PRISONERS OF DEMOCRACY:
THE LIL'WAT'S RIGHT TO AN IMPARTIAL TRIBUNAL
AN ANALYSIS OF THE LILLOOET LAKE ROADBLOCK CASE.

by

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ABSTRACT:

This thesis analyzes the response of the domestic judiciary to the Lil'wat peoples' assertion of territorial sovereignty as their defense to a charge of criminal contempt of court before the British Columbia Supreme Court. A lack of impartiality within the Canadian legal system is revealed through a critical legal realist examination of a specific encounter between the dominant Canadian society and the traditional Lil'wat peoples. Both overt and subtle colonial attitudes are demonstrated as embedded within the law, its institutions and its accepted practices in the context of Indigenous/Newcomer relations. This case study seeks to make visible a reliance on a series of invalid legal assumptions regarding Indigenous peoples. These assumptions are necessary to support the entrenched institutional biases that favour the self-interest of the Newcomer society. The thesis quotes extensively from the court transcripts of the criminal contempt trial against the Lil'wats. They were criminalized for blocking public access through their reserve in their attempt to prevent the desecration of their ancient burial grounds and pictographs. Interfor, a Provincially licensed logging corporation, was building a road through their sacred territory. The Lil'wats argued that the B.C. Supreme Court is without jurisdiction over unceded territory and therefore the injunctive order was a nullity. The extreme resistance of the superior court judiciary to hear or address the law presented in defense of the Lil'wat peoples was in breach of the rule of law, the principles of constitutional supremacy and the honour of the Crown. Following a detailed analysis of the judiciary's lack of impartiality and breaches of the rule of law, the thesis concludes by suggesting Canada submit the issue of Indigenous territorial sovereignty to third party adjudication through the creation of an internationally overseen cross-cultural mediation process.

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I could not have written this thesis if I had not been mentored by George Manuel, C.M., Hereditary Chief Robert Satiacum, and John and Mary Williams. I wish however to dedicate this thesis to the traditional Lil'wat peoples whose deep belief in their sovereignty enabled them to stand strong regardless of the response of the domestic legal system. I also wish to most sincerely thank Professors Doug Harris and June McCue for their support, suggestions and editorial skill that transformed my work into a readable study.

I must also thank JoAnn for believing I could write it, Christi for keeping her promise to provide formatting, and Deborah for searching for a number of lost references.

INTRODUCTION

1.1 Qwetminak's Speech

Figure 1. Qwetminak On Her Knees.

Qwetminak:[1] I am fifty-three years old. I have been educated both in the English language and in my own Lil'Wat language. I was teaching in public school for 14 years.[2] I feel that in all of those years I have done a lot of things. Raised my nine children, and now I have grandchildren. I am telling you this just so because I am going to ask you a question at the end. Because at 53 I am beginning to wonder if there is any justice for native people in this country.

I have been involved in a lot of political—both political things both in my community and outside my community. That morning that we were picked up we were on our way to work. I can't stand to see this country send in police like that. You say you are upholding justice, that people have to obey your laws. I believe that we should obey laws. Like Mr. Tysuk says, we probably aren't criminals. We are probably law-abiding citizens.[3] And that's true.

But when this country has done the things to my people that it's done, and when a person like myself witnesses and lives with those things we try to find ways to bring [out] our plight. We try to find justice because we believe that we are not getting it. When I was a little girl I didn't speak any English. I only spoke my language. I only knew my own world. Only in the language---through the language that I have, I knew my world. I was very, very excited to see my first white man, as we call him our Shama.

And then when I was taken off to boarding school. The things I suffered in that boarding school I wouldn't wish your children, my children, my grandchildren, any of that on anybody. I graduated from that school. I went on to university. I went back home. The things that happened to people in my community, the economic—lack of it, I guess I should say, of economy in my community where our freedom depends solely on the Welfare system. I hate that Welfare system so badly that I wouldn't even go out here to get a cup of soup. But I went because those people prepared it for us, even though I didn't want to take it.[4] My children, I will not allow them to take Welfare. I can go and work. I can work like everybody else because I can teach. But I chose to be with my children and to teach them how to live off that land because I know. And also if they can learn to work at jobs within that territory, which there are very few of.

I can understand the logging and that. I can understand that the people there need those jobs. But when we look at our valley, and they have taken almost all of it and

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[1] April 15th, 1991 Transcript, at 17. Qwetminak, a grass roots leader amongst the traditional Lil'wat people, made this speech at her sentencing hearing upon being convicted for criminal contempt of court for blocking the road through their unceded territory. The question of where can the Lil'wat people go to receive justice and have the rule of law obeyed that she repeatedly asks in her address to Mr. Justice MacDonald provides the starting point for the focal question of the thesis.

[2] Qwetminak taught at public schools both on and off the reserve during the fourteen-year period she refers to.

[3] *Ibid.* It is important to note that when she speaks of being a citizen that she is referring to being a Lil'wat citizen rather than a citizen of Canada as clarified by her comments at 3.

[4] This reference is to the non-native Supporters of the Lil'Wat Peoples Movement who had brought food to the courthouse as a gesture of support for the Lil'Wat people's assertion of authority over their lands.

left nothing for us, I can't understand that. When a man tells me: I've kept the fire going down at the lake because one of my brothers, actually a sibling is buried across there, how can anybody stand by and say: It's okay, go around that place because it's for the loggers? [5]

The social sufferings that go on in my community are the same sufferings that are pushed on people, oppressed people. And people say we are not oppressed. You are not half as bad as South Africa. Oppression is oppression. It has no degrees, measurements. And the things that we suffer socially cannot be measured in degrees of the kind of oppression that we are under in this country.

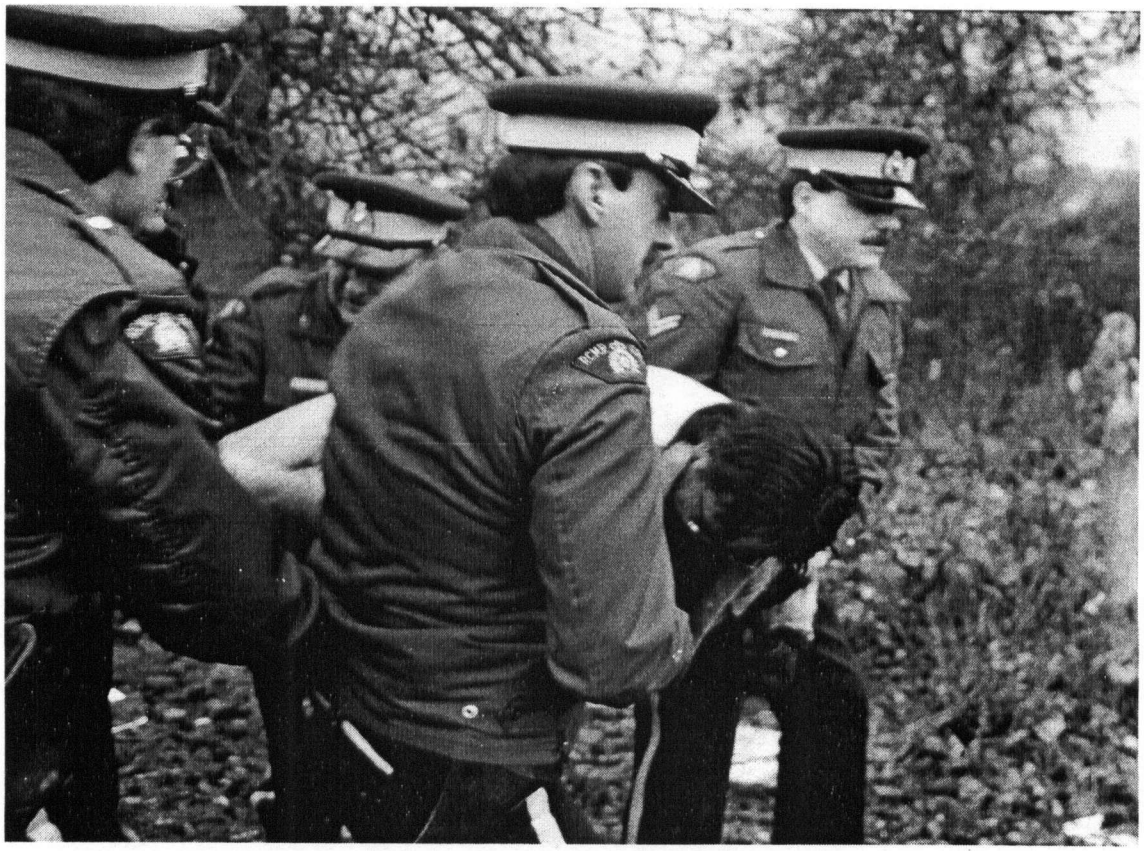

Figure 2. Lil'wat Dragged From Unceded Territory

We ask ourselves: where is the Redman's space in this world community? I want to know that because I want to bring up my children as good Lil'watum. Maybe one day I will say as good Canadian. But at this moment I don't want to say that.

Culturally, when they took us away to school they made sure they destroyed most of that. I was fortunate enough to speak my language. I could learn from my elders,

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[5] Here she is referring to a Lil'wat member who has a sibling buried on the west side of Anderson Lake. Interfor Logging Corporation has been blasting in this graveyard area, in order to facilitate their construction of a logging road. In keeping with Lil'wat spiritual practices, this relative has kept a fire burning.

my mom, my dad, my aunts, and my uncles. But there are others that don't have that. And they are looking for something. Everywhere else in the world people are allowed those things.

Politically, I can't stand the situation that we're in. I suppose that's the reason why I keep doing some of the things that I do. Because in order for me to say to my granddaughter: This is the life I want you to have. I want you to be happy. I want you to have a decent living. I want you to have a good house. I don't want you begging for it.

I never want my children to beg for anything. If they have to wear rags on their backs. I would rather they wore those rags on their backs than to beg in their own

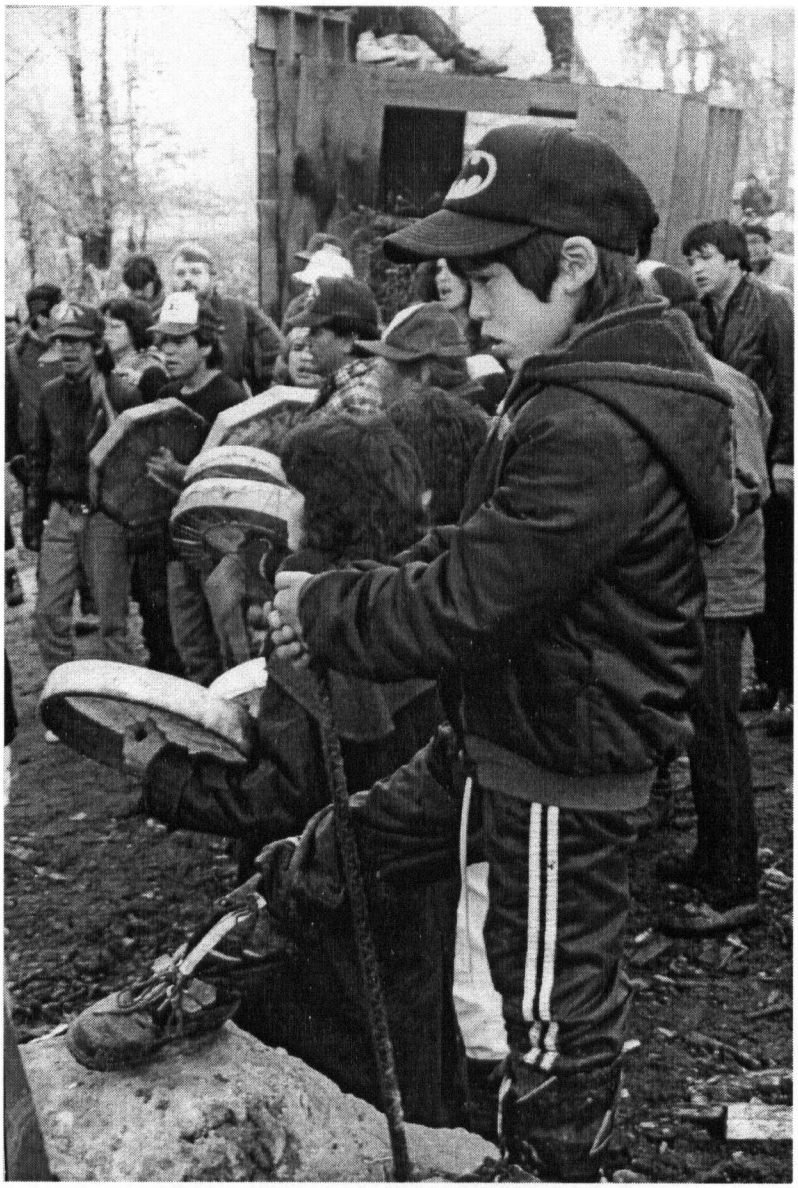

Figure 3. Lil'wat Child Witness at Roadblock.

homeland for their subsistence. How can they direct their own lives if politically they can't do that?

Every time we move, people are telling them: You have only this to live on. People go in our community from generation now to generation on Welfare. That's a kind of oppression that I don't want my children to live under. You might say: Well, why don't you move? I don't want them to do that either because that is their homeland, that is their home territory. Why should they move? When a Frenchman wants to stay in his country, he stays there. When a Japanese person wants to stay in his country, he stays there. When Italian people want to stay in their homeland, they stay there. I want my children to be able to say: This is my homeland. Lil'wat is my homeland. So I ask you, before we call this meeting off, where do we go?

Mr. Tyzuk says the rule of law must be upheld. There is supposed to be a rule of law protecting my people here in this country. And if that rule of law is not going to be found in these courts, where is it going to be found? That is my question. I want to know where do we go?

Back in '75 when we sat on the road I said I would never do this again. We occupied the black towers. We went to prison. I didn't want to do that again. But you people are just putting us to court, throw us back in our community, go back there. Where do we go from there if you are not going to uphold the rule of law here. Where do we go? What do we have to do? I witnessed one year, the year my aunty died, 17 people died. We were at the graveyard 17 times. Those people died because of the alcoholism which is a social problem in my community. But no one could find the answer for that. I don't know how long more we have to do what we do. What do we do? Because it doesn't matter what we do, all the noises we make and the speeches we make, the studies that are done.

Satiacum went to his grave.[6] He'll never see the justice in this country. I am hoping too. And that's why I'm asking you, where do we go? What do we do? How do we tell you? How do we get the rule of law followed in this country? We are supposed to be protected people. It's your rule of law. I don't want to come to these courts anymore trying to find justice if you can't tell me where to find it in your courts.

But one thing I have told my children, no more children will be registered with the Canadian government or the British Columbia government because they shouldn't be there. They will only be registered with the Lil'wat government. And if it doesn't

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[6] Hereditary Leader of the Puyallup Nation, Chief Robert Satiacum, fled the United States after being convicted of racketeering on the basis of fabricated evidence. After three years and eleven months in custody on a Canadian immigration hold, he was successful in obtaining United Nation Conventional Refugee Status against the United States. The majority of the judges of the Immigration Appeal Board on July 10th, 1987 agreed that he was persecuted by the American government for his implementation of Indigenous treaty rights of fishing, free trade and tax exemption. His case was overturned however by the Federal Court of Appeal in *Canada (Minister of Employment and Immigration)* v. *Satiacum* [1989] F.C.J. No. 505 on the basis that his fear for his life if returned to United States and incarcerated was not related to the crimes with which he was charged. The appeal court also held that there was no evidence to support the finding that he would not receive a fair trial in United States. The resulting loss of refugee status along with a finding of guilt in a fabricated case of child molesting returned him to the status of 'a fugitive from the American justice system'. He was captured for the second time and died of heart failure in custody before the Canadian authorities were able to deport him.

> exist right now, I will make it exist. Because I will not let that go. Why should I? No one else is expected to do that in this world.
>
> United States and Canada and everybody else ran to Kuwaits' defense. There has got to be somebody that is going to run to my defense. I am Lil'watum. I will die a Lil'watum. And if I can't find justice, then I guess I will have to keep looking. And I suppose I will have to spend some more time in jail, because that's exactly where you put us when we start acting up, as you call it. We are called rebels. We are called renegades. We are called everything that is not nice. But I want you to know why I do it.
>
> If you have to charge me with something else, I guess you have to. But I am going to go home because I have to work to make a living, just like everybody else. I haven't taken an easy route, nor do I plan to. But my grandchildren will grow up knowing who they are. And my children have learned to work. But we will never succumb because you want us to, because you force us to. That can only come if we understand each other.
>
> The Court: If I had the answer to your question, I would happily give it to you.[7]

The following day:

> The Court: May I say before you say anything more I have asked the court reporter to give me a copy of what you said. I too have a son. Not as many as you. I propose to send him what you said. One other white man will know what you said.
>
> Qwetminak: I hope he can do something about our situation, maybe much more than you and I have done here. And I know that you have to sentence us because you think that you have that right. But nothing will make me say that you have jurisdiction because you do not... And if this court is proven unjust in the future that won't be on our conscience. So my name is Mary Williams. You may do as you please, but I will not recognize your jurisdiction.[8]

Mr. Justice MacDonald's response to Qwetminak is where I would like to begin my analysis of whether or not the Canadian courts can provide impartial adjudication of issues such as territorial sovereignty violations by the Canadian state. I have yet to witness justice in Canada's legal institutions when it comes to Indigenous peoples protecting their lands. The Lil'wat people remain surrounded by injustice.

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[7] Monture-Okanee states: "The overall perspective of an aboriginal person toward Canadian legal institutions is one of being surrounded by injustice without knowing where justice lies, without knowing whether justice is possible." P. Monture-Okanee and M. Turpel "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice", (1992) U.B.C. L. Rev. 239-279 at 251.

[8] April 15th, 1991 Transcript at 46.

corde creditur ad justitiam…she who believes in the heart will do justice[9]

Figure 4. Lil'wat Peoples Movement Lillooet Lake Roadblock 1990/1.

1.2 Thesis Rational

This thesis emerges as a result of having been legal counsel to members of the traditional Lil'wat people who were arrested because of their blockade in 1990/1 on Lillooet Lake Road.[10] The Crown charged sixty-three Lil'wat individuals with criminal contempt of court for refusing to remove themselves from their blockade of a road that runs through their

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[9] L. Mills, *A Penchant for Prejudice: Unraveling Bias in Judicial Decision Making* (Ann Arbor: University of Michigan, 1999) at 1.

[10] The formal title of the case was *Attorney General of British Columbia and Her Majesty the Queen in Right of the Province of British Columbia* v. *Chief Fraser Andrew, as Representative of the Band Council and Members of the Mount Currie Indian Band, and Terri John, Ralph Dan, Ron Dan, Alvin Nelson, Albert Pascal, and John Doe as Individuals and as Representatives of the Persons Blocking a Road known as Lillooet Lake Road.* No. A906203. Vancouver (B.C.S.C.) ["*A.G.* v. *Chief Andrew*"]. The majority of the transcript references contained within the thesis are excerpts from this criminal contempt trial and will be referred to throughout by date and page. For example: January 8th, 1991 Transcript at 5.

reserve. Their trial took place before the Honorable Mr. Justice MacDonald over a five-month period in 1990/1 and involved approximately 33 days of trial.[11]

There were actually several hundred traditional Lil'wat people involved in the 116 day roadblock. Aware that the Band Council was part of the colonial regime, the Lil'wat People's Movement was formed to provide a voice for traditional Lil'wat members who were intent upon protecting their lands.[12] It was agreed that only a few of each family would allow themselves to be arrested, so that the remaining family members would be able to sustain their incarcerated family members, as well as themselves, during this lengthy action.[13]

These traditional Lil'wat people refuse to recognize the federally imposed Indian Reserve and Band Council system. From their point of view, the Band Council reserve system is simply an administrative arm of the foreign Canadian government. The roadblock was a non-violent assertion of Lil'wat sovereignty, authority, and jurisdiction in their unceded traditional territory; in other words, it was an assertion of Lil'wat territorial sovereignty. It was the Lil'wat's clear intention from the beginning of this action to use the Supreme Court of British Columbia proceeding as an opportunity to further the historical record of their sovereignty. The Lil'wat position, set out in the *Lil'wat Declaration of 1911*, is that they have neither been conquered nor have they or their ancestors entered into a cessation treaty

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[11] There were numerous applications before several additional courts that will be detailed in subsequent chapters.

