" is not (*Delgamuukw*). He also notes the strong possibility that the nature of present and historical occupation could have changed but this does not preclude a claim for title since the relationship to the land is maintained (*Delgamuukw*).

## Justification for Infringement

The test of justification, previously established in *R v Sparrow* (1990), is a test meant to determine whether or not the infringement of Aboriginal title is justified and has two parts to it. The first part is that the infringement of Aboriginal title must be in furtherance of a legislative objective that is "compelling and substantial" (*Delgamuukw*). The second part is an assessment on whether the infringement is consistent with the fiduciary duty of the Crown to Indigenous peoples (*Delgamuukw*, para. 161). The first part is ambiguous in what is meant by "compelling and substantial"; however, Lamer states that the range of definition is broad and that "most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty" (*Delgamuukw*; emphasis in original). Reconciliation used in this sense is in line with liberal recognition politics by maintaining democratic state legitimacy. The Crown's fiduciary duty when in pursuit of a "compelling and substantial" legislative objective is that of essentially giving those Indigenous peoples occupying the land a heads up to the exploitation and dispossession of the land in question (*Delgamuukw*). Similarly,

in Lamer's opinion, some of the legislative objectives that justify infringement include: "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 population to support those aims" (*Delgamuukw*).

Both the purpose and legal process of infringement must be accounted for. The second aspect of the test accounts for this to some extent in which the fiduciary duty of the Crown is primarily to consult with Indigenous peoples with title, without any requirement of consent on their behalf, and to consider the ordering of priorities of any infringement and Aboriginal Title in a fair and just way, though no actual criteria had been set out (Elliot, 1998; Niezen, 2003). The fact that consent is not required by the Indigenous peoples, whether they have title or not, effectively voids the original exclusivity and inherent limit content set out by the Court as it acts to allow the Crown to have discretion over just how exclusive and limiting these criteria are for their own gain. This demonstrates how the limits in place for Aboriginal Title are only there to limit the rights of Indigenous peoples and allow for the Crown to have control over the use of the lands for the Canadian government, which voids any Title held if the lands' inherent limit is breached in the process. Similarly, and most interesting, the ordering of priorities is done at the discretion of the Crown and means that it is more likely for the Crown to place its expansion based colonial agenda above all else (Elliot, 1998).

Overall, the Indigenous peoples get told how their lands are to be used and exploited rather than having a voice in whether or not the lands will be exploited or in what way. In essence, they only get recognized when they stand in the way of the exploitation of resources and lands, but this recognition is by no means protection. The Court acts to recreate Crown sovereignty as an unquestionable entity with a legal license to pursue its own interests as set out in the colonial agenda. Due to this, the courts of Canada, at all levels, are working together to continue the colonial oppression, dispossession, and exploitation of Indigenous peoples while remaining under the guise of a liberalist nation through the use of recognition politics.

Throughout Chief Justice Lamer's Reasons for Judgements, he frames Indigeneity in a citizen-state paradigm characterized by a concern for both Indigenous diversity and pan-Canadian unity, which envelops two types of interactions: interactions between the individual and their bounded communities; and interactions between individuals and the broader political community (Panagos, 2007). This paradigm ultimately suggests that an Indigenous individual has overlapping attachments and loyalties, including to the Crown. Lamer creates this paradigm in his Reasons for Judgements by recognizing that there are multiple Indigenous Nations and societies, which exist within the state, and this identity gives rise to a specific set of rights, which includes Aboriginal Title, that act to maintain and protect Indigenous individuals and their communities. However, Lamer also emphasizes that these rights take place within a broader political community in which the Crown

"is king," so to speak.

This articulation of Indigeneity maintains an underlying supposition that colonial powers such as the Crown and the Canadian nation are more important than Indigenous societies since the broader political community takes priority, as exemplified by the justification for infringement. The framing presented masks the colonial project of assimilation that desperately relies on Canada's ability to appear as an equitable and multiculturally tolerant nation when, in reality, its goal is homogeneity through oppression of difference. In this paradigm, the reasoning for the broader national identity, rather than the bounded community identity, taking precedence is found in the idea that Indigeneity is only a single facet of a person's larger identity (Panagos, 2007). This ultimately affects reconciliation at the level of the state since it places the broader Canadian identity at a paramount and Indigenous identities in a secondary, subjugated position. In essence, this position recognizes that Indigenous identity exists and that it is important, but it is not considered *as* important as the Canadian identity, therefore framing reconciliation within the realm of recognition politics, which rests on placing Indigenous peoples in an asymmetrical and non-reciprocal relationship founded on a state-imposed identity (Coulthard, 2007).