[12] The Lil'wat People's Movement consisted of hundreds of traditional Lil'wat people including the representatives of several family clans within their traditional governing system. It did not claim to represent the Lil'wat Nation as that would require a consensus position reached by the Lil'wat family heads.

[13] In addition to being present at the roadblock for almost four months, those who were arrested spent 26 days in custody at Oakalla Prison. This was followed by their required attendance at a 33 day trial that extended over a five month period. Each Lil'wat member had to travel to and from Mount Currie, as well as obtain food and lodging, so as to respectfully 'meet with' the judge at the Supreme Court of B.C. in Vancouver.

with the British Monarchs, their successors or heirs.[14]

The Lillooet Lake roadblock was an attempt on the part of the Lil'wat people to prevent the destruction of the most sacred area within their unceded traditional territory.[15] They desperately wished to stop the blasting of a logging road through the Ure Creek area that contains their ancestor's gravesites as well as their ancient pictographs.[16]

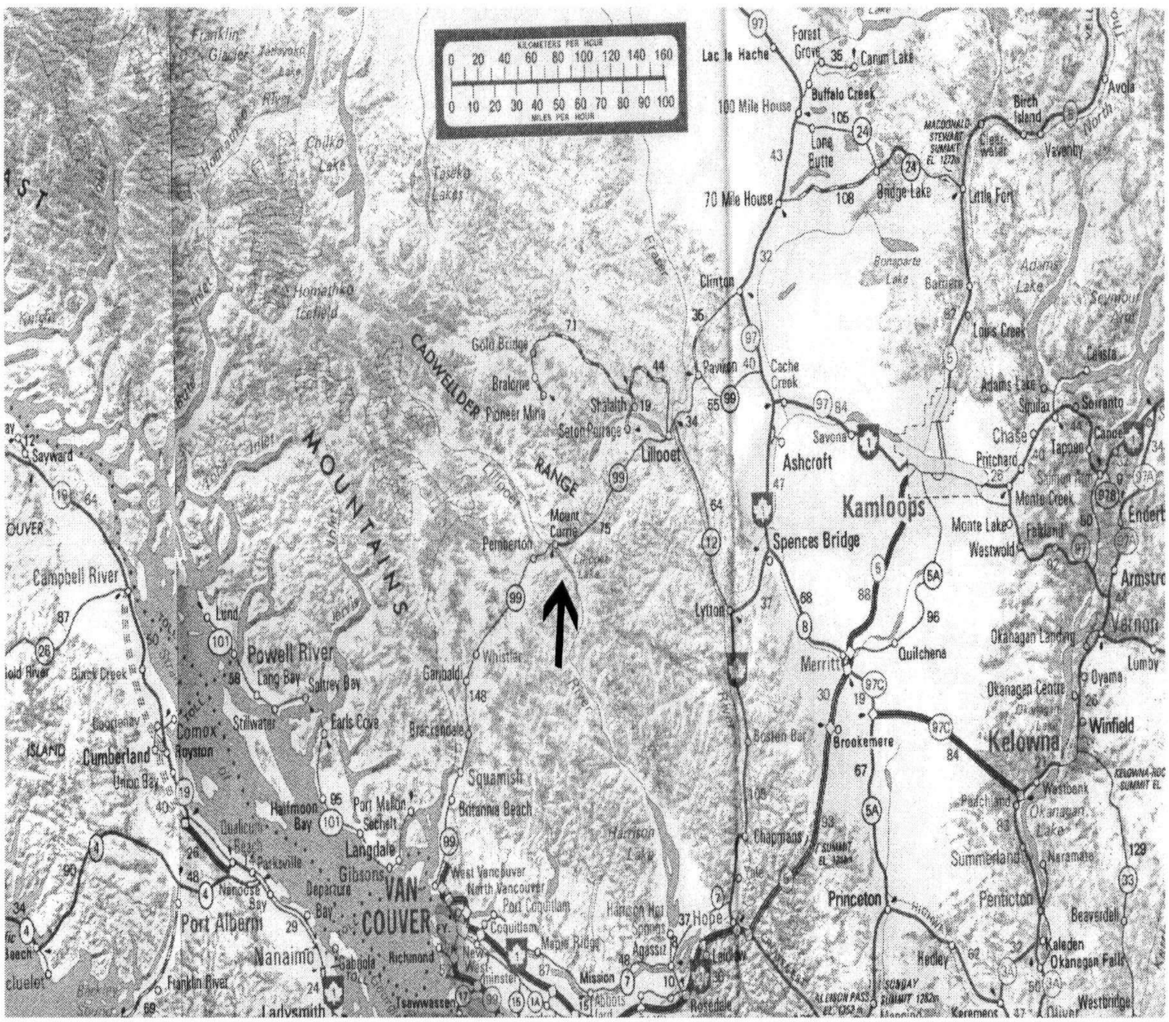

Figure 5. Map Showing Location of Mount Currie

[14] See Appendix II at 219.

[15] See testimony of Ishmeshkeya Chapter Two at 32-34.

[16] The significance of these ancient rock paintings is elaborated upon by Yahaalquin's testimony included at 37.

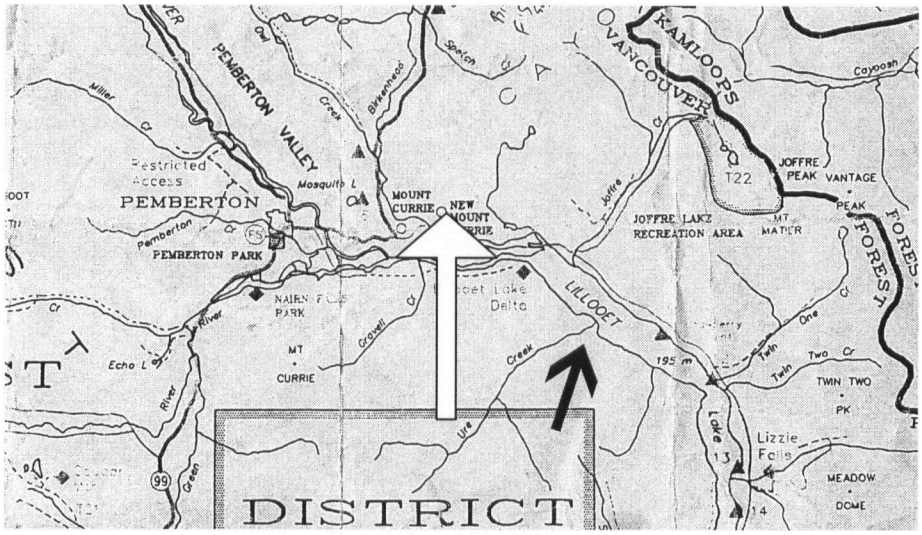

Figure 6. Map Pointing to Lillooet Lake Roadblock and Ure Creek.

Figure 7. Sacred Lil'wat Territory East Side of Lillooet Lake Near Ure Creek.

This Indigenous assertion of Lil'wat authority to protect their land led to Lil'wat charges of criminal contempt of court for disobeying the injunction granted to the B.C. Provincial government by the Chief Justice of the British Columbia Supreme Court on October 30th,

1990.[17] Each of the Lil'wat traditional people arrested and brought before the court were convicted and received criminal records for their attempt to protect their ancestor's graves.

The choice to analyze this particular case occurs for several reasons. First, an analysis of the legal proceedings resulting from the Lil'wat Roadblock will illuminate what is meant by traditional people's common reference to themselves as "Prisoners of Democracy". Many traditional Indigenous peoples refuse to vote or participate in the imposed elected Band Council governing structures. They are aware that Canada created these structures to replace the hereditary governing systems of the Indigenous Nations. The result is that the majority of the Indigenous people's voices are unrepresented and unheard. It is through the imposition of the Band Council system that Canada has implemented its control over most aspects of Indigenous peoples lives.

Being a witness to such subjugation has motivated me to write this thesis. I took an oath many years ago with traditional Lil'wat people, to "use my energies to publicize the history of colonialism" that oppresses Lil'wat people who continue to live in their traditional territories today. My oath to the Lil'wat people was the consequence of gaining an understanding of the international aspect of Indigenous issues and my realization that their Indigenous Nations' territorial sovereignty was being extinguished without their voices being heard. I have been specifically requested by Lil'wat traditional grassroots leaders to address my comments to my own race regarding their participation in the continuing oppression of Indigenous Nations.

Second, using the judicial system to record the assertion of sovereignty by the traditional Lil'wat peoples meets the continuing political, historical and legal objectives of the

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[17] *A.G.* v. *Chief Andrew, supra* note 10. Original Injunctive Application Hearing Oct. 22nd, 23rd, and 24th, 1990. Injunction Order issued Oct. 30th, 1990. Chief Justice Esson.

Lil'watum. For example, evidence of the Lil'wat sovereignty position, so clearly recorded throughout this action, stands in direct opposition to the Newcomer's[18] frequent assumption that Indigenous Nations have acquiesced to the imposition of Canadian sovereignty.

Third, the issue before the court involved a challenge to Newcomer jurisdiction in Indigenous unceded territory. The transcripts of the trial provide considerable evidence of the lack of impartiality in the response of the Canadian court system.

Fourth, the analysis of the domestic trial process reveals the existence of a *link* between the unavailability of an impartial forum to address assertions of existing Indigenous authority and jurisdiction over unceded lands and the extremely high suicide rates, particularly amongst young, native males.[19] The current denial within Canada of the international right of Indigenous peoples to social, cultural, economic and political self-determination is part of the explanation for the incredibly high rates of Indigenous suicide. This needs to be made increasingly visible and addressed by the domestic legal community including the judiciary.[20]

For example, Dean Nelson testified that Provincial authorization of clear-cut logging on unceded territory by Interfor without consulting and obtaining the consent of the Lil'wat people has manifested in tragic suicide rates:

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[18] 'Newcomer' as it is used in this thesis is meant to refer to all members of the Canadian society with the exception of Indigenous peoples.

[19] King writes of the infrequency of suicide in traditional native culture and states: "Our Elders tell us that suicide was not our way, before contact with Europeans." C. King, "Historical Context of Suicide", [unpublished paper, archived with the author] at 1.

[20] For example, the Honourable John Reilly of the Alberta Provincial Court held a public inquiry pursuant to the *Fatality Inquiries Act* in the Town of Cochrane, on Feb 26th, and June 11th, 1999. He forwarded a report to the Minister of Justice and the Attorney General of Canada regarding the suicide of Sherman Laron Labelle, a seventeen year old native male from Stoney Reserve at Morley with recommendations for the prevention of similar deaths. In his report he concludes: "Suicides among aboriginal young people are the result of the history of injustices that they have suffered and continue to suffer...To prevent young aboriginal people from taking their own lives there must be a commitment to end the tyranny that dominates and destroys their lives."

> Q. Have you anything to tell him about your brothers and sisters, what you've witnessed yourself as to their response to the destruction of your homeland?
> A. Well, no place to turn to show their feelings. More or less turn it to yourself and it just builds up. And not knowing when it's gonna come out or in what way. A lot of the violence that is shown or who it's taken out on they aren't the people that...are responsible for that. It just comes out. Whether it be on themselves, families. I know some people my same age that aren't here. They believed strongly enough. Maybe too strong...
> Q. The brothers and sisters that you're speaking of, what would you say caused their death?
> A. All negative things with one positive belief. I'd say seeing our strongest people and looking to them for direction and finding out that they're helpless.
> Q. And the one positive belief that they have that you speak of.
> A. That some day the wrongs will be righted. They were strong people, it's just the circumstances they were under. If they could hold on just a little bit longer then they would be here instead of in a graveyard.[21]

He continues to explain how he carries the same pain as those who commit suicide do because of witnessing the way the people and the land are now. He explains that without being given a chance to live as human beings and for the land to be kept unpolluted,[22] both the land and the people are going to "go under": "Take away hope from the people and they're not living any more. It's the same that goes for the land, it's not alive".[23]

Of the sixty-three Lil'wat accused named in this action, three of the young males are now deceased, including two of the strongest young Lil'wat traditional male singers. Eugene Dick

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[21] December 14th, 1990 Transcript at 8.

[22] In addition to the theme of the lack of jurisdiction throughout the Lil'wat's testimony there is also frequent reference to their awareness that their survival depends on their ability to maintain the purity of their land.

[23] December 14th, 1990 Transcript at 8; see also Ryan and Ominayak's article for a strikingly similar situation, where the loss of subsistence economies due to third party encroachers created dependency and powerlessness. This was reflected in the ever-increasing statistics on suicide amongst many other social ills. Their article explains that loss of viable subsistence economies results from the third party encroachment on Indigenous lands. "As the land base was disrupted human lives were shattered because the relationship with the land was broken. This meant a loss of linkage to the past, to the spirit world, to ancestors, to identity and to affirmation of self." They refers to the collective trauma of having "an important part of their world disappeared without so much as a sound." J. Ryan and B. Ominayak, "The Cultural Effects of Judicial Bias", in *Equality and Judicial Neutrality*, S. Martin and K. Mahoney, eds. (Calgary: Carswell Legal Publishers, 1987) 346-357 at 346.

died when the car he was in plunged into the Birkenhead river. Arnold Williams was found dead from hanging the day he was scheduled to appear in Provincial Court in nearby Pemberton on a charge of assault. His belief in sovereign Lil'wat jurisdiction was so uncompromised that I am told that he stated to fellow Lil'watum that "If the R.C.M.P come to take me from my homeland, it will have to be in a body bag."

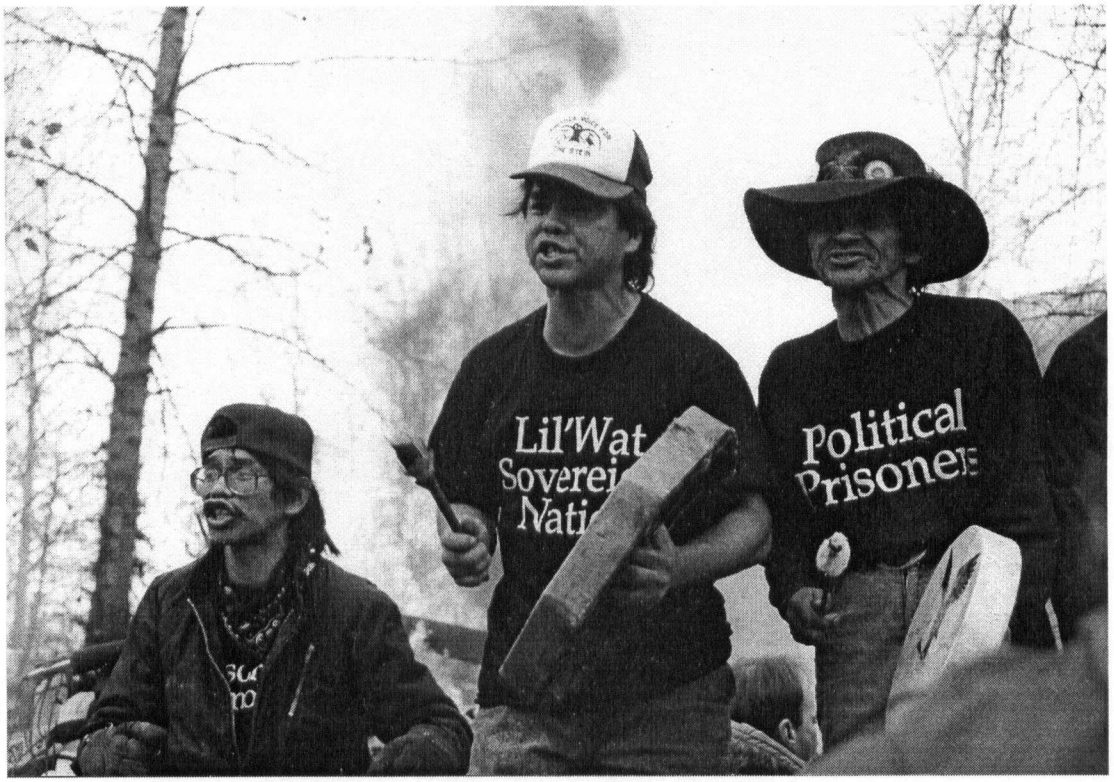

Figure 8. Arnold Nelson Leading the Singers.

In October, 2005, another Lil'wat male who was named in this action threw himself in front of the train as it came through the reserve. In March, 2006 Frankie Wells, became the most recent in the community to take his life, by shooting himself.

Fifth, a detailed examination of this dispute, where the protection of Lil'wat gravesites is pitted against a Canadian logging company's right to extract resources, will cause further reflection and dialogue on the extreme oppressiveness of the role played by the domestic legal system in such confrontations. A critical analysis of the Canadian system's current usurpation of jurisdiction is necessary to demonstrate the lack of an impartial forum in which

to resolve the ongoing jurisdictional disputes relating to traditional Indigenous territory.

A sixth reason for the examination of this case relates to the impact it had on the lawyers who assisted the Lil'wat people in their assertion of territorial sovereignty before the B.C. Supreme Court. The unjust manner in which the domestic justice system responded to the Lil'wat's position caused me to withdraw from further involvement in the practice of law. [24] At the completion of the case, on April 16th, 1991, I found myself advising the court that it had meant something to me to be an officer of the court. I had taken my obligation as a barrister to act as a minister of justice seriously. I stated on record, that I would not appear before the court again due to the fact that I no longer had respect for Canada's domestic system of justice. I could not continue, in good conscience, to participate as an officer of a court that would find an Indigenous person living uninterruptedly in tribal relations, guilty of criminal contempt based upon a writ of conspiracy to commit trespass and public nuisance on their unceded ancient territory,[25] without first requiring the Province to prove title. I resolved to:

> ...tell this story, the story that took place in this courtroom but I will do that in the world... I hope I live long enough to see their nationhood recognized, but I don't intend to do it through these courts.[26]

This ended my approximately fifteen-year long barrister's career.[27]

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[24] My colleague, Bruce Clark stated on record the following day, April 17th, 1991 Transcript at 4 that I had chosen "to maintain my dignity and to move on to other arenas in which the better to fight for justice". I would say, in all honesty, that I could foresee that unless I withdrew from the continuation of the assertion of Lil'wat sovereignty, not only Clark would end up incarcerated, psychiatrically assessed, and ultimately disbarred.

[25] *A.G.* v. *Chief Andrew, supra* note 10. Statement of Claim of the Provincial Government of B.C. at para.19: "The defendants, members of the Band and persons unknown have conspired to obstruct the Road and thereby to commit a public nuisance and trespass causing injury, loss and damage to the plaintiffs."

[26] April 16th, 1991 Transcript at 6.

[27] The cost of this decision is difficult to express. Whether you are disbarred or choose to leave as I did, suffice is say it has been challenging financially. But the real cost was my loss of faith that

Participation in this case, also brought to an end, the legal career of my co-counsel, Dr. Bruce Clark who has since been disbarred from the practice of law for refusing to retract his characterization of the judiciary as complicit in treason, fraud and consequentially ethnocide and genocide.[28] He made these strong accusations as a direct result of the endless refusal of the judiciary in British Columbia to hear the Lil'wat's substantive legal defense.

This thesis is my response to the domestic judiciary's handling of the territorial dispute. It is meant to illustrate the lack of impartiality in the domestic Canadian court system where the issue involves the assertion of Indigenous territorial sovereignty.[29]

1.3 Methodology and Outline

I examine a specific encounter between the dominant Canadian society and traditional Lil'wat people. I will identify overt and subtle colonial attitudes embedded within the law, its institutions and its accepted practices in the context of dominant Newcomer society-

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justice could be found in the courts on fundamental Indigenous issues. I had idealistically believed in the definition of jurisdiction as contained in Mozley & Whiteley's Law Dictionary: "A dignity which a man has to be a power to do justice in causes of complaint made before him." To this day I believe in the decision I made in 1991 to withdraw from participating as an officer of the court in which the criminalization of the Lil'wat people was condoned. It remains impossible to obtain an impartial hearing within the Canadian domestic legal system if asserting territorial sovereignty on behalf of an Indigenous client. Clark and I provide examples of two barristers that have paid the price and are in the position to make such a statement.

[28] B. Clark, *Justice in Paradise* (Montreal & Kingston: McGill-Queen's University Press, 1999) at 168; see also at 225 for the contents of Clark's *Notice of Disagreement* to the Law Society of Upper Canada regarding their disbarment decision.

[29] Mills observes: "Bell and critical race theory more generally recognize and seek to publicize the violence inflicted on people of color through the myth of legal neutrality and abstract law." Mills, *supra* note 9 at 20; consider also Milde's comment that "law is really best understood as another strand of the political process rather than as something apart from it." M. Milde, "Real Respect for the Rule of Law: A Critical Notice of D. Dyzenhaus, *Judging the Judges: Judging Ourselves*", (1999) 12 Can. J.L. & Juris. 333-343 at para.28.

traditional Lil'wat people relations.[30] This case study also seeks to make visible a series of invalid legal assumptions regarding Indigenous peoples.[31] It will reveal entrenched institutional biases that favor the continued self-interest of the Newcomer society. This thesis examines governmental legal positions, strategies, and practices that were condoned by the Superior court of the province when faced with an assertion of Indigenous territorial sovereignty. It is suggested that several actions of the government and the superior court judiciary constitute breaches of the rule of law, the principles of constitutional supremacy, and the honour of the Crown.

Although the legal argument in support of the existence of Indigenous sovereignty is of crucial importance, this area has been canvassed in detailed by Dr. Bruce Clark.[32] Rather than providing a comprehensive analysis of the Lil'wat's territorial sovereignty defense, I will be focusing on the remarkable history of the domestic courts' resistance to it through an analysis of the court transcripts.

In the unraveling of the myth of impartiality in the Canadian courts in the context of Indigenous jurisdiction, I challenge the assumption of British and Canadian sovereignty over

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[30] Richard Shaull's comment that "Thought and study alone did not produce Pedagogy of the Oppressed; it is rooted in concrete situations." is applicable to this Lil'wat case analysis. P. Freire, *pedagogy of the oppressed.* (New York: Continuum, 1970) at 19.

[31] Steven Newcomb's article assists in proving the majority of the assumptions relied upon by the superior court judiciary are remnants of our colonial period. They include the racist assumption originating in 15th Century religious doctrine that classified Indigenous peoples as heathen, savage, primitive and therefore subhuman. S. Newcomb, "The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson* v. *McIntosh*, and Plenary Power." Review of Law and Social Change, New York University, Vol. XX. No. 2, 1993, 303-341 ["Christian Nationalism"].

[32] See Clark, *supra* note 28; see also extensive legal arguments by Dr. Bruce Clark filed in numerous domestic court actions. For example see his 18 page pure law argument submitted in *International Forest Products Limited and Howe Sound Timber Co. Ltd.* v. *Harold Pascal, Bernard Dick, Reynold Joe, John Doe, John Doe and John Doe, as representatives of the persons blocking a road known as Ure Creek Mainline.* CA 103228 (B.C.C.A.) ["*Interfor* v. *Pascal*"].

unceded Indigenous territories through a critical legal realist perspective.[33] My goal is to increase awareness through the exposure of the intricate manner in which legal reasoning is used to mask judicial political activity.[34] Additionally, the thesis incorporates critical race theory[35] through the inclusion of insights into the role of law in Indigenous oppression,[36] counter-story telling,[37] and reliance on autobiographical information. With a deconstructionist aim, I hope to reveal unjustifiable legal fictions that underlie the current response of the Canadian Crown and judiciary to an Indigenous challenge of British sovereignty over unceded territory.[38]

Analysis of the actual legal proceedings provides a first-hand opportunity to observe the

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[33] See Mill's explanation that legal realists argue in addition to logic...social context, the facts of the case, judges' ideologies, and professional consensus critically influence individual judgments and patterns of decisions over time. Critical legal studies... further the legal realist project by making explicit the extent to which the classical conception of an objective system of legal rules perpetuate the interests of economic elites and promote class-based privilege Mills, *supra* note 9 at 16-17; see also R. Unger, *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1986).

[34] See E. Kwaw. *The Guide to Legal Analysis, Legal Methodology and Legal Writing*, (Toronto; Emond Montgomery Publications, 1992) at 9.

[35] Critical Race Theory (CRT) first emerged as a counter legal scholarship to the positivist and liberal legal discourse of civil rights. It departs from mainstream legal scholarship by sometimes employing storytelling. CRT looks at how citizenship and race might interact. "Critical Race Theory offers a way to understand how ostensibly race-neutral structures in fact help form and police the boundaries of white supremacy and racism... Critical race theory can also be used to provide the theoretical justification for oppositional "counter stories" that challenge assumptions from an outsider's perspective." L. Parker, D. Deyhle, and S. Villenas, eds., *Race Is...Race Isn't: Critical Race Theory and Quantitative Studies in Education* (Boulder, Colorado: Perseus Books, 1999) at 2.

[36] "The function of law is to legitimize domination." Kwaw, *supra* note 34 at 10.

[37] Counter storytelling is a methodology within critical race theory that attempts to rectify the omission, devaluation and misinterpretation of the history, experience and perspective of peoples of color. The inclusion of Lil'wat viva voce statements throughout this paper is meant to assist in filling gaps in western knowledge.

[38] John Borrows questions whether the mere assertion of Crown sovereignty is morally and politically defensible: "Sovereignty's incantation is like magic...This mere assertion is said to displace previous Indigenous titles by making them subject to, and a burden on, another's higher legal claims. Contemporary Canadian jurisprudence has been susceptible to this artifice." J. Borrows, "Sovereignty's Alchemy: An analysis of *Delgamuukw* v. *British Columbia*" (1999) 37 Osgood Hall L.J. 537 at 562 ["Sovereignty's Alchemy"].

reactions of both Canada's domestic governments and courts. Made without force or violence, the sovereign position asserted by the Lil'wat People's Movement[39] throughout the case, was the consensus response of the traditional Lil'wat people to the non-consensual Newcomer assertion of jurisdiction within their territory. The Lil'wat explained that they attended court in adherence to the original Indigenous/Newcomer agreement of Peace, Friendship, and Respect, in which each nation, the Newcomers and each of the Indigenous Nations, retained their own autonomy or sovereignty.

The Lil'wat traditional people, on the basis of their belief that the assertion of Lil'wat territorial sovereignty is an international issue, refused to surrender to the jurisdiction of the British Columbia Supreme Court. They did not consider the Provincial superior court to be an authority over them or their unceded territory. From the Lil'wat perspective, they attended court out of respect for the Canadian legal system. They insisted, therefore, that their appearance be referred to on record specifically as "a meeting"[40] so that it could not be considered as evidence of their surrender to the jurisdiction of the domestic court.[41]

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[39] The Lil'wat Peoples Movement was formed in 1990 by several traditional families of the Lil'wat peoples due to serious internal conflicts. The conflicts resulted from positions taken by the Chief and Council on behalf of the Lil'wat people that were unsupported by them. These positions were being imposed on them through the Band Council system. The People's Movement included hundreds of individual Lil'wats whose participation in their hereditary governing system enabled them to demonstrate their allegiance and commitment to Lil'wat law. The assertion of territorial sovereignty on behalf of the Lil'wat Nation was evidenced through the strong, non-violent stance taken by the people in protection of their ancestor's resting places.

[40] The Lil'wat accused were incarcerated for the first 25 days of the trial because of their refusal to sign a recognizance and thereby recognize the court's jurisdiction over them. The judge on Nov. 20th, 1990 became upset because the time they were serving in custody may already have been longer than if they were sentenced for contempt. The judge specifically requested that I speak to the Lil'wat accused to see if there was an agreement that could be reached that would allow for their release. It was a historic moment when the Lil'wat accused responded though me that they agreed "to meet' with the judge on a specific date for the continuation of the case. The judge agreed that they could use their wording while he would use his so as to enable him to release them without requiring that they sign a recognizance.

[41] This is of particular importance with regard to the doctrine of prescription that requires acquiescence on the part of the original sovereign. The sovereign assertion by the Lil'wat peoples,

The thesis will also reveal how the courts have institutionalized their lack of impartiality and draw on racist paradigms to reach conclusions that deny Indigenous territorial sovereignty.[42] The theory of the defense presented in this case is also very much in keeping with the suggestion of Robert A. Williams, Jr., that the most coherent and compelling strategy of resistance to colonialism, is to "deny the legitimacy of and respect for the rule of law maintained by the racist discourse of conquest and the doctrine of discovery."[43] In my view the court in this case has been extremely selective in it's use of the rule of law so as to enable it to enforce the injunction. As a result of such arbitrary use of power, the Lil'wat traditional leaders have concluded that without a fundamental change in the current approach of the Crown and the Canadian judiciary to unceded traditional Indigenous territories, there exists no possibility of reaching a just resolution.

Extensive resort is made throughout this case analysis to the contempt trial before the British Columbia Supreme Court. It is through the statements made by the Lil'wat people during this trial that this thesis contributes to the creation of the Lil'wat "counter-reality" of legal and political history regarding Indigenous/Newcomer relations. Historical knowledge of this case from the Lilwat defense perspective provides a true accounting of the events that took place in 1990/1. Neither the media coverage at the time of the incident nor the subsequent published case reports of this jurisdictional legal challenge recognized the historical significance of this case. The media focused on the economic loss in the tourist

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as recorded in this case before the Supreme Court of British Columbia, prevents Canada from arguing that the Lil'wat Nation has acquiesced to the Newcomer's usurpation of jurisdiction over their traditional territory.

[42] In Mill's opinion the analysis of a specific case is of significant assistance in positioning the judiciary "squarely within the racist paradigms from which they do their judging." Mills, *supra* note 9 at 22.

[43] R.Williams, Jr., The American Indian in Western Legal Thought: Discourses of Conquest (New York: Oxford University Press, 1990) at 325.

town of Lillooet, while the published case reports emphasize the legal position and arguments of the Band Council.[44] It is of particular interest, from a critical legal realist perspective that within these two reporting systems there is next to no visible record whatsoever of the territorial sovereignty assertion by the traditional Lil'wat people. Equally there is no public historical record of their criminalization within the Canadian legal system for attempting to protect their ancestor's gravesites within the most sacred part of their traditional homelands.[45]

The Lil'wat counter reality as told in the transcripts fills this overt gap in Lil'wat-Newcomer relations. The use of the Lil'wat traditional people's sworn testimony is one method of providing a direct voice to the Lil'wat people. Their statements provide the dominant society with a continuing record of the Lil'wat assertion of sovereignty in relation to their homeland. It is this empowering aspect that Professor John Borrows refers to when he states:

> Situating the interpretations and consequences of judicial decisions in affected communities gives a voice to people who are disadvantaged by the application of law.[46]

He refers to such accounts as "containing an alternative vision of law" or "Constitutional Law from a First Nation Perspective."[47]

Not only are transcript excerpts my preferred method of giving voice to each of the

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[44] Legal counsel for the Band Chief and Council confined her arguments to the issue of the constitutionality of the Province's resumptive power *vis-a vis* Indian reservation lands.

[45] When the Lil'wat traditional people first approached me to be legal representative of the Lil'wat People's Movement in this case, I recall naively believing that everyone would be able to empathize with the position of the Lil'wat people in this case given the universal reverence for the resting places of one's relatives.

[46] J. Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" U.B.C. L. Rev. (1994) Vol. 28: 1-47 at 3 ["Constitutional Law"].

[47] *Ibid.*

accused in the trial, but they also prove an invaluable tool through which to reveal and scrutinize the assumptions embedded in the colonizer's legal system. In order to expose these legal fictions, quotes are relied upon extensively to present the exchange of legal positions and supporting arguments on behalf of the Lil'wat people and opposing counsel, representing the Attorney General of British Columbia and the Attorney General of Canada. The transcripts also contain R.C.M.P. testimony that assists in recreating the role they played in the confrontation.

For example, in his testimony before the British Columbia Supreme Court, on December 12th, 1990 Sasquatch describes his participation in this way:

> We're respecting your guys' law right now....And like now we're respecting your law by coming in here to your courts out of respect, not to go blocking that road again just so as you guys can hear us, and yet we're respecting your law and you're not even respecting our territory right now when they're still out there logging, still out there building a highway...
> Even though our people have been treated badly for all these years, we still have enough respect to sit in here with you guys and listen to what you say, but you got to respect us too for wanting to keep life going on in this world.[48]

John Borrow's comments regarding Indigenous perspectives on constitutional law are applicable:

> As this alternative conception is placed beside the dominant discourse, we will see that the form and structure of First Nations jurisprudence may look very different from that which is commonly understood and is in perspicuous contrast with the dominant legal discourse and challenges many of its ideas.[49]
> ...we see a different vision of law that emphasizes a nation to nation relationship between First Nations and the Crown. This vision demands the restraint of legally oppressive power when it mutates or ignores this relationship. [50]

Finally, because it is frequently by way of a judge's procedural decisions that the alleged abuses of the rule of law are committed, a thorough examination of exchanges between

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[48] December 12th, 1990 Transcript at 30-33.

[49] Borrows, "Constitutional Law", *supra* note 46 at 10.

[50] *Ibid.* at 46.

counsel and the judiciary with respect to procedural matters are included. The reliance on the record of proceedings is the only method of reaching an informed conclusion about the alleged lack of impartiality in the provincial superior court. In keeping with the intentions of John Borrows, it is hoped that the thesis "challenges the explanations of those people and institutions that continue to oppress First Nation governments."[51]

As Linda Tuhiwai Smith states in *Decolonizing Methodologies: Research and Indigenous Peoples:* "...in law, there is an extensive history of attempts to legitimize the most dehumanizing of systems...the challenge is always to demystify, to decolonize."[52] After commenting on some of the assumptions and biases of the legal system she concludes: "...taken as a whole system, these ideas determine the wider rules of practice which ensure that Western interests remain dominant."[53]

It is precisely this point that this thesis aims to illustrate. My hope is that through my analysis of the court proceedings, the reader will be able to observe something 'other than' the rule of law, at work within the domestic legal system. This thesis is an attempt to demonstrate that this 'self-interest phenomenon', rather than the rule of law, is profoundly present within the positivist system that the judiciary insist they are bound to uphold.[54] The thesis is presented as a legal challenge to the judiciary's current reliance on positivism as the

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[51] Borrows, "Sovereignty's Alchemy", *supra* note 38 at 25, fn. 108.

[52] L. Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: University of Otago Press, 1999) at 16.

[53] *Ibid.* at 45.

[54] Consider Allan's definition: "At its lowest common denominator Hart's positivism makes two claims: 1. that law is best understood as a system of rules, and 2. that 'law as it is' should be kept conceptually distinct from 'law as it ought to be." J. Allan, "Positively Fabulous: Why It Is Good to Be a Legal Positivist" (1997) 10 Can. J.L.& Juris. 231-248 at para. 3; consider also Boyd's explanation of positivism as "The theory that law can be understood as a valid set of rules whose content is to be determined through a logical system of precedents, rather than through the application of moral considerations." N. Boyd, *Canadian Law: An Introduction* (Toronto: Thomson Canada Limited, 2002) at 351.

justification for their rulings. Such an interpretation of positivism lacks the fundamental requirement of a strict separation between the practice of politics and the practice of law.

The focus throughout the thesis on revealing the self-interest of the dominant society embedded in the court process is obviously entwined with the legal requirement of impartiality. Once might is judicially condoned as right, the essential cornerstone of the rule of law is non-existent. Impartiality is so fundamental to the functioning of the rule of law that a judgment of a court that proceeds without it results in a loss of jurisdiction rendering its judgments null and void or of no legal consequence.

The second chapter of the thesis begins with extensive contextual information, so as to place each of the parties in the roles they played in this jurisdictional confrontation regarding unceded Indigenous territory. Following a summary of the various court actions, the legal positions and roles of the traditional Lil'wat people, the Band Council, the Attorney General of British Columbia, the R.C.M.P., the Attorney General of Canada, and legal counsel are outlined. This material, it is argued, is part of the information necessary for a reasonable person to be well informed prior to consideration of the legal test of whether there is an apprehension of bias.[55]

The judicial role is developed in chapter three. It contains a doctrinal summary of the more important requirements of judicial and institutional impartiality and includes analysis of

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[55] Consider the Supreme Court of Canada's discussion on the apprehension of bias: "Public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so. A judge's impartiality is presumed and a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified. The criterion of disqualification is the reasonable apprehension of bias. The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude. Would he think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?" *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, (2003), 231 D.L.R. (4th) 1.

a series of examples from the trial transcripts that relate to specific impartiality prerequisites.

The fourth chapter begins with a brief discussion of the requirements of the rule of law followed by a compilation of excerpts from the criminal contempt trial relied upon to demonstrate judicial breaches. This material is required to enable the reasonable person to compare the procedural decisions and formal rulings of the judiciary with the legal requirements of impartial adjudication, prior to their consideration of the legal test for bias.

Chapter Five contains explicit observations regarding embedded colonialism as the major cause of the domestic court system's lack of impartiality. The contribution to the jurisdictional dispute of a faulty domestic legal education is briefly considered, as well as suggestions relating to the immediate need to transform the Indigenous curriculum in Canadian law schools to an international, rather than a colonial perspective.

The sixth chapter addresses the urgent call for the decolonization of the judiciary and legal practitioners. I urge those of us involved in the administration of justice to increase our awareness of the international human rights of Indigenous peoples in a timely fashion. This will result in the creation of an internationally overseen, mutually agreed upon, mediation style resolution process. A mechanism built on a cross cultural foundation would profoundly enhance the impartiality of the process, something that is essential for the resolution of outstanding issues between Indigenous nations and the dominant society comprising the Canadian nation.

CHAPTER TWO

Analysis of the Lillooet Lake Roadblock Case: Contextual Information:

2.1 The court process and associated applications:

The main trial in which the traditional Lil'wat people were involved consisted of the criminal contempt of court hearing. At that trial they refused to submit to the jurisdiction of the B.C. Supreme Court. Only counsel for the Mount Currie Chief and Band Council entered an appearance in that proceeding. While the traditional Lil'wats in Supreme Court were having no success in having the law in support of their sovereignty defense heard, the appeal by the Band Council Chief of the original injunctive order proceeded without them. Appendix I provides the reader with a chronological delineation of the criminal contempt hearing as it proceeded through the domestic court process.[56] It will also help bring order to the numerous applications made on behalf of the Lil'wat traditional people before numerous judges at every level of the available domestic courts.