# Reconciliation

Throughout this paper, I have raised attention to the implications of arguments and decisions made in the *Delgamuukw* case and how the consequences demonstrate Canada's narrow definition of reconciliation and their inability to uphold this very same definition. Thus far, I have demonstrated that the two existing conceptualizations of reconciliation are aiming for two different objectives and, as such, are in constant tension with one another. This tension exhibits itself in the land claim process and Indigenous resurgence movements by demonstrating the two different conceptualizations existing within the same geo-political space, metaphorically and literally. More than this, however, I have also demonstrated how the Canadian state's definition is not only harmful to Indigenous rights, but also is not being upheld by the state or the culture itself. In this section, I will discuss how the Canadian government failed to uphold their definition of "reconciliation." I will continue the discussion by demonstrating the real-world consequences of the *Delgamuukw* case by looking at recent events on Wet'suwet'en territory and, in doing so, use this case as a prime demonstration regarding the current state of reconciliation in Canada as a consequence of prior litigation. Following this, I will suggest baseline initiatives that can be taken on by all levels of government in order to bring about reconciliation as previously defined in this paper.

As can be surmised from statements made by politicians, judges, and other state officials, reconciliation is conceived of in a liberal social solidarity framework in which

Indigenous peoples' aspirations are framed in a discourse of multiculturalism and recognition politics, therefore placing Indigenous issues within the category of 'minority' issues which simply require more recognition (Coulthard, 2007). This framework emphasizes the categorization of people as minority or majority and relates these categories to the manner in which issues affecting them are dealt with, either through simple recognition of the issues or through drastic structural redress (Coulthard, 2007; Short, 2005). This framework is inherently flawed and paradoxical since it claims that all are equal, but some (read: settler colonials) are more equal than others. This very paradox came up in the Crown's argument when the Crown subverted the nation's values of acceptance, tolerance, and equality by arguing that Gitxsan and Wet'suwet'en peoples, and presumably all Indigenous peoples, are, in fact, not equal— with respect to their cultural, social, and basic human rights— to Euro-Canadians. This is evidenced by the very nature of the *Delgamuukw* case and the current Canadian Land Claims (CLC) system. Within the context of the case, the approach of promoting Euro-centric standards of culture is the method by which the plaintiffs' rights are said to not exist, as seen both in the judgements made and the Crown's argument. This method has existed within the context of colonial nations for hundreds, if not thousands, of years and are what allow for Indigenous populations to be framed as noble savages that must be "elevated" to a level that is "civil" and "proper" (Asch, 1999). It is the method by which oppressive institutions such as the Indian Residential "Schools," missionaries, land claim systems, and so-called democratic and liberal governments have been built. In the context of the CLC system, the inequality that is perpetuated through such institutions is evidenced by the forceful and legally justified, by a Euro-centric legal order, extinguishment of Indigenous rights thus pigeonholing Indigenous populations into agreements that do not achieve the original goal of maintaining their sovereignty and rights but instead force them to pick some at the expense of others.

The categorization of people as majority or minority is seen throughout the *Delgamuukw* case, as well as the consequences of these categorizations on issues concerning the populace. For example, the final judgement passed down from the Supreme Court of Canada declared that any Indigenous rights that may have survived the assertion of Crown sovereignty in British Columbia could be infringed upon by federal and provincial governments with the caveat that the infringement is in line with a legislative objective that is "compelling and substantial" and is "consistent with the special fiduciary relationship" of the Crown to Indigenous peoples (*Delgamuukw*).

As previously established, this can be virtually any exploitative economic venture the governments would like to pursue. Though on the surface, this judgement seems to be in line with reconciliation as defined by the Canadian government, it is actually reproducing colonial oppression because recognition will only be given to Indigenous peoples if it does not place the sovereignty of the Crown into question or jeopardy. This places the well-being and rights of Indigenous peoples secondary to that of the Crown and Canadian government. Again, this gives rise to a paradox in which equality is not only deserted as a prospect, but so too is the government's definition of reconciliation. In

2016, Prime Minister Justin Trudeau stated that the key aspects of reconciliation as set out by his government are "the recognition of rights, respect, co-operation, and partnership" (Government of Canada). However, when recognition, and thus, reconciliation according to the Canadian government, is made conditional on the premise of it not threatening Crown sovereignty, then is it actually recognition? This aspect of the judgement made by Lamer subverts co-operation, partnership, and respect for the unilateral exploitation of resources and lands by giving the Crown free license.