Prior to my decision to withdraw from further participation in this case, I appeared on behalf of the traditional Lil'wats before thirteen different judges within a five-month period. None of these members of the domestic judiciary found themselves willing or able to address the substantive defense of the Lil'wat people prior to their criminalization for their assertion of jurisdiction in sacred Lil'wat territory. This chapter describes the various parties involved and their roles in the proceedings, beginning with the traditional Lil'wat people.

2.2 The role of the Lil'wat traditional people:

The Lil'wat traditional people emphasized several points when they prepared Dr. Bruce Clark and me for the defense of their criminal contempt of court charge before the Supreme

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[56] See Appendix I at 213-18.

Court of British Columbia. They gave utterly clear instructions that they were Lil'watum rather than Canadian, as is so often erroneously assumed. They repeatedly explained that they had never been conquered, entered into a treaty with British Monarchs or their successors or heirs, or surrendered their Lil'wat sovereignty in any manner whatsoever. They confirmed that their position as contained in *The Lil'wat Declaration of 1911* has never changed.[57] They have no oral history of ever having ceded their land.[58] They reiterated that they were not subject to Canadian jurisdiction because Canada had yet to enter into a treaty with them.[59]

On Dec. 5th, 1990, Clark presented the Lil'wat legal position to the court:

> Clark: They are not here to attorn to the jurisdiction of this court. Rather, they are here to meet with your lordship in order to inform this court of

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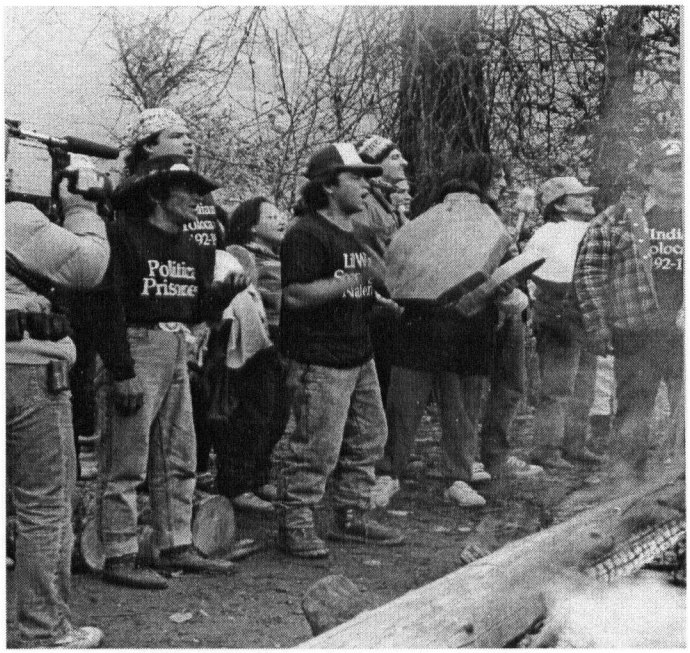
[57] See Appendix II at 219 for the *Lil'wat Declaration of 1911*. Lil'wat leaders delivered the *Declaration* to the Federal and Provincial governments as well as representatives of the British Crown in 1911.

[58] Henderson explains: "The Supreme Court of Canada in *Sparrow* [1990] 1 S.C.R. 1075, held that the word "existing" means "unextinguished."..."To extinguish Aboriginal rights the Sovereign's written command must be clear and plain." J. Henderson, "Empowering Treaty Federalism", (1994) 58 Sask. L. Rev. 241 at 378 ["Empowering"]. The Supreme Court of Canada decided *Sparrow* prior to the Lil'wat confrontation and the Crown was unable to provide evidence of extinguishment regarding the land in question. *Sparrow* v. *The Queen* [1990] 1 S.C.R. 1075 [*"Sparrow"*] Why did the court in the interim injunction application refuse to recognize the valid legal assertion that the Lil'wats had authority over their unceded territory?; consider also that the court held: "sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians" is required by the words "recognition and affirmation." *Sparrow* at para. 83. This particular statement of the Supreme Court of Canada makes the treatment of the Lil'wat people in the 1990/1 criminal contempt case all the more relevant in a discussion on judicial impartiality. Such questions will be elaborated upon in the following chapters however, a hint of the answer, lies in Moodie's conclusion that: "The practical consequence of all this seems to be a position, fixed by the close of the 20th century, whereby the Supreme court determined that it would consider only narrow assertions of specific self-government powers on a case-by-case basis, each time invoking the *Van der Peet* "distinctive practices test" in assessing the claimed right." D. Moodie, "Thinking Outside the 20th Century Box: Revisiting 'Mitchell'-Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government" (2003-2004) 35 Ottawa L. Rev. 1-41 at 21.

[59] See Clark's statement: "So far as the Indians' unpurchased lands were concerned, the only jurisdiction before treaty was the jurisdiction to make the treaty, and the constitutions of both the United States and Canada assigned that jurisdiction to the federal governments. Clark, *supra* note 28 at 43.

> the reason this court does not have jurisdiction over them. The whole purpose of me addressing this court is to assert my clients' sovereignty and their corresponding constitutionally protected immunity from such contempt proceedings.[60]

Instead of referring to their allegiance to Canada, the Lil'wat traditionalists made it exceedingly clear that their allegiance was to their nation and it's laws, which included their obligation to the Creator to protect their traditional territory from destruction. They were adamant that it was obedience of Lil'wat law that they considered paramount. It obliged them to protect both their ancestor's gravesites and their ancient pictographs from the desecration that was taking place at that time. While instructing counsel, several of the traditional people indicated that they were prepared to give their lives, if that was what was it took to stop this sacrilege.[61]



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[60] December 5th, 1990 Transcript at 52.

[61] Arnold Williams at his sentencing hearing also advised Justice MacDonald: "...some of us said in your own presence in your own court, that we are ready and we are willing to die for the territory that our people spilt their bloods on." April 30th, 1991 Transcript at 14; I had also advised the judge on Jan. 17th, 1991 Transcript at 13, that I had been instructed by my Lil'wat clients that they were prepared to die, if necessary, in order to assert Lil'wat jurisdiction over the land in question.

Figure 9. Traditional Lil'wat People Face the R.C.M.P.

In order to place this dispute regarding jurisdiction of the road in its proper context, negotiations had taken place between the Mount Currie Band Council and the Provincial government over the previous three decades. The representatives of the Lil'wat People's Movement[62] were adamant, however, that neither the Band Council Chief, nor his lawyers could represent or make agreements on behalf of the Lil'wat Nation.[63] They were additionally adamant that such negotiations must take place between the Lil'wat and the Federal government rather than with the Province.

They explained that the Band Council was a foreign governing system, imposed upon them as part of the reservation system by Canada.[64] They consider the Band Council as

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[62] This group of several hundred grassroots Lil'wat people reached decisions regarding their actions and positions through the process of consensus in accordance to Lil'wat governance. They did not claim to speak for the Lil'wat Nation but rather as a group within that nation, who were asserting their internationally protected human rights.

[63] Henderson explains the assumption that Indigenous people transfer authority to a centralized ruler or king as do the Europeans is generally absent amongst Indigenous governing systems. "Indeed, a total transfer of Aboriginal authority over the members of First nations is inconsistent with Aboriginal political thought. Such a concept requires a centralized ruler or king, a European tradition that is generally absent among Aboriginal peoples. Only positive law empires created around centralized rulers or aristocratic society can transfer total control to another ruler. ...none of the First Nations had such an idea or structure." "Empowering", *supra* note 58 at 253. This understanding is of assistance in the realization that the present Canadian Band Council system is legally unable to surrender the rights of the Indigenous nations.; see also Taiaiake's comment that "Non-native structures, values and styles of leadership lead to coercive and compromised forms of government that contradict basic Indigenous values"..."Even if Band Chiefs have good intentions holding non-consensual power over others is contrary to tradition." A. Taiaiake, *Peace, Power and Righteousness: An Indigenous Manifesto* (Don Mills, Ontario: Oxford University Press, 1999) at 23-26; see also Crompton's paper which focuses on the Canadian creation of the new identity of native politicians, including 'Chiefs' and 'Band Councilors'. L. Crompton, "Without Consent: Technologies of Extinguishment Through Constituted 'Chief' and 'Band Council' Agreements." (April 2000) [unpublished paper for Law and Society Seminar with Alan Hunt, U.B.C. School of Law] ["Without Consent"].

[64] The first five Lil'wat reserves, comprised approximately 1200 acres, and were allotted by Commissioner O'Reilly on the 6th of Sept., 1881. On June 15th, 1904 a further 4000 acres were designated reserve lands by Commissioner Vowell. Between then and 1929, four pieces of land totaling 1200 acres were added to existing Lil'wat reserve lands.

nothing more than an administrative arm of a foreign government that has usurped jurisdiction over the 'reserve'.[65] The Lil'wat traditional people consider it an illegal remnant of the colonial period. How, they ask, 'could an imposed Band Council Chief and Councilors be acceptable as Lil'wat Nation representatives when their salaries are paid by the Canadian government?' They insist the Mount Currie Chief and Band Council have neither the legal capacity nor the necessary consent to act as if they represent the Lil'wat Nation.

The Lil'wat traditionalists also advised me that although the Band Council had been involved in negotiations with the Provincial government over the public's use of the road through the reserve since at least 1970, no agreement between the two had ever been reached.[66] There was, therefore, no legal basis for access through their territory by either the Province or the general Canadian public. In fact, the Lil'wat people, at a highly attended community meeting shortly preceding the roadblock, overwhelmingly rejected the suggestion by the Band Chief and Council's lawyer that they lease the road to the Province.[67]

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[65] Consider for example the imposition of a foreign legal concept when the domestic legal system made the elected Indian Chief the legal representative of all persons in his or her Band; see also where Henderson defines the right to self-determination as "the legal right for the capacity of any people or nation to decide how to order its political relations to others and how it shall live." "Empowering", *supra* note 58, at 298; consider also that to begin to unravel the institutional impartiality myth, one must consider why the Provincial government and the Superior court insist on acknowledgment of the Band Council system rather than the traditional family head governing system of the Lil'wat Nation. The insistence that the Mount Currie Chief and Band Council represents the Lil'wat Nation is particularly questionable, given that it is acknowledged within Canadian case law that the statutorily created Band Council is a federal board, with less power than a provincial municipality.; see also where the Federal Court of Canada held: "The Band Council is a statutory body constituted by Parliament under the Indian Act." *Shubenacadie Indian Band* v. *Canada (Human Rights Commission)* (T.D.) [1998] 2 F.C. 198; see as well where the same court ruled that "Band Councils are an arm of the Federal government...a somewhat restricted form of municipal government on federally-controlled Indian reserves." *Gabriel* v. *Canatonquin*, [1978] 1 F.C.124 at para.10, aff'd [1980] 2 F.C. 792.

[66] This fact was acknowledged in a letter dated September 26th, 1990 from D.I.F. MacSween, Chief Property Agent, Ministry of Transportation and Highways written to Ms. Janice Cochrane, Director General of Indian and Northern Affairs Canada.

[67] A community meeting was held at the Mount Currie gymnasium upon the Band Council receiving a $124,000 cash offer from the Province. The traditional people instructed the Band Chief and

Meanwhile, as these negotiations wore on without agreement, the provincial Ministry of Forests granted International Forest Products Limited ("Interfor") a Forest License in August of 1982. The license allegedly conferred the right to harvest 59,300 cubic meters of Crown timber from the most sacred area within the Lil'wat traditional territory each year, for fifteen years, from the date of the grant.[68] With their provincial license in hand, the logging company continued blasting a road along the east side of Lillooet Lake, regardless of having been advised by the Lil'wat people of the desecration of gravesites and pictograph sites the blasting was causing.

The Lil'wat people had also made numerous attempts to resolve the issue of public access with the Federal government, which they consider to be the proper party to deal with such issues. Consider, for example, a letter forwarded to the Prime Minister of Canada on November 10th, 1989 from the Mount Currie Band Council Chief:

> We request that you, Mr. Prime Minister, meet with us so the Lil'wat's interpretation of sovereignty can be properly aired and elaborated. Failure on your part to do so can only be interpreted as an absence of good faith and a confirmation that your government is committed to a course which we will be compelled to resist at all costs. With your immediate response please contact me. Chief Fraser Andrew.

The Lil'wat Band received no response to its many attempts to involve the Federal government in its dispute with the Provincial government regarding public access through the reserve.

It was Interfor's refusal to halt their blasting of a road through this sacred area that caused the Lil'wat people to block access to this specific area by preventing traffic in general from

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Council to advise the Provincial government in writing of their refusal of the monetary offer. Ms. Pinder, on behalf of the Chief and Council advised the Province of the refusal in a letter dated Sept. 26th, 1990.

[68] In excess of 100 logging trucks per day were transporting logs through the village of Mount Currie at the height of logging season in 1990.

passing through their land. What made this most urgent was the sacredness of this particular area to the Lil'wat people, not only as burial grounds but also as spiritual training grounds. Their need of recognition of their right of self-determination or jurisdiction over their homeland is also due to their fundamental belief that their very survival depends upon maintaining the purity of their land.[69]

The Lil'wat people have yet to obtain international human right protections including a right to a fair hearing before an impartial tribunal. [70] At an international level, a review of the domestic government actions to criminalize the Lil'wat people's efforts to protect their ancestor's graves and sacred sites from desecration could be undertaken. Before an international forum the following Lil'wat statement would perhaps be granted more weight:

> Ishmeshkeya (phonetic): Howe Sound Timber and International forests are trying to take the last old age forest growth in our entire territory. And they want to go through our sacred land for it.[71]

While Ismeshkeya summarizes the process by which the Provincial government initially obtained access through their reserve, she stresses that it was without their consent and reveals conflicts of values between the dominant society and the traditional Lil'wat people:

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[69] See testimony of Tsemhu7qw on Dec. 11th, 1990 Transcript at 32-3.

[70] This international human right is contained in Article 10 of the United Nation's *Universal Declaration of Human Rights.* Adopted and proclaimed by General Assembly Resolution 217A(III) of December 1948 ["*UDHR* "]; see also *International Covenant on Economic, Social and Cultural Rights* and *International Covenant on Civil and Political Rights*, both contained in B.A. Res. 2200(XXI), 21 UN GAOR, Supp. (No. 16), UN Doc. A/6316 (1967). Came into force on 3 January 1976 and 23 March 1976 ["*ICESCR"*] and [*"ICCPR. "*] respectively. Canada acceded to these covenants on 19 August 1976. *The Optional Protocol to the Covenant on Civil and Political Rights*, annex to G.A. Res. 2200A, 21 UN GAOP, Supp. No. 16 59, UN Doc. A/6316 (1967), came into force on 23 March 1976, and was acceded to by Canada on 19 August 1976.

[71] Howe Sound Timber Company was contracted by Interfor Corporation to build logging roads on their behalf. See April 15th, 1991 Transcript at 30.

In 1949 the PFRFP, the Prairie Farmer's Rehabilitation Farm Program[72] came to Lil'wat and they asked our people if they could lower the Lillooet Lake. But in order to lower the lake they had to bring equipment through our land. So they asked our people, my father was one of them, if they could use the land long enough to bring the equipment through and lower the lake. And so our people said.... That they were going to allow an agreement for to move fences and fruit trees just to make it wide enough for them to get their equipment through, and that was done. ...however, there was an illegal transfer of the agreement to the province. ...There was never any agreement or consent given from the Lil'wat to the province for the use of this land. We wanted to sit down and talk about the past use of this road before we talk about any future use because we feel that's right. Our people were meeting for several months prior to this roadblock out of frustration because there was no one listening or doing anything about our concerns and that was the total destruction of our territory. We could hear the blasting. [73] We knew that there was land being desecrated without our consent. And over the total area of land that we were even forbidden to go to ourselves because of the sacredness of this land because this is where our whole history lies. The richness of our culture is in this area of land that we are trying to protect.

When we accepted the European people to live side by side with us, they brought a disease called small pox. And there is tens of thousands of people, our people, that are buried throughout this whole area of land which surrounds the Lillooet Lake. And our people at that time, this was before they even knew of the religion called the Roman Catholic, our people had powerful faith and respect for the creator.

They used to go this area of land up to eight years long it took to train. There was two brothers. They were the protectors of our land. They were chosen by the people to go train there to become ackwa (phonetic). And ackwa means sacred. They didn't take anything with them. They stayed in this area of land. And when they came back they were so powerful that they could even---they could even float down the river on

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[72] This association represented the non-native farmers in the Pemberton Valley who were attempting to reduce flooding on their farmland many miles to the west of Lillooet Lake and the Mount Currie reserve by lowering the water level of the lake. The access through the reserve they hoped to obtain was the most convenient way to bring in their heavy equipment. The Provincial government claimed that the negotiations on behalf of the Pemberton farmers relating to access for their irrigation project had resulted in a right of public access that was simply assumed by the Province at a later date.

[73] It is important to appreciate that there are two different roads being referred to in the Lil'wats' testimony. One road is being blasted along the east side of Lillooet Lake through their most sacred land and the other road, frequently referred to, is the road on their reserve that they blocked access on. Although throughout the confrontation the government referred to the matter as the Duffy Lake Roadblock, I was instructed by a Lil'wat leader to refer to the matter as the Lillooet Lake Roadblock, as it did not occur near the Duffy Lake but rather near Lillooet Lake on the reserve. In Ishmeshkeya's testimony on April 15th, 1991 at 28, after referring to her concerns about the road being blasted through their hillside of sacred gravesites, she referred to the damage resulting from over 100 logging trucks through their reserve each day: "There were so many people hurt just on that one road. They see people walking down the road. You would think they would slow down? No. They even took one car along with them. And there is one baby still in the hospital from brain damage. People eat their dust all summer long on this road. People have allergies because of the dust."

> a blade of grass. They could even run and catch up to a deer. And even scoop a crow before it could even fly because they were ackwa. They were so sacred.
>
> And the people were always very busy in sustaining their lives. There was these two people that were selected to be their protectors while the rest of the people just gathered the different herbs and the different food throughout our territory to survive on.[74]

Her testimony supplies the reader with a glimpse into the spiritual significance to the Lil'wat people of the area being desecrated. In the summation of her testimony she reiterates: "The Provincial government has no legal means on using this land..." Her detailed knowledge of the history and of the method used by the Province to gain access through the reserve provides insight into the illegality of the process. The Lil'wat people are most aware that they have never given the consent necessary to allow public access through their reserve. This awareness is expressed in the following statement of another Lil'wat accused: "My name is Lachsha (phonetic). I am the granddaughter of Miditayash (phonetic). Just because there is a road going through there just doesn't mean it is yours."[75] Her comment strikes at the assumptions underlying the actions of the Provincial government in this dispute.

Next, a member of the family that has actually lived on the piece of land being used for the roadblock for generations: Qual'wa: "When I was at the fire, right where the fire was where the land—where our sacred fire was were our land sits, that's my grandfather's. That land is part of our family tree. It is ours. What I by mean "ours" is the whole Lil'wat."[76] Important discussions and decisions amongst the participating traditional Lil'wat people were made by consensus before this sacred fire that was kept burning throughout the duration of the roadblock.

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[74] April 15th, 1991 Transcript at 26.

[75] April 15th, 1991 Transcript at 59.

[76] Dec. 12th, 1990 Transcript at 8. His statement reflects individual possession within a communal stewardship where he refers to the Lil'wat peoples' relationship with their land.

One of the Lil'wat accused testified that the section of the road the government allegedly expropriated crossed his family's land:

> Paul Pierre: That road goes right through the middle of my property. And I still say that people have no jurisdiction over me. That's all I got to say...
> The Court: Mr. Pierre, I suspend sentence on you.
> The Speaker: That don't mean anything to me.[77]

His response to the judge reflects the strength of his belief that the authority of Lil'wat law regarding the land in question is paramount.

In keeping with this belief, the traditional Lil'wat people expressed during the preparation of the contempt case their wish for it to be clearly understood that their appearance in the foreign court was not in any manner a surrender to the jurisdiction of the court. From their perspective it was simply in keeping with their side of the original Indigenous/Newcomer agreement of Peace, Friendship and Respect.[78] It was an act of respect to the Canadian legal system, by continuing to 'meet' with the judge regardless of the fact that they considered the court to be without jurisdiction.[79] As further evidence of the agreement, they maintained what the judge referred to as a respectful manner in the

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[77] April 16th, 1991 Transcript at 47.

[78] Lil'wat people refer to the *Guswehenta (Kaswehntha) Two Row Wampum Treaty of Alliance* of the Iroquois/Haudenosaunee as evidence of this agreement in which autonomy for the governing systems of both the Newcomers and the Indigenous Nations is confirmed. The Two Row Wampum Belt is summarized by the Iroquois/Haudenosaunee as follows: "This symbolizes the agreement under which the Iroquois/Haudenosaunee welcomed the white peoples to their lands. We will NOT be like father and son, but like brothers. These TWO ROWS will symbolize vessels, traveling down the same river together. One will be for the Original People, their laws, their customs, and the other for the European people and their laws and customs. We will each travel the river together, but each in our own boat. And neither of us will try to steer the other's vessel." The agreement is kept by the Iroquois/ Haudenosaunee to this day.

[79] Henderson states: "Without manifested consent by the First Nations to the treaties, no alien conventions and laws applied to them." then adds: "The same principle applies to those First Nations which chose not to enter into a formal treaty relationship. They have delegated nothing to the Imperial Crown" "Empowering", *supra* note 58 at 250 and fn. 37; he concludes: "Neither the prerogative treaties, instructions, proclamations nor acts of the imperial Parliament ever authorized the provinces or the federal government of Canada to enact a comprehensive legislative code for First Nations or their members." *Ibid.* at 273.

courtroom, regardless of the fact they were jailed for twenty-six days and required to appear for a lengthy 33 day trial for their alleged criminal behavior.[80] In return, however, they expected similar respect to be shown for their traditional Lil'wat governing system and laws. They were, therefore, particularly disturbed not only by the court's refusal to enforce it's own rule of law that provides protection of Indigenous land from encroachment,[81] but also in it's refusal to recognize Lil'wat law as having authority over the territory in question.

The following Lil'wat member's statements make reference to the lack of respect they are experiencing in the court process:

> Sasquatch: ...right now... they're still out there logging, still out building a highway.[82]
>
> Eugene Dick: We lost our pictographs. They're still blowing them up today while you guys have us here. And that fiduciary trust obligation says supposed to be no production for the white man until we settle things here. Still behind our backs.[83]

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[80] Mr. Justice MacDonald comments on the peaceful nature of this particular demonstration and "the genuine beliefs evident from what I heard this morning, as well as what I heard last fall, in the righteousness of this cause." April 15th, 1991 Transcript at 31; see also the judge's statement: "...your clients have showed what I consider to be a considerable amount of respect for my position and my obligations here..." March 11th, 1991 Transcript at 61. It was most difficult for the Lil'wat people 'to meet with' the judge in Vancouver considering that the majority were unemployed in terms of a paying job. The majority did not own vehicles. In addition to being incarcerated for 26 days each Lil'wat had to provide for their transportation to and from Mount Currie as well as food and lodging in the city during the lengthy trial.

[81] The theme that the rule of law itself was on trial ran throughout this case. An example is where Clark states: "I think its important that message get out to the Indian people of this country, to the aboriginal people, that just because the venal federal, provincial, colonial governments with their rapaciousness have gone about trashing the law and, in effect, committing frauds and abuses contrary to the Imperial scheme that it doesn't mean the law itself is corrupt. Just because the administration of the law is corrupt doesn't mean that the rule of law is fundamentally flawed or that there's something inherently wrong with the concept. And it's in that sense that I'm asking that your lordship vindicate the rule of law. Not vindicate the aboriginal peoples, but to vindicate the rule of law. It's in that sense that when I said the other day the rule of law was on trial that I meant what I said." Dec. 5th, 1990 Transcript at 65.

[82] Sasquatch in his testimony on December 12th, 1990 Transcript at 31, is referring to the road through their sacred area on the west side of Lillooet Lake. The logging corporation known as Interfor, obtained an interlocutory injunctive order from Mr. Justice Wetmore of the B.C. Supreme Court on February 1st, 1991, (after making a minor detour around a group of visible cache pits) that allowed the corporation to continue to blast a road through this sacred hillside.

[83] Dec. 14th, 1990 Transcript at 2.

> Yahaalqu: ...they just clear cutted them right through and they went right up into the mountains there right towards the burial grounds...the whole area is sacred. The whole west side of the lake.
>
> A lot of [pictographs] are very important to us 'cause the trainers always leave their markings there and powerful medicine people always put their markings in the mountains by creeks, by lakes. ...The areas where the burial ground is that the people keep talking about today at the court is—the whole mountain area is, it's like a cemetery to our people. It's from the ancient ones, old ones, people that are buried there and we have to protect them...The people are buried in platforms in the trees there, and also the twins that died they're put on the branches, just on the branches so the grizzly bear could come and take the twins back.[84]
>
> Q. ...where did the road appear to be going so far as you could tell?
>
> A. Right through the spiritual grounds, the burial grounds ..
>
> A. They are disturbing the old ones, the people passed on...So the old ones up there, they are angry for what is going on. That's why I say this must stop now. Even as we speak today, you know, they are still working on this road. Each word we speak they take about a foot of the road.
>
> A lot of the medicine people, they trained along creeks, edges of lakes where there is pictographs, there are markings, the histories...that's where all the power points are from the supernatural, where we get our powers from training before the sun comes up.[85]
>
> Mr. Dick: It's kind of hard for us to even come here to talk to you because you guys don't seem to hear what we say. We pray for you. We try to tell you—we tell you the truth every time we come here. Still you guys only hear what you want to hear, see what you want to see. It's hard for me to come out to this and look for a ride and have to look for my meals, and you guys are living really good here, make your money on us, criminalizing us. Kind of hard for me to come back and forth. And I've got things to do at home. I have to go work in gardens or hunting. That's my survival. I don't work for money. I work for my –living. I don't get paid money. I get paid with food. I make my own drums, do my art. That's my survival. Where I get my drums comes from the hills. It's kind of hard for me to sit back and watch you guys blow up our grave sites there and sit back and maintain. I don't know who the real criminals are. I'm not a criminal. I ain't no roadblocker. I'm a Lil'wat Nation. I'm a protector of the land. Thanks for listening[86]

Yahaalqu has managed through his testimony to provide a deeper understanding of why the Lil'wat are doing every peaceful thing in their power to prevent the destruction of what has profound meaning to them as traditional Indigenous people. The spiritual interference

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[84] *Ibid.* at 21-25.

[85] *Ibid.* at 29.

[86] April 30th, 1991 Transcript at 14.

with their way of life and oneness with their land is extreme.

Kasheenuk explains that the area where they are blasting is the area of Lil'wat registered trap-lines:

> Kasheenuk: And an elderly man has 500 traps in there yet, they are still in there. And also Chief Paul Dick has a trap-line in there…That's the only valley in Pemberton that has not been touched. [87]
> Qwal'wa: We are like the fish or the deer. Lil'wat is our home... We were there before Christianity and our forefathers told me—"Our land, we should never sell our land. That is part of us. [88]

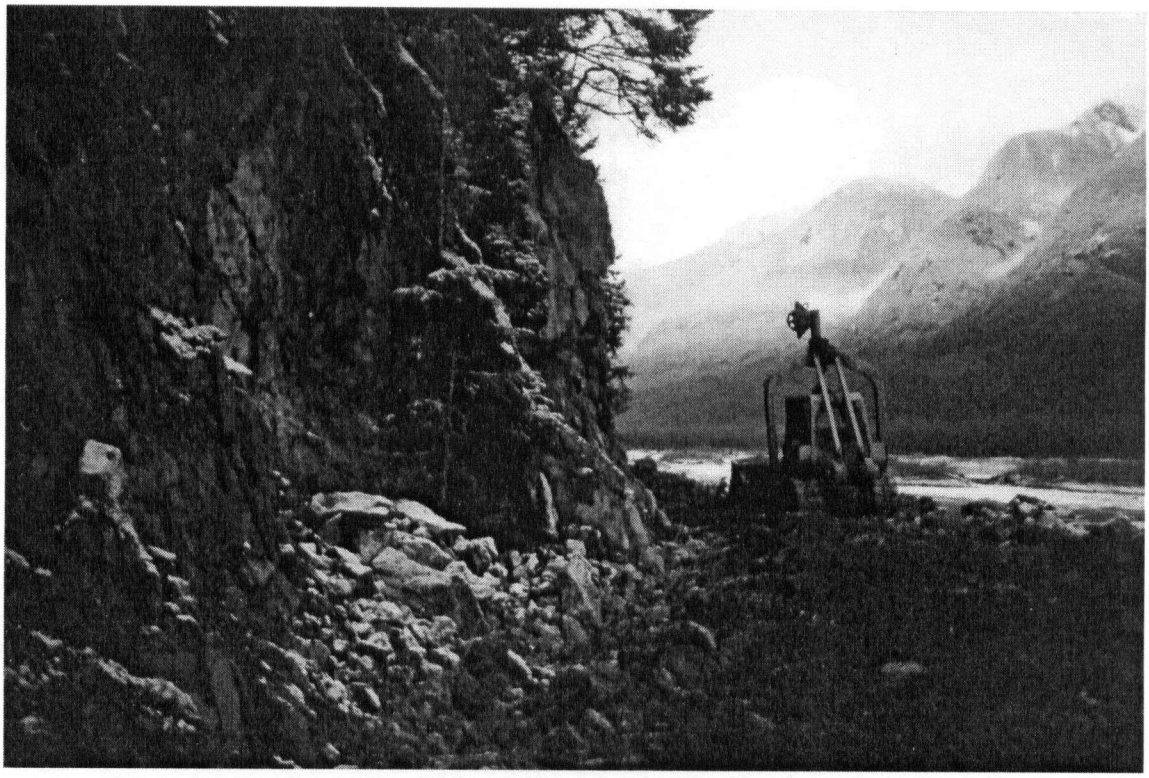

Figure 10. Desecration of Pictographs Along the Shores of Lillooet Lake

One further fact of major significance from the Lil'wat perspective was that they made repeated attempts both by phone and in writing to ask the Federal government to enter into negotiation with the Lil'wat Nation so that agreement between the proper parties could be

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[87] She explains that the area where they are blasting is the area of Lil'wat registered trap-lines. Dec. 12th, 1990 Transcript at 40.

[88] *Ibid.* at 9.

reached regarding access through their lands.

> Sasquatch: When we put up that roadblock, we were there because we couldn't get the federal government to come and talk to us when we write to them or give them phone calls...to get them to come and talk to us in our lands because they got that fiduciary trust obligation to us. And not once did we see them or answer to us to talk with us.[89]
> Ishmeshkeya (phonetics): And we aim to protect our traditional land because we didn't choose to live in a colonial system that is going to put us on reserves just to shut us up. We are not going to take it anymore.[90]

These statements demonstrate the Lil'wat's belief in their territorial sovereignty. They also represent unquestionable evidence that the days of acceptance by Indigenous peoples of an imposed colonial system are past. Of equal importance however is the evidence of the Lil'wat people's willingness to negotiate access through their territory on behalf of the Newcomers provided they are met on a nation-to-nation basis by the appropriate party.

2.3 The role of the Mount Currie Chief and Band Council:

The Band Chief, on behalf the Band and as legal representative of all the Lil'wat Band members, was served by the Attorney General of British Columbia with notice of the injunctive application.[91] Counsel for the Chief and Council, Ms. Leslie Pinder, appeared and surrendered to the jurisdiction of the court. She presented a decidedly different legal position from that of the sovereign minded Lil'wat traditional people when she challenged the

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[89] *Ibid.* at 29; see also Louise Mandell's memorandum of law that relates to the Liberal government's referendum on treaty negotiations held by the Provincial government in 2002. It demonstrates the requirement of the Federal and Provincial governments to participate in negotiations as a result of the principles of fiduciary trust law. L. Mandell, "Recommended Referendum Ballot" (Feb. 2002) [unpublished paper, archived at Union of B.C. Indian Chiefs] at 19.

[90] April 15th, 1991 Transcript at 29. This excerpt is one of many references in the transcripts to the non-acceptance of the imposed Band Council and reservation system that considers legal title to all reserve land to be vested in the Queen; see definition of "reserve" in the *Indian Act*, R.S.C., 1985, c. I-5 2 at (1)(a.): "means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of the band."

[91] At the time of this action, Russell G. Fraser was the Attorney General of British Columbia.

constitutionality of the Provincial resumptive power.[92] By surrendering to the jurisdiction of the Superior court, the Chief at domestic law is alleged on behalf of all Lil'wat members to have given recognition to the assumption of British sovereignty. The traditional Lil'wat people viewed the Band Council as a colonial imposition rather than a legitimate governing authority within an Indigenous nation.

2.4 The role of the Attorney General of British Columbia:

Before the roadblock the British Columbia government had negotiated for more than thirty years with the Mount Currie Band Council, in its attempt to gain public access through the Mount Currie Indian reserve. Nevertheless, on September 28th, 1990 they resorted to expropriation powers as their 'legal' solution to the 116-day roadblock. The expropriation authorization, signed by the Lieutenant Governor and the Provincial Minister of Highways, was the Provincial government's method of unilaterally assuring continued public access through Lil'wat reserve lands.[93]

To facilitate the expropriation of the land in question, the Province relied on a general right of resumption, contained in Order-in-Council 1036.[94] This Order-in-Council allegedly allowed the Provincial government to resume up to one-twentieth of a Federal Indian reserve for a number of public purposes, including the need for lands to assure access for hydro,

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[92] As explained above, hundreds of traditional Lil'wat members participated in the roadblock as a demonstration of their assertion of complete territorial sovereignty. In keeping with this assertion they (unlike the Chief and Band Council) purposely failed to appear before the court conducting the injunction application so as to avoid giving recognition to the jurisdiction of the British Columbia Supreme Court; consider also the comments of Clark on March 11th, 1991 Transcript at 12, where he attempts to clarify the conflict between the two positions: "We have a remarkable instance where the elected chief and council appear to be operating in concert with the timber lawyers acknowledging the jurisdiction of the court, which is to say repeat the exact same mistake in *Delgamuukw*..."

[93] *Provincial O. I. C. No. 1505/1990*. Ordered and Approved September 28th, 1990.

[94] *Provincial O. I. C. No. 1036/1938*. Ordered and Approved July 29th, 1938 (in respect of the Pemberton Tribe, Nesuch Reserve No. 3, at 19 of the attached schedule.)

railways, telephone, or public highways.

Once the resumption documents were signed by the Provincial Minister of Highways, the Attorney General of B.C. relied on them as the basis upon which to issue a writ suing the Lil'wat Chief, Band Council and numerous traditional Lil'wat individuals, by arguing that it was in the public interest to do so.[95] The legal base of the Provincial government's action against the Lil'wat people was a writ of trespass and nuisance, allegedly committed by blocking public access through their unceded land. The writ provided for the B.C. government's injunctive application, as well as the order to arrest and remove any person involved in 'impeding the flow of vehicular traffic' on Lillooet Lake Road.

Following the Provincial government's expropriation of the land on September 28th, 1990 it succeeded in obtaining an interlocutory injunction order from Chief Justice Esson on October 24th, 1990. The Attorney General of B.C. quickly returned to court, twice in five days, to add police powers of enforcement, to facilitate the dismantling of the roadblock on the Mount Currie reserve.[96] The Provincial government was successful in this application, enabling the Attorney General to instruct the R.C.M.P. to enforce the Superior court's order disallowing any interference with the flow of vehicular traffic, including the trucks and road-

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[95] Of interest from an impartiality perspective is that "public interest" is tacitly assumed by both Canadian governments as well as the domestic courts, to include all Canadians other than Indigenous peoples. For example, the court considers it to be 'in the public interest' to maintain access through the Lil'wat territory, without recognizing that the vast majority of the public in the area are Lil'watum. The only instance in the case at bar, that the judge included the Lil'wat people within his use of the term 'public', was when he interpreted their sovereign stance as constituting 'a mass public defiance' so as to enable him to categorize their contempt as being criminal, rather than civil, in nature.

[96] *A.G.* v. *Chief Andrew*, *supra* note 10. Provincial Government of B.C. Application to Add Police Enforcement Powers, November 2nd & 5th, 1990. Chief Justice Esson. The case citation in the injunction application is identical to that of the contempt case. This reminds the reader that although the injunction matter and the criminal contempt charge are being processed through the courts separately they are both based on the government's writ that alleges a Lil'wat conspiracy to commit trespass and public nuisance on the road through their reserve.

building equipment of the logging corporation, through the Lil'wat reserve.

Mr. Justice Macdonald summarized the Crown's position as follows:

> Contempt proceedings are enforcement proceedings, limited in scope by their very nature. Their purpose is not to determine the merits of the case, especially one such as the sovereignty argument, which would have far reaching effects if successful.[97]

In addition, the Crown argued that:

> ...to permit doubt to be cast upon the jurisdiction of this court to hear these contempt proceedings, they submit, would lead to doubt about the validity of the injunction and create uncertainty generally about the rule of law in this province.[98]

The provincial government argued that the rule of law is imperiled when court orders can be ignored on the basis of defenses yet to be argued. Moreover, to allow the jurisdictional challenge was to invite the Canadian public to disobey injunctions and to cause confusion as to the authority of the court and the rule of law in this province. Crown counsel then suggested to the judge that the evidence he was about to lead would show "a mass disobedience of a court order'.[99] In his written opening, he argued:

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[97] March 18th, 1991 Reasons for Judgment at 7. The Crown's statement reveals a fervent bias in favor of maintaining the Newcomer's status quo. The judge, as an impartial arbitrator, would also have to acknowledge the 'far-reaching effects' to the Lil'wat peoples of being unable to protect their ancestor's gravesites and ancient pictographs from desecration. Additionally, "far-reaching effects" is an invalid reason to refuse to hear the legal defense of an accused facing a criminal charge.

[98] See February 15th, 1991 Transcript at 3. This does not appear to be sound legal reasoning in a criminal proceeding where an individual's liberty is at stake. This is particularly so, given the unique jurisdictional distinctions between an Indigenous person living in tribal relations and a Canadian citizen who participates in the Canadian democratic process; see where the Law Reform Commission refers to the existence of the potential risk of arbitrariness with contempt charges that can sometimes be used as a tactical or political measure of pressure. The report concluded that "our tradition of moderation, the existence of our democratic system, and the judicial guarantees of the rights of the accused, make it possible to mitigate this danger." The Law Reform Commission, *Contempt of Court: Report #17,* (Ottawa: The Commission, 1982) at 27. In the prosecution of the Lil'wat peoples for criminal contempt there was exhibited a lack of all three mitigating factors as evidenced by the judicial condoning of the dismantling operation, the imposition of Canadian citizenship and a foreign governing system, and the refusal to provide the accused their constitutional right to fundamental justice.