Therefore, this definition of reconciliation reasserts the colonial ideology of cultural superiority by preventing the equal footing that is truly required to achieve reconciliation, as defined in this paper. Ultimately, this framework assumes that all are 'equal' so long as 'all' are like 'us,' therefore erasing and ignoring specific needs and alterities of Indigenous peoples, such as the right to self-determination, self-government, and sovereignty. Lastly, as seen throughout the case, Canada does not uphold their own definition of reconciliation unless it is convenient for them.

## Unist'ot'en Camp and Indigenous Governance

The outcome of the *Delgamuukw* case has allowed for ongoing resource extraction practices to take place on the land of the Wet'suwet'en peoples as no title was found. Most recently, the construction of a liquified fracked gas pipeline has been under scrutiny. TransCanada was selected to build, own, and operate a 670 km pipeline, dubbed the Coastal GasLink pipeline, which connects fracked gas production in the northeastern interior of British Columbia to the Pacific coast for global export (Coastal GasLink, 2012).

However, the pipeline transects the unceded territories of the Wet'suwet'en, which allows it to become a contemporary act of land dispossession, which serves to reassert illegitimate state sovereignty (McCreary & Turner, 2019; Unist'ot'en Camp, 2017; Smart, 2020). Beginning as early as the summer of 2015, those associated with the Unist'ot'en Camp and Wet'suwet'en Nation have regularly blocked access to their territories from employees and contractors of TransCanada (McCreary & Turner, 2019). At the core of the dispute between the Wet'suwet'en Nation, TransCanada, and the provincial government is that although the company signed agreements with all 20 elected First Nations chiefs along the pipeline's path, these chiefs, according to *adaawk* and *kungax*, have no actual authority over their peoples since they are elected to their positions due to the imposition of a colonial electoral system (McCreary & Turner, 2019; Phillips, 2020; Unist'ot'en Camp, 2017; Smart, 2020). Moreover, it should be noted that the elected band chiefs only signed such agreements under duress and fear of the militarization of RCMP (Smart, 2020). Thus, the Crown's ability to use this land for resource extraction is void as it did not involve the consultation of hereditary Chiefs. According to Mills (1994) and Daly

(2003), chiefs in Indigenous legal orders of the Gitxsan and Wet'suwet'en obtain their status and authority from ancestral marriages with the spirit of the land. This spirit is how each house, clan, and chief get their name. In essence, the authority of the chief comes from the chief's direct connection to and understanding of the land. Furthermore, with the 2019 implementation of the United Nations Declaration on Indigenous Rights (UNDRIP), consent from Indigenous chiefs is now made mandatory under Article 10 (UN General Assembly, 2007).

Unist'ot'en Camp is a movement that, through the action of Indigenous legal orders and adaptive use of cultural traditions, acts to demonstrate that the definition of reconciliation put forth in this paper is not dead in Canada but instead, has been halted by previous litigations and ethnocentric views that continue to be held by the Canadian government. As such, Indigenous peoples have taken up the torch by demonstrating their understanding of what needs to be done to reach reconciliation. Interestingly, it would seem that the perpetuation of the colonial thesis has led to the development of an antithesis, e.g., the camp, which has ultimately been able to allow space for Indigenous resurgence of cultures, traditions, and practices in Unist'ot'en Camp, as well as across Canada, as seen with their allies. In an almost counterintuitive way of thinking, the colonial directives that are perpetuated and imposed through politics of recognition, such as the outcome of the *Delgamuukw* case, develop a space for Indigenous resurgence and survivance practices, therefore allowing for a stronger counter-colonial initiative— though this is not through means ideal for anyone.