[99] Nov. 19th, 1990 Transcript at 17. This interpretation of the Lil'wat's actions is a theme that the Crown returns to throughout the criminal contempt proceedings. For example, on December 10th, 1990 Transcript at 1, Mr. Tyzuk refers to the Lil'wat action as 'a mass public defiance'.

> Once a court order is made, it is to be obeyed...the court made an order prohibiting certain behavior. The arrested...did not comply with that order. Therefore, this proceeding is not about sovereignty, nor is it about aboriginal rights, rather it is about the rule of law.[100]

The lawyers acting for the Attorney General of British Columbia made every possible procedural and substantive objection, in the thirteen courts I attended in this case, to prevent the recognition of the rights of Indigenous peoples regarding authority over their land and their resources.

This judicially condoned practice on the part of the Attorney General of B.C. must be considered in light of the fact the Provincial government was simultaneously promoting treaty negotiations with the Lil'wat Nation. The Provincial government's purpose in such negotiations is to extinguish outstanding Indigenous claims of authority and jurisdiction regarding unceded territories. How is it that the domestic Superior court can claim to provide an impartial forum once it accepts the criminalization by the Province of Indigenous persons who assert their inherent rights? The universal human right to protect an ancestor's gravesite must fall within the Newcomer's definition of an 'aboriginal right' pursuant to s. 35 of the *Constitution Act, 1982.*

Finally counsel for the Attorney General, in his opening, argued the evidence that he was about to lead in the contempt case against the Lil'wat accused would provide the judge with the necessary proof that their actions were calculated to bring the administration of justice into scorn.[101] From the legal perspective of the traditional Lil'wat people the exact reverse was true. In fact, both the Provincial government and the R.C.M.P. are seen to be the trespassers where unceded Indigenous land is involved.

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[100] This statement was part of the Crown's opening. November 19th, 1990 Transcript at 2.

[101] Nov. 19th, 1990 Transcript at 17; the 'administration of justice' includes the provision, maintenance and operation of police forces, criminal investigations, prosecutions, corrections, and the court system.

2.5 The role of the R.C.M.P.:

Figure 11. R.C.M.P. Dismantling Operation.

The R.C.M.P., in their capacity as a Provincial police force, were instructed by the Attorney General of B.C. to enforce the B.C. Supreme Court order by taking the necessary steps to dismantle the blockade. Members of the R.C.M.P. attended at the roadblock to read and provide a copy of the B.C. Supreme Court injunctive order to the Lil'wat people blocking the public from accessing the road through their territory. The R.C.M.P. in attendance were addressed by Lil'wat spokespersons as well as by several other traditional Lil'wat people present. The police officers were repeatedly informed that they had no

jurisdiction on Lil'wat territory.[102] The officers eventually left after 'serving' the court order on the Lil'wat people by attaching the documentation to a post near the site; no Lil'wat would physically accept receipt of the document.

Following 116 days during which the road was blocked, 75 armed R.C.M.P officers appeared, assisted by several R.C.M.P. helicopters,[103] as well as two buses for the transportation of the arrested Lil'wat peoples, and several attack dogs. The R.C.M.P. under the command of senior officer Inspector Byam were to fulfill the instructions contained in an operational plan for the dismantling of the roadblock. During cross-examination Inspector Byam denied, and then subsequently agreed, that in addition to the sixty officers brought in to execute the arrests of the Lil'wat people, there was also a fifteen-member Special Emergency Response Team. These officers were armed with or had quick access to AK 42 semi-automatic military assault weapons strategically placed nearby, as Inspector Byam explained under oath, "in case the Lil'wats became violent".[104]

The heavy-handed approach of the R.C.M.P. requires being placed in a more complete context. In cross-examination Inspector Byam admitted that he was repeatedly informed by the Lil'wat protesters of their commitment to a non-violent, unarmed assertion of sovereignty over the lands in question.

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[102] Inspector Byam stated that the natives on the roadblock were chanting "RCMP has no jurisdiction" when he approached and that they appeared sincere. Nov. 28th, 1990 Transcript at 62.

[103] In cross examination Inspector Byam agreed there were approximately five helicopters above the roadblock during the dismantling procedure even though he only recalled ordering one helicopter. November 28th, 1990 Transcript at 15.

[104] Consider as well the following exchange in which a Lil'wat accused confirmed to the judge both the desire of the Lil'wat peoples to peacefully negotiate the issue and their commitment to an unarmed stance. "The Speaker: And when we did this roadblock stuff, hey, we wanted a nation-to-nation negotiation with the Federal Government as we always did right from the beginning. And the darn guys said every time, the first time he said he didn't want to come and negotiate with us because he thought a gun was pointed at his head. When we got arrested, all of us people, did any of us have a gun? Did any of us have a gun when we got arrested? The Court: Not that I'm aware of." April 15th, 1991 Transcript at 20.

Figure 12. R.C.M.P. Excessive Use of Force

According to his testimony, he had confirmed this through both R.C.M.P. intelligence and surveillance, including active helicopter scrutiny throughout the roadblock period. Furthermore, he agreed that the Lil'wat commitment to non-violence was confirmed during a formal meeting between the R.C.M.P. and the Lil'wat traditional people, which I attended as their defense counsel.[105] Additionally, copies of three letters to the R.C.M.P. dated Nov. 2nd, 6th, and 10th, 1990, outlined and confirmed the Lil'wat people's commitment to an unarmed, non-violent, position. These letters were submitted as defense evidence in the trial.[106]

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[105] See *A.G.* v. *Chief Andrew*, *supra* note 10, Exhibit #7: Affidavit of David George Cowley, Superintendent and Commanding Officer of the Vancouver Subdivision of the Royal Canadian Mounted Police, in which he refers to his attendance at this meeting on November 1st, 1990.

[106] Nov. 28th, 1990 Transcript at 42.

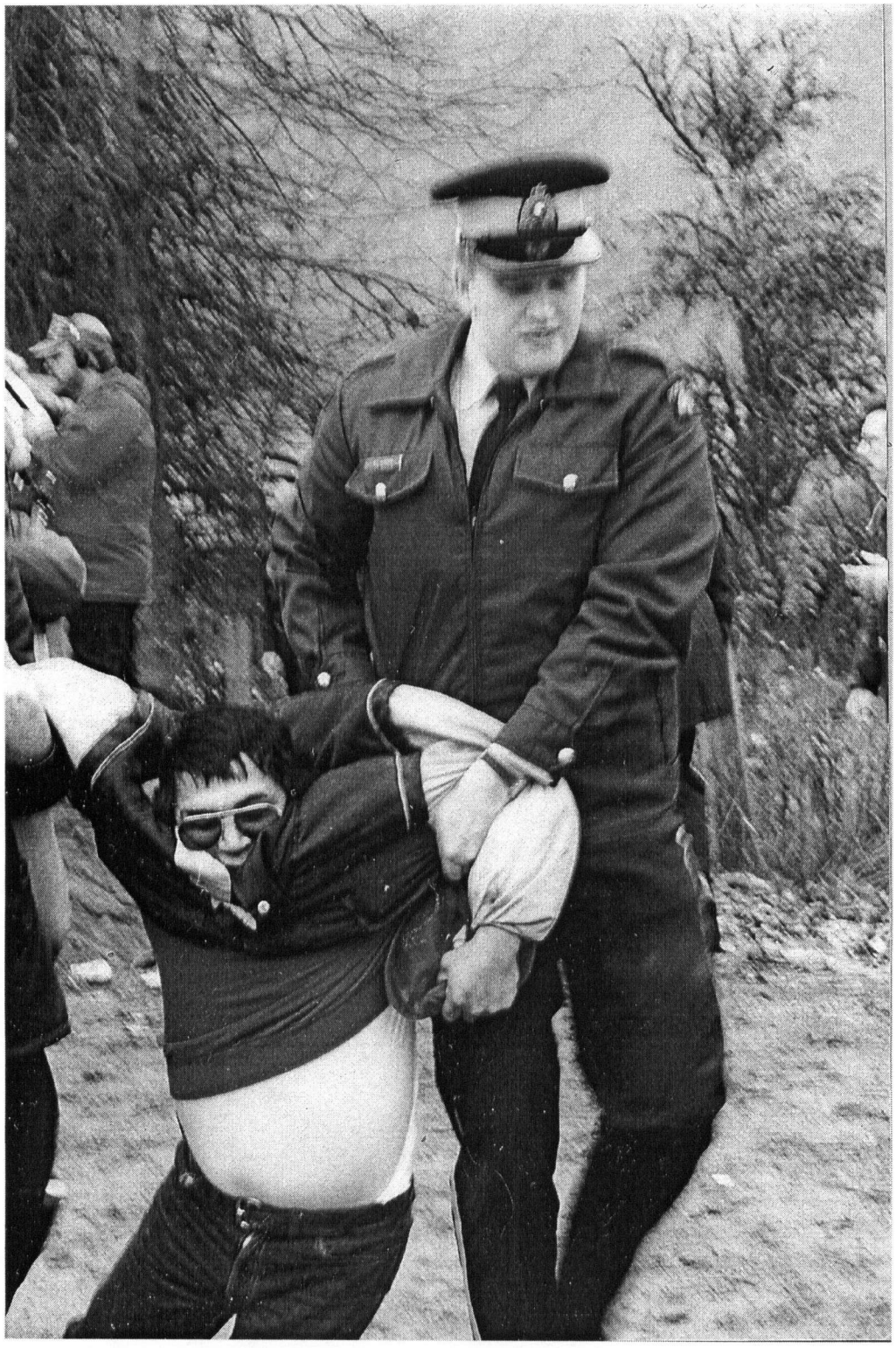

Figure 13 The Practice of Passive Resistance.

Figure 14. Lil'wat Being Dragged To Bus.

On Nov. 27th, 1990 Clark submitted a copy of a letter to the Commissioner of the R.C.M.P., dated Nov. 6th, 1990, in which he outlined a legal opinion in an attempt to prevent crimes by the R.C.M.P. against the sovereign Lil'wat peoples. His letter demonstrated that the Lil'wat peoples fall within the definition of Internationally protected persons provided for

by the domestic law.[107] The letter also informed the R.M.C.P. that the British Columbia Supreme Court injunction order was made *per incuriam* or 'through inadvertence'. Clark's letter explained that once the applicable British Imperial law was placed before the court, it would demonstrate that the injunctive order was issued without jurisdiction and was therefore a nullity.

Figure 15. R.C.M.P. Trespassers on Unceded Lands

Clark attempted on Nov. 28th, 1990, to ask Inspector Byam in cross-examination if he had obtained a legal opinion in response to receiving counsel's letter that provided the basis to legally validate the Lil'wat assertion of territorial sovereignty. Mr. Justice MacDonald was absolutely adamant that he would not entertain any argument on the point.[108] Inspector Byam, resumed his testimony and stated that his squad of R.C.M.P. officers were instructed

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[107] *Criminal Code,* R.S., 1985, c. C-46, s. 424.

[108] This point is elaborated on in Chapter Four including quotes from their exchange.

to use only as much force as necessary to implement the arrests of the Lil'wat people.

Figure 16. Prisoner of Democracy

The following list includes the Lil'wat injuries that occurred during the roadblock dismantling operation conducted by the R.C.M.P at the request of the Attorney General of the Provincial government:[109]

- a young native Lil'wat was knocked unconscious and the police were seen standing on his back during his arrest. He was still unconscious when his identification picture

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[109] Nov. 27th, 1990 Transcript at 25 and 77-86.

was taken by the R.C.M.P. in which they are shown to be holding his head up by his hair so as the photo can be taken;

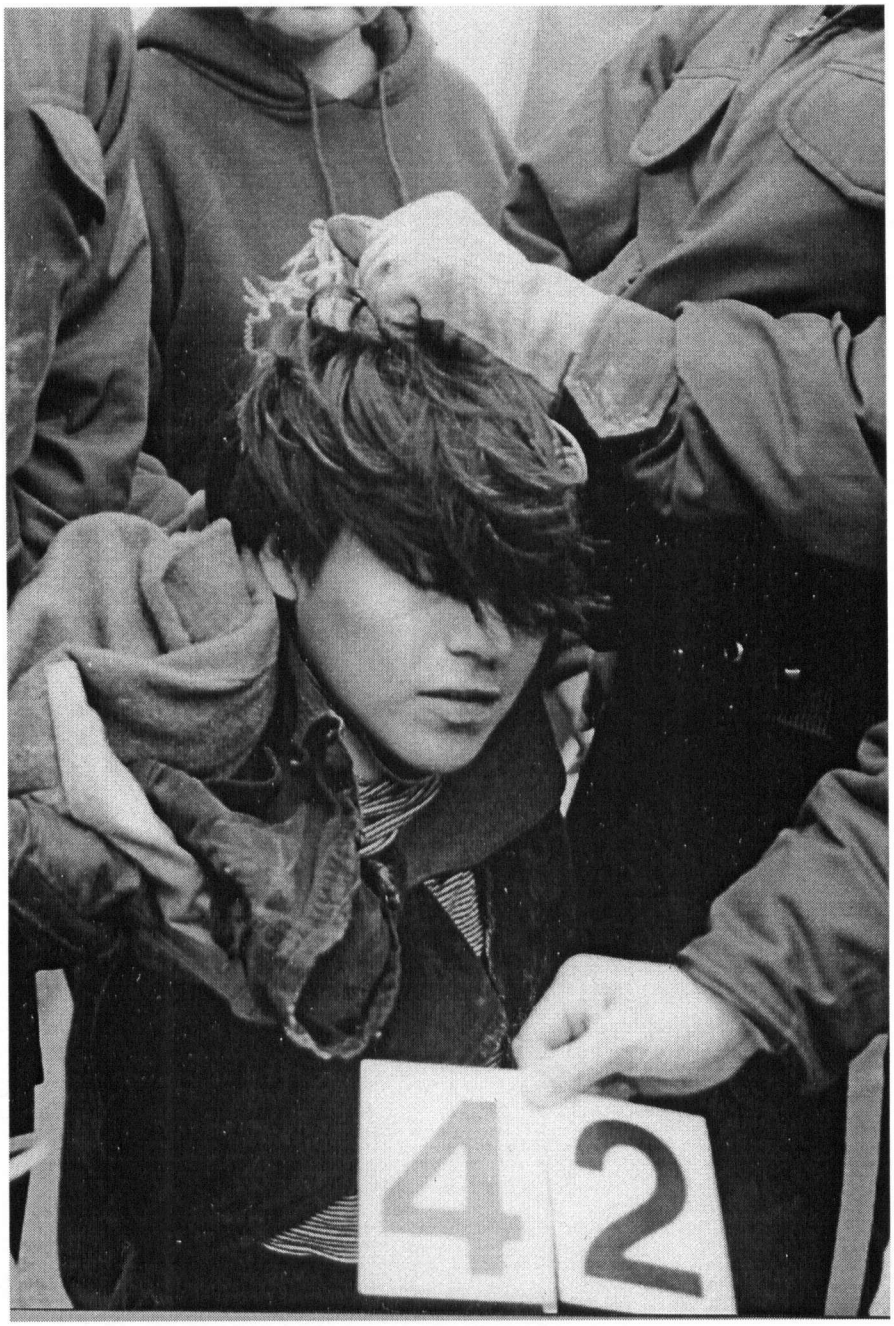

Figure 17. Unconscious Lil'wat Photographed by the R.C.M.P.

- four officers each held a limb while arresting one Lil'wat youth, while a fifth officer grabbed his genitals and did not let go while the youth was carried approximately 100 meters to the bus;
- a young Lil'wat woman had a knee applied to her back during her arrest with such force that it caused her to lose consciousness;

- several Lil'wat individuals had their thumbs and fingers twisted backwards to the point of excruciating pain that caused subsequent nerve damage to occur;

Figure 18. Nerve Damage

- a young male Lil'wat had his shoulders twisted to the point of dislocation;
- one Lil'wat male had his head smashed into the side of the bus during his arrest;
- a number of the officers used choke holds during the arrests of the male Lil'watum;
- a Lil'wat male during his arrest is videoed being backhanded with full force;
- a Lil'wat woman's nose is broken during her arrest as a result of being dragged face down along the ground;
- one Lil'wat member had their breathing cut off as a result of the R.C.M.P. pulling with such force on her clothes;
- an officer purposely stepped on the testicles of one Lil'wat male during his arrest; and
- several Lil'wat members reported nerve damage in their hands as a result of their plastic handcuffs being kept tied behind their backs during the journey from Pemberton to Whistler.

Much further into the case, when one of the Lil'wat Watchmen who would not step aside from his stand at the Ure Creek gravesite area was brought into court so badly beaten that I truly had trouble recognizing him, I recall asking Mr. Justice MacDonald how much longer

he going to make me to witness this.[110] Watching such brutality exhibited on the part of the R.C.M.P. against the Lil'wat people was unbearable.

James Louie, a Lil'wat Elder nearly four months after his arrest testified:

> ...I told you when I first came up here that I had a grandchild. I have a grandchild. I have a grandson. I can't even hold my grandson for five minutes and my arms just about fall off because of the way I was arrested. That's it. Thank you. [111]

Although the list of injuries incurred may not immediately be seen as relevant to the topic of judicial impartiality,[112] such details are required to understand the roles and legal positions of each party appearing before the court at the criminal contempt hearing.[113] It is also important data to consider when we reach the impartiality principle that requires justice not only to be done, but also to appear to be done. In response to the injuries sustained by the Lil'wat people, Justice MacDonald stated that he could not do anything about:

> the excessive use of force because that would take place in another action... it doesn't seem to me that it goes to the issues that I have to decide...whatever sympathy I have with the treatment that these people received at the time of the arrest after the fact, it's their actions up to that point that are before me in this proceeding...It seems to me

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[110] The individual before the court was Tsemhu7qw, known in English as Harold James Pascal, Sr. He was a traditional "Watchman" amongst the Lil'wat peoples. It was in keeping with his hereditary governing position (that has some equivalency to a community police person) that he insisted on protecting the graves of the medicine people buried at Ure Creek. Along with Bruce Clark he traveled to Europe and made several unsuccessful attempts to have the Lil'wat jurisdictional argument addressed in the international arena. He passed away on August 23, 2002 and was buried traditionally, according to his wishes, amongst the gravesites at Ure Creek.

[111] April 15th, 1991 Transcript at 25.

[112] Mr. Justice MacDonald stated that it would obviously require a separate action, commenced by the Lil'wat people against the R.C.M.P. for assault due to excessive use of force. This judicial advice demonstrates the judge's lack of acceptance that in the eyes of the Lil'wat people the British Columbia Supreme Court does not have jurisdiction over Lil'wat territory where the incident occurred. It would therefore be inconsistent with their sovereignty position to issue a writ in the Canadian court system against the R.C.M.P.

[113] It is also important data to consider when we reach the principle relating to impartiality that requires justice is not only to be done, but also to appear to be done. Mr. Justice MacDonald stated early in the proceedings that the underlying matter in this action was civil in nature, a property dispute. The same court is able to condone the use of a military type assault on the non-violent assertions of traditional Lil'wat people while simultaneously claiming the court provides an impartial forum for the resolution of the jurisdiction issue.

> that really has nothing to do with whether a given individual was operating or acting in contempt of the injunction...[114]

2.6 The Role of the Attorney General of Canada:

The federal government, or fiduciary trustee in relation to "Indians and Lands reserved for the Indians",[115] chose to ignore entirely the repeated requests of the Lil'wat traditional people to negotiate a solution with their nation to resolve issues such as public access through their unceded lands by third parties.[116] Nevertheless, the Federal government's first involvement in this particular confrontation was when they made application for intervener status before Mr. Justice MacDonald to join the contempt action. In complete breach of their legal obligations they proceeded to align themselves as co-counsel with the Attorney General of British Columbia against the Lil'wat people who had by now been arrested, jailed and charged with criminal contempt for disobeying the order of the provincial Superior court.[117]

2.7 The Role of Lawyers:

Lawyers must take the positions of their various clients. Each level of government in the criminal contempt trial was represented by a number of counsels.[118] Lead counsel for the

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[114] November 28th, 1990 Transcript at 4.

[115] The Supreme Court of Canada prior to this trial had made it clear that the fiduciary legal obligations of the federal government required the government to act with the utmost good faith on behalf of the Indians and in a non-adversarial manner.

[116] *The Royal Proclamation, 1763* (7 October 1763); Privy Council Register, Geo. III, vol. 3 at 102; U.K. Public Record Office, c. 6613683: R.S.C. 1970, app. I required the federal government to prevent encroachment upon unceded territory by third parties unless they have previously purchased the land with the consent of the Indigenous inhabitants. Such a third party reference includes the provincial government and others licensed by same, whether it be logging corporations or the general public.

[117] The Attorney General of B.C. is a party to the dispute, the expropriator of the land in question and the prosecutor of the criminal contempt charge.

[118] These included Mr. J.M. MacKenzie, Ms. D.C. Prowse, Mr. Groberman, Mr. G. Plant, and Mr. Goldie on behalf of the Attorney General of B.C. Mr. Partridge appeared as co-counsel with Mr. Haig, on behalf of the Attorney General of Canada.

prosecution, on behalf of the Attorney General of British Columbia was Mr. Tyzuk. Approximately six other lawyers joined him at various times throughout the trial. Mr. Haig appeared as lead counsel for the Attorney General of Canada, however the Federal government also brought in additional counsel for various arguments during the lengthy proceedings.

The Band Chief and Council were treated by the domestic legal system as the legal representatives of all members of the Lil'wat Band and the court recognized their counsel, Leslie Pinder, as representing the Lil'wat Band members in the original injunctive application before Mr. Justice Esson. The sixty-three Lil'wat accused of criminal contempt were represented by Dr. Bruce Clark and me, acting as co-counsel.

While the thesis focuses on the judiciary, the case analysis also reveals a series of conflicts and fundamental questions for counsel involved in such matters. The evident conflict between positions taken by counsel for the Band Chief and counsel for the 63 traditional Lil'wats charged in the case reveals the enormous difficulties that ensue from the clash between the imposed Band Council system and the existing hereditary governing systems of the Indigenous nations. Additional conflicts that emerge throughout the paper result from the role each lawyer in the case chose to pursue. Such conflicts become apparent when counsel for the Attorney General of B.C. misrepresent the public interest or counsel for the Attorney General of Canada act in a manner that is in direct conflict with the Federal government's fiduciary obligations *vis-à-vis* Indigenous peoples.

The disbarment of Bruce Clark and my refusal to continue to participate as a barrister in the Canadian legal system are elaborated upon. In fact, observations regarding the role of counsel appear throughout the thesis, particularly in Chapter Six where their role in the extinguishment of Indigenous sovereignty is more fully analyzed.

2.8 The judicial role: introduction

The judicial role is obviously of major significance in relation to the thesis topic. It is a legal fact that without judicial and institutional impartiality, a court loses jurisdiction. I have devoted the following two chapters to the discussion and analysis of the judicial role. Chapter Three contains an outline of the judicial requirements of impartiality illustrated through numerous transcript references that aim to demonstrate the existence of bias in the criminal contempt case, as well as in the legal system as a whole. Chapter Four concentrates on judicial breaches of the rule of law. These breaches prove that the domestic Canadian judiciary is unable to provide an impartial forum where the dispute involves an Indigenous/Newcomer jurisdictional confrontation.

CHAPTER THREE

The requirements of judicial and institutional impartiality:

In this chapter I argue that neither the judge nor the institution of the court met the required standards of judicial or institutional impartiality in the Lil'wat criminal contempt trial. The chapter begins by introducing the legal test and evidentiary threshold for establishing lack of impartiality. It then applies each of the specific prerequisites of impartiality—no prejudgment, no leaning in favour of one party, no biased comments, no conflict of interest, and institutional impartiality or the need for the appearance of justice to the criminal contempt trial. At the conclusion of the examination of the prerequisites of impartiality and the court's manner of handling this criminal contempt case the reader will be in the position to be able to decide whether the Superior court provided an impartial tribunal for the Lil'wat accused.

3.1 The Test for Apprehension of Bias and The Evidentiary Threshold for Impartiality:

The Supreme Court of Canada states that: "The courts should be held to the highest standards of impartiality…Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer."[119] The parties are entitled to expect complete impartiality and a faithful, honest and disinterested decision.[120] According to Grandpre J., in *R.* v. *S.* the legal test of impartiality is to ask "what would an informed person viewing the matter realistically and practically...and having thought the matter through...conclude?"[121] The idea that "justice must be seen to be done" cannot be

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[119] *R.* v. *S. (R.D.)* [1995] N.S. No. 184 (N.S.S.C.) (Q.L.) ["*R. v. S.*"].

[120] *McCain* v. *St. John* (1964) 50 M.P.R.363 (N.B.C.A.).

[121] *R. v. S.*, *supra* note 119.

severed from the standard of reasonable apprehension of bias. The relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was.[122] The reasonable person, through whose eyes the apprehension of bias is assessed, expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them.[123]

Would an uninvolved reasonable person with knowledge of the relevant circumstances in the Lillooet Lake road dispute conclude that Justice MacDonald's adjudication in the criminal contempt trial created an apprehension of bias? To reach their conclusion they must address questions of judicial prejudgment on issues of fact, favoritism towards a party or a particular result, conflict of interest, institutional impartiality and the appearance of justice. For each requirement of impartiality the examiner must conclude that there were no circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable person a suspicion of his impartiality. If the examiner is unable to conclude that there was no apprehension of bias, then the judge and the institution must be disqualified, even if no bias exists.[124] Automatic disqualification is justified in cases where a judge has an interest in the outcome of a proceeding.[125]

3.2 Prejudgment: A Judge Must Not Have a Preconceived Opinion on Issues of Fact:

A trier of fact must not have preconceived opinions on issues of fact in matters before the

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[122] *Wewaykum Indian Band* v. *Canada* [2003] 2 S.C.R. 259; 2003 SCC 45 (CanLII) ["*Wewaykum*"].

[123] *R.* v. *R.D.S.* [1997] 3 S.C.R. 484.

[124] *Wewaykum*, *supra* note 122 at para.66.

[125] *Ibid.* at para.69-70.

court. This is one of the most basic requirements of the judiciary in their duty to maintain procedural and institutional impartiality. Where the judiciary have so firmly made up their mind that they are not amenable to persuasion they have failed in their duty to provide an impartial forum.[126] In *A Penchant for Prejudice*, Linda Mills defines a lack of impartiality as a prejudice that results from "prejudgment or forming of an opinion without sufficient knowledge or examination".[127] When adjudicating cases a judge is not to hold an opinion so strongly so as to produce a fixed and unalterable conclusion.[128]

Prejudgment appeared frequently in the judiciary's response to the traditional Lil'wat peoples' assertion of a sovereign based legal defense in their contempt trial. In retrospect, reliance on unsubstantiated assumptions regarding essential facts was the most common way that the courts avoided adjudicating on the legal issue of Indigenous territorial sovereignty. The most significant example was the judge's refusal to allow argument on the preliminary challenge to jurisdiction. Bruce Clark and I attempted on numerous occasions to provide Justice MacDonald with the applicable law to support a jurisdictional challenge premised on the Lil'wats' history of never having surrendered their sovereignty. Consider the decision of the Supreme Court of United States in *Cherokee Nation* v. *Georgia*, where that court concluded that it was not impartial *vis-à-vis* boundary and jurisdiction disputes between the Native government of the Cherokees and the Newcomer government of the State of

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[126] *Old St. Boniface Residents Assn. Inc.* v. *Winnipeg (City),* [1990] 3 S.C.R. 1170 at 1197.

[127] Mills, *supra* note 9 at 12.

[128] *Muscillo Transport Ltd.* v. *Ontario (License Suspension Appeal Board* (1997) 149 D.L.R. (4th) 545 (Ont. Gen. Div.), (1997) 32 M.V.R. (3d) 27 (Ont. C.A.); see also where Grange, J. held: "Prejudgment of the issues of fact is a ground for disqualification of a Judge on the basis of bias." The judge also mentioned that prejudice "might operate on his mind completely unconsciously but nevertheless can be termed as bias." *Re: Downer and The Queen* 35 C.C.C. (2d) 198 (Ont. H.C.) at para.2.

Georgia.[129] *Cherokee Nation* was part of the extensive support for the proposition that a preliminary challenge regarding Newcomer jurisdiction over unceded territory posed a valid legal position to assert and seek adjudication upon, in defense of the Lil'wat accused.

In *Re; Sproule* the Supreme Court of Canada held that:

> ...if any necessary link in the chain to constitute jurisdiction be wanting no one can be legally punished...If the judge who presides at a criminal trial be without proper authority in regard to such a trial the conviction is a nullity, and so in all other cases where from any cause there was not jurisdiction, and when such want of jurisdiction is made to appear, it must necessarily result in the discharge of the convicted party.[130]

The majority of the B.C. Court of Appeal applied this fundamental principle in *Canada* v. *Sacks* where a non-native foreigner challenged the jurisdiction of the court. The majority were of the opinion that the preliminary objection to jurisdiction was "well taken" and, furthermore, "it was an objection that could be taken without notice, and the Court has had to raise it itself. It is a question of jurisdiction."[131]

In refusing to hear the Lil'wats' preliminary objection to jurisdiction, Mr. Justice MacDonald provides an example of prejudgment when he insists on holding that the capacity of the Chief Justice to issue the original injunction "is unquestioned."[132] He dismissed the threshold jurisdiction argument on the basis that " a court having jurisdiction" means the "capacity" of the court to make an order such as the one impugned. He reasoned that given that the British Columbia Supreme Court has the capacity to order injunctive relief there could be no argument made challenging the jurisdiction of any injunctive order made in a Superior court of general jurisdiction even if, in the case of unceded Indigenous territory,

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[129] *Cherokee Nation* v. *Georgia*, (1831) 30 U.S. 1.

[130] *Re; Sproule* (1886) 12 S.C.R. 140.

[131] *Canada* v. *Sack [Chin Sack (No. 2)]*[1928] B.C.J. No. 56; 50 C.C.C. 137 (B.C.C.A.) at para.1-2.

[132] *A.G.* v. *Chief Andrew, supra* note 10. Reasons for Judgment. Collateral Attack Argument. March 18th, 1991 at 26. Mr. Justice MacDonald.

such an order was a mistake. He ruled that the only manner to attack the validity of such an injunction was by appeal of the original order. Mr. Justice MacDonald became increasingly adamant that he was unable to hear any submission by Clark that contained law, legal precedents or legal argument that challenged his, or the Chief Justice's jurisdiction. He stated:

> ...that is why I made my ruling on the second day of the trial---was that I can't permit you to say to me that the Chief Justice's order is a nullity. I can't permit that in this court. A higher court must do that, and that is where the sovereignty argument has to be made. That is where the jurisdictional argument has to be made, is in that court.[133]

Clark argued repeatedly that the jurisdictional issue before the court could not be answered by the fact that the Superior court is a court of general jurisdiction. Rather the court needed to address the more specific question of whether the Superior court of general jurisdiction is a court of general jurisdiction regarding unceded territory of Indigenous peoples.

In fact, the first major incident of prejudgment in the Lillooet Roadblock case occurred much earlier in the Lil'wat criminalization process. Chief Justice Esson, in response to the Provincial government's application to add police enforcement powers to the injunctive order, held that Indigenous sovereignty and the resulting proposition that Canada and British Columbia are without jurisdiction "is not a position which can be supported at law."[134] At

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[133] Feb. 15th 1991 Transcript at 5. Further discussion of the ruling by Mr. Justice MacDonald on the jurisdictional challenge is included in Chapter Four however one must keep in mind that it is standard procedure to challenge jurisdiction by way of a preliminary objection prior to the commencement of a criminal trial. In the case of the Lil'wat accused however the British Columbia Court of Appeal refused their application to join the appeal already scheduled before them to be argued by counsel on behalf of the Band Chief and Council.

[134] *A.G.* v. *Chief Andrew, supra* note 10, November 2nd, 1990 Reasons for Judgment. Application by the Attorney General of B.C. for police enforcement powers at 8. Esson, C. J.; consider also C. J. McEachern's classic statement in this regard where he explains: "In their pleadings and argument the plaintiffs admit that the underlying or radical or allodial title to the territory is in the Crown in Right of British Columbia. This reasonable admission was one which the plaintiffs could not avoid.

this time he also referred to the position being taken by the Mount Currie Band Council to be "the responsible position".[135] Chief Justice Esson's *per incuriam* (through inadvertence) finding in relation to both sovereignty and jurisdiction is an example that fits Margo Nightingale's observation that "impartiality is virtually impossible where a judge's personal predispositions (biases) are viewed as objective realities."[136]

This initial ruling by Chief Justice Esson is in direct opposition to the statement of his predecessor, Chief Justice McEachern, who emphasized in the Legal Compendium that: "...the first question to be determined *in every case* is whether the court has jurisdiction to hear and decide the case."[137]

Chief Justice Esson's prejudgment in regards to the sovereignty issue became of even greater significance when Mr. Justice MacDonald held that he could not question it in the contempt trial. He flatly refused to allow Clark's extensively researched legal arguments that fundamentally challenged Chief Justice Esson's assumption regarding this most essential legal point. That it was an 'assumption' became clear when Chief Justice Esson subsequently admitted that the defense of sovereignty was not argued during the three day hearing of the

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It sets the legal basis for any discussion of title." *Delgamuukw* v. *British Columbia* [1991] B.C.J. No. 525, (1991) 79 D.L.R. (4th) 185, Part 10 at 79 [*"Delgamuukw"*].

[135] *Ibid.* This statement by Chief Justice Esson introduces his entwinement with embedded institutional bias. At this early stage in the proceedings only the Band Chief had entered an appearance and had not presented a sovereignty argument. The Chief Justice mentioned reading about the sovereignty position of the Lil'wat traditional peoples in the local newspapers. He lost his neutrality in the dispute once he indicated his strong preference for the appearance by counsel on behalf of the imposed Band Council system versus the 'impossible' sovereignty assertion by the traditional Lil'wat accused.

[136] M. Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 Ottawa L. Review 71 at 71; consider also that C. J. Esson was guilty of prejudgment when he referred to the road in the dispute as "an integral part of the Province's highway network." *A.G.* v. *Chief Andrew*, *supra* note 10, Oct. 30th, 1990. Reasons for Judgment at 5. Injunction Application. Esson, C.J.

[137] C.J. McEachern, "The Law, the Courts, the Judiciary and the Legal Profession" in *Legal Compendium* (1999), online: *Legal Compendium* <http://www.courts.gov.bc.ca (date accessed: 20 December 2000)[Emphasis added].

Attorney General's injunctive application.[138] On the basis of this admission, it is fair to conclude that prejudgment occurred in the issuance of the original injunctive.[139] In fact, it was Chief Justice's Esson's conjecture on this key point that formed the legal basis for the enforcement order that enabled the Attorney General of British Columbia to arrest and incarcerate the traditional Lil'wat peoples. Mr. Justice MacDonald would rely on this prejudgment to find the Lil'wat people guilty of criminal contempt of court.

As a third example of prejudgment, consider the following comment by Mr. Justice MacDonald early in the trial. It reveals his resolve that the only matter that concerned him was:

> ...the conduct of the individuals who were arrested, not on a group basis but on an individual basis. Did they know of the prohibition against blocking the road, and did they, as individuals in fact, participate in conduct contrary to that injunction...?[140]

The narrow boundaries set by Mr. Justice MacDonald near the outset of the hearing were based upon a prejudgment or upon the assumption of a legal fiction on an issue of fact. Before him were a group of traditional Indigenous persons asserting Lil'wat territorial sovereignty. They clearly articulated their non-acceptance of the imposition of Canadian

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[138] January 8th, 1991 Transcript at 2.

[139] For the Lil'wat traditional people to appear and submit to the jurisdiction of the Supreme Court of British Columbia to argue against the Province's injunctive application would have been in direct conflict with the legal position they were intent upon asserting. Only counsel on behalf of the Chief and Band Council entered an appearance and thereby submitted to the jurisdiction of the court.

[140] It is important however to note that in MacDonald's Reasons for Judgment dated March 18th, 1991 Transcript at 3 he acknowledged that the Lil'Wat accused before him sought to raise a much more fundamental issue which he outlined as follows: "...they say that this court has no jurisdiction to find them in contempt of the injunction in question; that it has no authority over their conduct on unceded Indian lands...the Lil'Wat nation is a sovereign people; one over which this court has no jurisdiction."; see also Clark's statement in his opening in which he explains: "...a group of Indians, whether it's a band, tribe, nation, individuals as a collective entity is under the protection of the Crown under the *Royal Proclamation of 1763*, and that's the essential point." Nov. 19th, 1990 Transcript Vol. II at 30.

citizenship.[141] Numerous Lil'wat individuals testified under oath that they had no allegiance whatsoever to the Canadian nation and had not, at any time, consented to being citizens. One traditional person stated: "Lil'wat. I am Lil'wat, and they called me Canadian, whatever they called me."[142] Traditional Lil'wat, James Louie, refers to the imposition of citizenship by stating: "Canada need not recognize us as a sovereign nation, that still does not make me a member."[143] In the introductory speech, Quetminak stated: "...I want to bring up my children as good Lil'watum. Maybe one day I will say as good Canadian. But at this moment I don't want to say that." Regardless of the Lil'wat *viva voce* evidence of their allegiance to the Lil'wat Nation, Mr. Justice MacDonald insisted on proceeding as if the Lil'wat peoples were voluntary citizens of the Canadian state.

Justice MacDonald's prejudgment on the issue of citizenship was in breach of the international human right of peoples not to be arbitrarily deprived of their nationality as well as in breach of the right of all peoples to political self-determination.[144] Judicial reliance on such an assumption was necessary for the judge to be able to insist that the Lil'wat accused were obliged to obey the laws created by the Canadian state, as legislated through its institutions. The judge persisted in upholding the citizenship fiction, regardless of

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[141] Taiaiake explains that the notion of 'citizenship' is a European concept. He warns Indigenous people that to remain native, they must eradicate such concepts and shift to concepts that are grounded in their own culture. Taiaiake, *supra* note 63 at xiv.

[142] Dec. 12th, 1990 Transcript at 8.

[143] April 15th, 1991 Transcript at 24; see also A. Memmi, *The Colonizer and the Colonized* (Boston: Beacon Press, 1967) at 96. The following observations of Memmi apply to the situation the Lil'wats find themselves in when he states: "...the colonized enjoys none of the attributes of citizenship; neither his own, which is dependent, contested and smothered, nor that of the colonizer. He can hardly adhere to one or claim the other."