These resurgence and survivance practices are highlighted through the movement of Unist'ot'en Camp as it has been focused on direct action and reclamation of lands and traditions. Direct actions that have been taken by the Wet'suwet'en peoples and other Indigenous Nations across Canada, as well as non-Indigenous allies, include national train blockades, refusal of land access to non-Indigenous peoples at the point of access at Unist'ot'en Camp, sustainable living practices that include the occupation and use of traditional hunting practices of Wet'suwet'en people, and nationwide protests. These direct actions, although thought to be extra-legal, illegitimate in nature, are, in fact, none of these as they work to challenge and directly oppose the maintenance of colonial agendas through the enforcement of Indigenous legal orders and the refusal of colonial impositions. It does so by working against the capitalist market, which is a prevalent source of colonial power as demonstrated by the resource extraction market that Canada so heavily relies on as well as the intrusion on Indigenous lands for transports of such goods.

These actions reassert Indigenous legal orders' primacy and influence colonial power structures through less mediated and more disruptive ways that are integral to engaging in decolonization for Indigenous peoples as it indicates a loosening of internalized colonialism. According to Coulthard, this is a precondition for any truly meaningful change while also building skills and social relationships within and among Indigenous communities (2013). The bottom-up character of the movement is what makes it so transfor-

mative in terms of its capability to decolonize. It is not led by any elected politician, national chief, or paid executive director but rather, it is led by the Wet'suwet'en people as a whole. Moreover, it is a result of this grassroots initiative that it has spoken so loudly nationwide to many Indigenous Nations. This camp acts as a locale or pilgrimage point for community members of all Indigenous Nations to reflect and cope with the trauma of colonization and to reconnect with sustainable and traditional modes of living (McCreary & Turner, 2019) and has become an epicenter for Indigenous resistance efforts (Unist'ot'en Camp, 2017). Through the occupation of their lands and the resurgence of their sustainable lifestyle, the Wet'suwet'en are actively and visibly articulating their rightful jurisdiction, which has helped contribute to the increasing robusticity of Indigenous rights nationally though these acts have been met with extreme resistance from the rest of Majority (read: white) Canada (Laframboise, 2020; McIntosh, 2020; Li, 2020). Interestingly, the actions taken by the RCMP on Wet'suwet'en lands was not deemed to be the same degree of resistance.

In using Indigenous legal orders to demonstrate Indigenous sovereignty, Indigenous peoples further the development of their culture, their rights, and their practices through resurgence efforts while simultaneously asserting their power over their people and their lands in the face of colonial oppression (Alfred & Corntassel, 2005). They demand respect through the demonstration of a nation-to-nation relationship between each Indigenous nation, which sets the expectation for the relationship between Indigenous Nations and Canada. Through the resurgence of cultural traditions, Indigenous peoples will actively rediscover their "peoplehood," dubbed by Alfred and Corntassel (2005), which involves the transcendence of colonialism on an individual basis through the reconnection with community, land, language, and cultural practices. This reconnection slowly expands outwards into the community and broader relationships, which ultimately acts to reshape, strengthen, and redevelop Indigeneity from an internalization of colonial subjectivities to the active rejection of dispossession and assimilative practices and resurgence of Indigenous governance, legal orders, cultural practices, language, and ways of life. With time, this reshaping of Indigeneity results in a restructuring of the colonial narrative and thus, the building of a foundation for reconciliation. There is still hope that reconciliation can occur as long as Indigenous and non-Indigenous alike are all committed to the fair and equitable treatment of our fellow person.

## Framework for Reconciliation in Canada

With Indigenous peoples already acting to set a foundation for reconciliation, it becomes time for the state to do the same. To address this issue, I present two recommendations that should be implemented by all levels of the Canadian government in order to truly begin working towards reconciliation. These recommendations address shortcomings of

*Delgamuukw*, as well as previous and current land claim issues, by holding the Canadian state accountable to international law under the UN, as outlined by UNDRIP, and by integrating Indigenous legal orders into a new system for Indigenous land rights negotiations. This ensures that Canada will be held to a standard above what it sets for itself, but also that a nation-to-nation paradigm will start to develop, therefore making progress towards the paradigm of reconciliation defined at the beginning of this paper.

First, Canada must federally, provincially, and territorially implement and actively use the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP is a document developed by the United Nations in consultation with Indigenous peoples from around the globe to provide a language to assert and affirm Indigenous rights of self-determination, self-government, informed and prior consent to the use of their traditional lands, and the prevention of their dispossession from those lands in the international arena (Hausler, 2012; Sayers, 2019). UNDRIP was formalized in 2007, with Canada being one among four colonial nations who did not vote in favour of it at the time of its adoption— the other three nations were the United States, Australia, and New Zealand (Hausler, 2012). Although endorsed by Canada in 2012, it was solely recognized to the extent to which it resonated with existing government practice and as an "aspirational document" that reflected only an "ideal relationship" between sovereign and Indigenous peoples (McCreary & Turner, 2019) despite scholars and advocates having stated repeatedly that UNDRIP is not an "aspirational document" but instead, a framework that must be entirely adopted (Hausler, 2012).

In 2019, the province of British Columbia began its adoption of UNDRIP with provincial Bill 41 (Sayers, 2019; Bill 41, 2019). With the development of this bill, British Columbia is now committed to a government action plan to implement the framework set out within UNDRIP to its current and future laws (Sayers, 2019). Moreover, with the implementation of UNDRIP, the First Nations people of British Columbia can now hold British Columbia accountable internationally for any legal shortcomings. This is important as it means that there is now a third party governing these relations rather than only the colonial state. Furthermore, with article 10, 18, and 19 of UNDRIP in place, First Nations peoples have the full capability to say no to projects being conducted on their lands, in addition to providing consultation for how they will proceed (UN General Assembly, 2007). This is extremely important since prior to this point, they were told rather than asked how the project would occur and no consent from Indigenous peoples was required. However, it has been noted by Indigenous scholars that the full implementation of UNDRIP will take some time and since it has only been implemented provincially, and not yet federally, the ability to exercise consent only extends to provincial projects of dispossession and not federal ones (Sayers, 2019).

Second, following the federal implementation of UNDRIP, state legitimacy of Canada, as well as for Indigenous Nations, must be produced and reproduced through legal and equal methods. This can be achieved through negotiations between the Canadian state

and Indigenous peoples on the basis of nation-to-nation relations as developed within UNDRIP (2007). Within this nation-to-nation framework, Indigenous nations would be treated as self-governing and self-defining nations that are separate from the Canadian state and deserve equal respect to that of the Canadian state (Panagos, 2007). Moreover, since these negotiations would be occurring after the adoption of UNDRIP, it means that they are governed by international law and any outcomes are deemed to be international treaties between the Canadian state and the Indigenous nation(s). These negotiations should take place in the stead of the current Comprehensive Land Claims (CLC) agreement process, which is highly problematic since, from the perspective of the state, the purpose of these agreements is to maintain state sovereignty, which means that when Indigenous peoples sign the final agreement, they are required to agree to the extinguishment of any 'undefined' rights, which are not found in the agreement (House of Commons, 2018; Samson, 2016).

Moreover, CLC agreements take place between elected Indigenous chiefs and the Crown; however, as previously stated, these elected chiefs obtain power from a colonial system. Instead, any negotiations that take place in a nation-to-nation framework should be between representatives from the traditional governance systems of the Indigenous Nation(s) (House of Commons, 2018; Samson, 2016). For these negotiations to work, three key criteria must be met: they take place on an equal footing as set out in a nation-to-nation paradigm of relations; the final treaty that arises from these negotiations must be legally binding internationally to hold any and all parties equally accountable; and the treaties that arise must be viewed in the Indigenous sense in that they are living documents – in other words, they must be revisited and maintained by all parties through "check-in" meetings whenever either party calls for it. I suggest a minimum of every four years to coincide with federal change of office.

# Conclusion

The belief in equality amongst all is a foundational belief within the Canadian identity. However, as the litigation of many Indigenous rights cases over the years illustrate, this belief in a liberalist and multicultural nation that is built on notions of acceptance and tolerance is more an aspiration than a priori truth. This becomes evident upon a close reading of the case known as *Delgamuukw v. the Province of British Columbia*. The primary objective of this paper demonstrates the falsity of this liberalist narrative, as well as how its portrayal is actually harmful to Indigenous rights and reconciliation, regardless of how you define it. This was accomplished through the examination of the positions taken by the Crown and the Supreme Court Justices, all of whom act as representatives of the Canadian government, and ultimately, the Canadian people.

The secondary goal of this paper highlights Indigenous peoples' demands and initiatives to promote nation-to-nation relations and reconciliation, as defined in this paper. This was completed in the final section of the paper where I discussed the current day protests at Unist'ot'en Camp on Wet'suwet'en territory and developed a foundation upon which to build a framework for nation-to-nation relations and reconciliation. Reconciliation begins by turning one's back on the colonial master and state recognition through Indigenous peoples and nations recognizing each other and strengthening relations with one another with the hopes that this will eventually change the colonial government's methods and ideologies when it comes to relations with Indigenous peoples (Coulthard, 2014). Although colonialism may not be as obvious as it once was, factors such as land dispossession, cultural oppression, and ethnocentric ideals are all maintained as central tenets of the Canadian government, as illustrated in the examination of the positions of the Crown and the Supreme Court of Canada.

The outcome of the *Delgamuukw* case is particularly relevant due to the contemporary consequences of the case, as seen through the protests occurring at the Unist'ot'en Camp on Wet'suwet'en territory today (Unist'ot'en Camp, 2017). These protests demonstrate the current status of reconciliation in Canada as being far from ideal, while also illustrating the importance of Indigenous peoples' assertion of sovereignty through resource governance efforts in forcing the hand of Canada to move forward with true reconciliation (McCreary & Turner, 2019). Essentially, these findings have shown that in order to reach reconciliation's true potential in Canada, an entire systemic overhaul must occur where the federal and provincial governments must revisit their definition of reconciliation with input from Indigenous Nations' traditional leaders and bring it in line with UNDRIP (2007).

Similarly, UNDRIP (2007) must be federally implemented and utilized as a set of guidelines and regulations for negotiations, which must be held to standards of international law. Most importantly, Canada must let go of its ethnocentric ideals and approach Indigenous rights through a nation-to-nation paradigm. Moving forward, Canada has considerable room to improve its relations with Indigenous peoples. To quote Chief Justice Lamer, "we are all here to stay" (*Delgamuukw*, para. 186) and therefore, these relations should be a national priority. Without institutional changes, Canada will fail non-Indigenous and Indigenous peoples alike – after all, this is everyone's home on Native Land.

# References

Alfred, T. & Corntassel, J. (2005). Being Indigenous: Resurgences against contemporary colonialism. *Government and Opposition*, *40*, 597-614. DOI: 10.1111/j.1477-7053.2005.00166.x

Coulthard, G. (2007). Subjects of the Empire: Indigenous Peoples and the 'politics of recognition' in Canada. *Contemporary Political Theory*, *6*, 437-460. doi: 10.1057/palgrave.cpt.9300307

Coulthard, G. (2014).*Red Skin, White Masks: Rejecting Colonial Politics of Recognition*. Minneapolis, MIN: University of Minnesota Press.

Culhane, D. (1998). *The pleasure of the Crown: Anthropology, law, and First Nations*. Burnaby, B.C: Talonbooks.

Daly, R. (2003). *Our box was full: An ethnography for the Delgamuukw plaintiffs*. Vancouver, B.C.: UBC Press.

Elliot, D. (1998). Delgamuukw: back to court? *Manitoba Law Journal*, *26*, 97-132.

Filsfeder, M. A. (2010). A bridge to reconciliation: A critique of the Indian Residential School Truth Commission. *International Indigenous Policy Journal*, *1*(1).

Foster, H. (1992). It goes without saying: The Doctrine of Extinguishment by implication in Delgamuukw. In F. Cassidy (Eds.), *Aboriginal Title in British Columbia; Delgamuukw v. The Queen* (pp. 133-160). Oolichan Books and The Institute for Research on Public Policy.

Hausler, K. (2012). Indigenous perspectives in the courtroom. *The International Journal of Human Rights*, *16*, 51-72. doi: 10.1080/13642987.2011.609480

Lindqvist, S. (2007). *Terra nullius: a journey through no one's land*. New York: New Press.

McCreary, T. (2014). The burden of sovereignty: court configurations of Indigenous and State authority in Aboriginal Title litigation in Canada. *North American Dialogue*, *17*, 64-78. doi: 10.1111/nad.12016

McCreary, T. (2016). Historicizing the encounter between state, corporate, and Indigenous authorities on Gitxsan lands. *Windsor Yearbook of Access to Justice*, *33*, 163-197. doi: 10.22329/wyaj.v33i3.4896

McCreary, T., & Turner, J. (2019). The contested scales of Indigenous and settler jurisdiction: Unist'ot'en struggles with Canadian pipeline governance. *Studies in Political Economy*, *99*, 233-245. doi: 10.1080/07078552.2018.1536367

Mills, A. (2000). Three years after Delgamuukw: the continuing battle over respect for First Nations interests to their traditional territories and rights to work their resources. *Anthropology of Work Review*, *21*, 22-29. doi: 10.1525/awr.2000.21.2.22

Mills, A. (1994). *Eagle Down is our law: Witsuwit'en law, feasts, and land claims*. Vancouver, B.C.: UBC Press.

Niezen, R. (2003). Culture and the judiciary: the meaning of the culture concept as a source of Aboriginal Rights in Canada. *Canadian Journal of Law and Society*, *18*, 1-26. doi: 10.1017/S0829320100007687

Panagos, D. (2007). The plurality of meanings shouldered by the term "Aboriginality": an analysis of the Delgamuukw case. *Canadian Journal of Political Science*, *40*, 591-613. doi: 10.1017/S0008423907070710

Samson, C. (2016). Canada's strategy of dispossession: Aboriginal land and rights cessions in comprehensive land claims. *Canadian Journal of Law and Society*, *31*, 87-110. doi: 10.1017/cls.2016.2

Sayers, J. (2019). A historic day for B.C. First Nations. Now the work starts: UNDRIP starts us on a journey but without work, co-operation and shared vision we will be lost. *B.C. Studies*, *204*, 11-13.

Short, D. (2005). Reconciliation and the problem of internal colonialism. *Journal of Intercultural Studies*, *26*, 267-282. doi: 10.10800725686050015353 4

## Legal References

Bill 41, *Declaration on the Rights of Indigenous Peoples Act*, 4th Sess, British Columbia, 2019.Canada, Parliament, House of Commons, Standing Committee on Indigenous and Northern Affairs, *Indigenous Land Rights: Towards Respect and Implementation: Report of the Standing Committee*, 42nd Parl., 1st Sess., No 12 (February 2018) (Chair: Hon. MaryAnn Mihychuk)

*Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 [Delgamuukw].

George R., Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1.

Government of Canada. (2016). *Statement by the Prime Minister of Canada on advancing reconciliation with Indigenous Peoples*. https://pm.gc.ca/en/news/statements/2016/12/15/statement-prime-minister-canada-advancing-reconciliation-indigenous

*Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1 (Ottawa: Library and Archives Canada, 2015).

*Report of the Royal Commission on Aboriginal peoples: Renewal: A Twenty Year Commitment*, vol. 5 (Ottawa: Supply and Services Canada, 1996).

UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: adopted by the General Assembly*, 2 October 2007.

## Popular Media

Coastal Gaslink Pipeline. (2012). *About Coastal Gaslink Pipeline*. https://www.coastalgaslink.com/about/

Laframboise, K. (2020 March 02). Montreal protestors set up new blockade in support of Wet'suwet'en despite proposed agreement. *Global News*. https://globalnews.ca/news/6619936/montreal-pointe-saint-charles-blockade/

Li, W. (2020 February 09). From blockades to rail stoppages: Wet'suwet'en protests grab spotlight nationwide. *Toronto Star News*. https://www.thestar.com/news/canada/2020/02/09/from-blockades-to-rail-stoppages-wetsuweten-protests-grab-spotlight-nationwide.html

McIntosh, E. (2020 February 13). The Wet'suwet'en told supporters to 'shut down Canada.' Now trains are cancelled nationwide. *Canada's National Observer*. https://www.nationalobserver.com/2020/02/13/analysis/wetsuweten-told-supporters-shut-down-canada-now-trains-are-cancelled-nationwide

Phillips, B. (2020 January 06). Wet'suwet'en hereditary chiefs terminate access agreement with Coastal Gaslink. *Prince George Daily News*. https://pgdailynews.ca/index.php/2020/01/06/wetsuweten-hereditary-chiefs-terminate-access-agreement-with-coastal-gaslink/

Smart, A. (2020 January 09). What the Wet'suwet'en case says about how Canadian courts address Indigenous law. *CTV News*. https://www.ctvnews.ca/canada/what-the-wet-suwet-en-case-says-about-how-canadian-courts-address-indigenous-law-1.4759601

Unist'ot'en Camp. (2017). *About Unist'ot'en Camp.* https://unistoten.camp/no-pipelines/background-of-the-campaign/