[144] See *U.D.H.R*, *supra* note 70 at Art. 15(1.) Everyone is entitled to a nationality, and Art. 15(2.) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality; see also the *Draft Declaration of Indigenous Peoples* at Art. 1. Indigenous people have the right to the full and effective enjoyment of all of the human rights and fundamental freedoms which are recognized in the *Charter of the United Nations* and in the human rights law; see also at Art. 5. Every Indigenous person has the right to belong to a nationality.

explanations demonstrating the lack of a consensual relationship between the Lil'wat peoples and the Canadian state. Because the Lil'wat Nation was not conquered and the Lil'wat people have never acquiesced to being subjects of a foreign state, there exists a lack of legitimacy in the unilateral imposition of Newcomer citizenship status.[145]

Before an impartial tribunal, the opportunity would exist to consider the legal failure of the Newcomers to obtain Indigenous consent prior to the substitution of an alien concept of citizenship. A neutral adjudicator would allow a legal challenge to a breach of an order of an institution which the accused could prove they owed no allegiance to or duty to obey. Youngblood Henderson explains: "In the post-colonial era, Canadians are comfortable in believing Canadian federalism grew out of mystical democratic traditions, just as they are comfortable in assuming the rule of law exists. These beliefs are as much a matter of prejudice as convenience."[146] Michael Milde elaborates on this point where he explains that the legitimacy of the positivist approach "depends on a democratic theory which says that people speak through their elected parliamentary representatives"[147] Since the theory claims that people should be represented in institutions that have power over their lives, he argues that once the necessary representation is shown as lacking "the substantive justification for their approach is absent."[148]

The judge also insisted on prejudgment on an issue of fact when he refused the defense

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[145] McLachlin, C.J.C. stated "Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered." in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 (CanLII) at para.25; consider also that an immigrant, before being granted citizenship, is required to swear their loyalty to Canada, its institutions and its laws.

[146] "Empowering", *supra* note 58 at 305.

[147] Milde, *supra* note 29 at para.13.

[148] *Ibid.* In reaching a similar conclusion, Henderson comments: "Without a proficiency in indigenous world views, languages, rights and treaties, the Canadian legal system cannot equitably talk about authentic democracy." "Empowering", *supra* note 58 at 245.

request that the Province be required to provide strict proof of ownership given that their contempt prosecution was based on a claim of conspiracy to commit trespass and public nuisance against the Lil'wat peoples on their own lands. On this issue Justice MacDonald insisted on upholding an invalid presumption regarding the highly contested claim to the Province's ownership of the unceded territory in question.[149]

Reliance on unsubstantiated assumptions regarding essential facts is one means of exercising prejudgment in a case.[150] The judiciary's insistence on prejudgment of the issues of territorial sovereignty, jurisdiction, ownership, authority, nationality and citizenship begin to reveal that something in addition to a strict positivist approach is influencing their exercise of discretion.

Another example of prejudgment, involved Justice MacDonald's declaration that the elementary justification for contempt proceedings was the preservation of the court's authority.[151] Although Mr. Justice MacDonald was able to agree with the proposition that having authority over the people in question is an element of the charge of contempt, he simply refused to accept that before he could convict for contempt he must first establish his authority *vis-à-vis* the traditional Lil'wats. When challenged on this point, Mr. Justice MacDonald's responded tautologically that the Chief Justice's order had issued and he as well had spent considerable time exercising jurisdiction over them by holding this hearing so

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[149] This is particularly so in the case at bar, where the Provincial claim to ownership was based on it's recent, constitutionally questionable, expropriation of the land in question.

[150] See L Crompton, "Unscrutinized Assumptions in Indigenous Issues", [unpublished paper delivered at the Law Forum, Laval, Quebec, May 27th, 2001to the Council of the Canadian Law Deans] for further elaboration on this point.

[151] *A.G.* v. *Chief Andrew, supra* note 10, March 18th, 1991. Reasons for Judgment at 26. Collateral Attack Argument. On this date Mr. Justice MacDonald delivered written reasons.

therefore, he must have it.[152] In his written reasons he concluded: "There can be no argument that this court has the jurisdiction to defend its own authority. ... Without such a power, the court would have form but would lack substance."[153]

The fact of the matter was that Mr. Justice MacDonald had predetermined that Canadian law had authority over the Lil'wat territory before considering the applicable British Imperial law and precedents that challenged such an interpretation. In doing so, he avoided the relevant issues, which is evidence of partiality and shows in this instance a leaning in favor of a particular party as well as a particular result.

For those schooled in the British legal tradition, it is difficult to comprehend that Canada might not be the only governing system and source of laws in the territory in dispute. Simply because Indigenous systems are not as visible as are Canadian ones, it does not follow that they are non-existent or unsophisticated. As Monture-Okanee and Turpel explain:

> The notion of a written code or law is also foreign to aboriginal cultures. This does not mean that aboriginal systems of law were not as "advanced" or "civilized" as European-based systems; these are racist stereotypes. It merely means that aboriginal law was conceptualized in different but equally valid ways. Laws were not written because law needs to be accessible to everyone. When an oral system is effective, the law is carried with each individual wherever he or she travels.[154]

In his response to the judge's request for him to spell his Lil'wat name, James Louie explains to Mr. Justice MacDonald that Lil'wat law continues in existence:

> We usually don't write our names. We don't write our laws. They come from here. From mouth to mouth sort of thing, from heart to heart...we have lived this way since

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[152] *Ibid.* "While I accept Ms. Crompton's submissions that the court must deal with a challenge to its jurisdiction, and must find jurisdiction as one of the elements necessary to support a conviction for contempt, I consider that I have spent considerable time in doing exactly that."

[153] *A.G.*. v. *Chief Andrew, supra* note 10, March 18th, 1991 Reasons for Judgment at 11. Collateral Attack Argument. Mr. Justice MacDonald.

[154] Monture-Okanee, *supra* note 7 at 246.

> time out of mind. But it is still here. We don't have to write it. You are brought up with it. You live in it.[155]

To further reveal judicial reliance on embedded assumption, the use of analogy may assist the reader. Place an American citizen in the situation of a Lil'wat native. Imagine, that the Provincial government of British Columbia had unilaterally issued a logging license to Interfor to clear-cut an area that an American owner claimed to be just within the territorial limits of the United States. Due to survey errors made long ago, it has long been assumed by Canada that the land was within its territory. The British Columbia Supreme Court proceeded to grant an injunction on the assumption it had jurisdiction. Similar to the traditional Lil'wat accused, the American owner refused to attend the injunction application on the grounds that the British Columbia Superior court did not have jurisdiction over him or his American homestead, which had been in his family for generations. He took this position on the basis of the legal principle that the order of a court without jurisdiction is a nullity.

If the British Columbia Superior court proceeded to issue an enforcement order, erroneously, giving authority to the R.C.M.P. to enter onto lands not validly within the Superior court's jurisdiction to arrest the American owner from his own land, would this individual then be prevented from arguing in a criminal charge of contempt of court that the British Columbia Superior court was without jurisdiction over him and the land in question? Would he not be allowed to argue that he owed no allegiance to abide by the foreign court's orders issued without jurisdiction on the basis that such orders amount to a nullity?

Would he, following his arrest, be prevented from making an application for habeas corpus on the basis of a jurisdictional argument that could prove the unlawfulness of his/her detention? Would he be prevented from seeking a non-suit on the basis of the argument that

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[155] Dec. 13th, 1990 Transcript at 1.

the Crown could not possibly prove ownership at trial? Would the court refuse to hear any legal argument regarding his preliminary challenge to jurisdiction and insist that the only manner for the American citizen to have this matter addressed would be to submit to the jurisdiction of the court for a trial before a court he alleges is without jurisdiction? And most importantly, would the British Columbia Superior Court, prior to the trial (which will most likely not take place for at least two years), assume that the balance of convenience falls sufficiently in the Attorney General of B.C.'s favor for the court to make it a precondition of the release of the American accused that he swear not to return to his land until the trial is completed?

Even more to the point, would the B.C. Superior court be allowed to criminalize the American citizen on the basis of a prejudgment or assumption regarding the jurisdictional point once the American was prepared to support his preliminary jurisdictional challenge with extensive legal argument based on binding legal precedents? It is submitted that the court would be required to hear the applicable law and case precedents and then adjudicate upon the jurisdictional challenge prior to proceeding to trial, so as to abide by the principles of a fair trial including due process.[156] To reduce the rights of the Indigenous peoples to less than those afforded other members of the world community is in breach of international human rights law.[157]

This analogy reveals that it simply does not make sense that persons living beyond the territorial jurisdiction of a court are bound by the orders of a foreign court until the matter

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[156] *R.* v. *Suchacki* [1924] 1 D.L.R. 971, *Gladstone Petroleum Ltd.* v. *Husky Oil (Alberta) Ltd.* 1 D.L.R.(3d) 219 (Sask. C.A.)

[157] *UDHR* , *supra* note 144; see also *ICCPR.*, *supra* note 70; consider also where the Federal Court of Appeal states: "Citizenship requires attachment to Canadian laws and institutions and a commitment to the duties that ensue as a Canadian citizen." *Lavoie* v. *Canada* [2000] 1 F.C. 3 (F.C.A.) at 4.

has been brought to trial. This is what happened to the Lil'wat.[158] As to the notion that the jurisdictional argument could only be heard at a trial some two years in the future Clark stated: "...it's absolutely preposterous to say that you can't make a fundamental legal argument going to jurisdiction except at a trial. I mean that's absolutely absurd." Although Mr. Justice MacDonald refused throughout the contempt case to rely on his inherent jurisdiction to hear the applicable law regarding the Lil'wat sovereignty defense, he nevertheless replied to Clark: "I recognize that."[159]

The only difference between the American citizen and the Lil'watum is the existence of embedded colonial assumptions. Pervasive judicial prejudgment combined with an extraordinary degree of resistance to hearing applicable legal arguments reveals bias in the B.C. Supreme Court.

3.3 A Judge is Not to Have a Leaning to One Party Over the Other

A trial judge must not have an inclination or predisposition towards a particular party or a particular result.[160] According to principles of impartiality the judge must be indifferent between the parties before him or her, even where one of those parties is the Queen.[161]

In a case involving two distinct peoples[162], each with their own sets of laws over the land in question, the fact that the domestic judiciary swear that they "will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, according

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[158] March 11th, 1991 Transcript at 41.

[159] *Ibid.*

[160] *Yusuf* v. *Canada (Minister of Employment & Immigration)* (1991), [1992] 1 F.C. 629, 7 Admin. L.R. (2d) 86, 133 N. R. 391 (C.A.); *R.* v. *Arnold* (2000), 2000 CarswellOnt. 1644 (Ont. S.C.J.), aff'd (2000). 2000 CarswellOnt 3471 (Ont. C.A.)

[161] *R.* v. *Drakes* (1998) 122 C.C.C. (3d) 498.

[162] Until a treaty between the Newcomers and each Indigenous Nation is mutually agreed upon, the two peoples remain legally autonomous and distinct.

to law" presents such a circumstance.[163] In fact, the domestic judiciary swears to uphold the law created and relied upon by the Province, one of the parties to the dispute. This is to choose sides in a dispute over jurisdiction with Indigenous peoples. Such laws are in direct opposition to the territorial assertion of sovereignty by the Lilwat people who have been in continuous possession of their unceded land for many centuries.[164]

A more specific example of a leaning in favor of one party occurred where the domestic judiciary refused to listen to legal submissions by both parties involved in the dispute. Interfor applied for a second injunction against the Lil'wat people who, following the dismantling of the roadblock, continued to interfere with road construction at the gravesite area surrounding Ure Creek. Clark referred to a lack of judicial indifference by Mr. Justice Wetmore who heard the application:

> Mr. Justice Wetmore listened only to the law tendered by the logging company...When he refused to listen to the law he necessarily placed himself above the law. He based his decision upon one side of the story. That is, he made a non-judicial decision...But the authentic obligation upon every judge is to judge as between contending positions. By refusing to hear the one side's position at law, Mr. Justice Wetmore, in effect, cast off his robes of office and descended into the dust of the political arena.[165]

A third example demonstrating a leaning in favor of one of the parties in this dispute was where Mr. Justice MacDonald, without providing reasons or hearing argument, stated emphatically that: "any contempt found in this case will be a criminal contempt and not a civil contempt, and the proceedings will be conducted on that basis."[166] In order to make this ruling, Mr. Justice MacDonald had to determine whether the activities of the Lil'wat

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[163] A copy of the oath sworn by the B.C. Supreme Court judiciary upon their appointment to the bench on file at the Vancouver Supreme Court Law Library.

[164] Such laws are also in conflict with applicable international human rights law.

[165] Feb, 8th, 1991 Transcript at 20.

[166] Nov. 19th, 1990 Transcript at 18.

protestors amounted to disobedience directed at the plaintiff or whether it was behavior calculated to bring the administration of justice into scorn. He relied on the characterization of criminal contempt as a public act by a large number of persons, in defiance of an order of the court, which has the effect of calling the very authority of the court into question, or which tends to bring the justice system itself into scorn. He cited *R.* v. *Bridges No. 2* for the proposition that:

> In the whole spectrum of conduct classified as contemptuous, there can be none more sinister or more threatening than that of organized, large scale, deliberate defiance of an order of the court.[167]

Lord Shaw's statement in *Scott* v. *Scott*, where the House of Lords reversed the Court of Appeal offers a different view of injunctions:

> Cases for breach of injunction are tried every day, but I have never yet heard that they were anything but subject to trial by the civil Judges as in a civil cause or matter; and in the course of that trial it is open to the person accused of breach to establish upon the facts that what has been done, was not a breach in fact, but was a legitimate and defensible action. [168]

The superior court of B.C. certainly did not provide an opportunity for the Lil'wat accused to establish the legitimacy of their acts. Consider as well the caution expressed in *Re Clements*, where Sir George Jessel M.R. stated:

> Therefore, it seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject.[169]

Justice MacDonald seemed determined to rely on the criminal contempt charge against the Lil'wat accused. He certainly did not exhibit a reluctance to exercise the jurisdiction relating

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[167] *R.* v. *Bridges* (No.2) 61 D.L.R.(4th) 155 (B.C.S.C.) at 157-8.

[168] *Scott* v. *Scott* (1913), 82 L.J.P. 74, (H.L.) at 110.

[169] *Re Clements* (1877), 46 L.J. Ch. 375 at 383.

to contempt as the precedent suggests. In terms of considering other modes of proceeding that could be brought to bear on the dispute, the domestic judiciary was absolutely resolute that there was no alternative in the circumstances but to prosecute the traditional Lil'wat people for criminal contempt.

Mr. Justice MacDonald understood that "these proceedings originate in a civil action for trespass and nuisance on what is alleged to be a public highway."[170] Therefore his characterization of the contempt as criminal in nature, prior to hearing any evidence or characterization of the contempt as criminal by the prosecution, was a ruling that could be interpreted to demonstrate a leaning in favor of the Crown or a particular result. The consequence of this ruling was that one party to the civil dispute involving land became an accused facing the possibility of a criminal record, while the opposing party in the property dispute became the prosecutor of their alleged crime.

Mr. Justice MacDonald's protection of counsel representing the Crown and his failure to provide Clark with similar assistance provide a fourth example of his favoritism.[171] Clark requested on Feb. 11th, 1991, that Justice MacDonald recommend to Mr. Justice Wallace that if Clark were to be disbarred that he at least be allowed to complete his submissions relating to the sovereignty defense of the Lil'wat peoples facing contempt charges before Justice MacDonald.

Clark's possible disbarment arose out of an appearance in the B.C. Court of Appeal on February 8th, 1991, before Mr. Justice Wallace.[172] In an affidavit supporting an application for leave to appeal the recent injunction issued by Mr. Justice Wetmore in relation to Ure

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[170] *A.G.* v. *Chief Andrew, supra* note 10, March 18th, 1991 Reasons for Judgment at 25. Collateral Attack Argument. Mr. Justice MacDonald.

[171] February 11th, 1991 Transcript at 18.

[172] *Interfor* v. *Pascal, supra* note 32.

Creek, Clark included the statement that: "...my clients feared a judicial conspiracy was under way to stonewall the law by simply refusing to allow the law into the court."[173] Because of the word "conspiracy", Mr. Justice Wallace adjourned Clark's leave application while simultaneously recommending that the Attorney General of British Columbia have the Law Society investigate the possible disbarment of Clark for his use of the word. Clark's explanation for the reaction of the judge was that it was an attempt to have him disbarred due to the fact that his application "disturbed the judges' assumption about their own jurisdiction".[174]

Clark also attended at the B.C. Court of Appeal for the commencement of the appeal of the *Delgamuukw* case where the presiding panel not only refused to hear his submission on the law, but additionally requested that Clark leave when he suggested to them that their assumption of jurisdiction was "treasonable, fraudulent, and genocidal". The judiciary's defensive behavior, coupled with their refusal to hear the law, revealed both a leaning toward one party as well as a leaning to a certain outcome in the case.

Clark explained to Mr. Justice MacDonald the specific importance of at least being allowed to pursue the sovereignty argument in his court:

> Mr. Clark: Now I am not attempting to pat myself on the back here, but the reality is, I just happen to have spent the last five years doing a doctorate on that very subject. No one else has done this. So, you know, there really isn't anyone else who can be put in...my place, effectively. And any suggestion that someone can, and that the clients are not being denied their fundamental right to counsel of their choice, in terms of the Royal Proclamation of 1763, it would simply constitute yet another fraud and an abuse within the meaning of that constitutional instrument.[175]

The judge simply responded as follows:

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[173] Clark, *supra* note 28 at 102.

[174] *Ibid.* at 103.

[175] Feb. 11th, 1991 Transcript at 12.

> The Court: Mr. Clark, if the Law Society reaches a decision that you should not be allowed to practice in this province, there is very little I can do about that, it seems to me.[176]

This response indicated reluctance on the part of the judge to become involved in assuring that the legal arguments of Clark on behalf of the Lil'wat people were heard. Mr. Justice MacDonald had stated on record prior to this point in the case that Clark's arguments were sophisticated and would have a fundamental effect on the rights of Indigenous peoples if held to be valid. What prevented him from agreeing to inform Mr. Justice Wallace of the particular importance of allowing Clark to complete his defense submissions in the contempt hearing?

The judge showed a leaning in favour of one party over the other when he refused to assist Clark who was being criticized, but would not hear, on the other hand, any criticism directed at counsel for the Crown. Mr. Justice MacDonald refused to respond to repeated allegations by defense counsel that Crown counsel, for both the federal and provincial governments, were acting improperly. Consider the following statement by Clark:

> Mr. Clark: Earlier this morning...you will recall ...that co-counsel, Lyn Crompton, made certain comments about the canons of ethics and the proposition that counsel for the Attorney General is in breach thereof.[177] I made comments that we are entrapped in a process constituting a fraud and abuse under the *Royal Proclamation of 1763* and criminal offences under Sections 424 and 431 of the *Criminal Code*. I have been reported to the Law Society by Mr. Justice Wallace. I am asking that your lordship report to the Law Society counsel on the other side. I suggest that the more serious offence is being perpetrated by them and not by me and the answer is not silence the truth by shutting up defense counsel. If the Law Society is going to

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[176] *Ibid.*

[177] See Jan. 17th, 1991 Transcript at 29: I had referred to the Canons of Legal Ethics that states the primary duty of a prosecutor is not to convict but to present both sides so as to create the appearance that justice is being done. To that end, he is not to withhold any evidence or prevent the admissibility of any evidence that supports the innocence of a party before the court. This was my response to the attempt by the Crown to have all the testimony of the Lil'wat accused excluded on the basis that it was irrelevant to the charge of criminal contempt of court.

> investigate, I'm suggesting that it should look into the whole situation, not just going on a witch hunt against defense counsel.[178]

The judge responded:

> The Court: ....I have no intention of reporting counsel for the Attorney General to the Law Society. There is no conduct before me which—on their part, which would dictate that. You are perfectly free to do that but there is nothing that's been disclosed to me in the conduct of these counsel here that would justify me in taking that step.
> Mr. Clark: And the allegation of criminal offences and frauds and abuses would not constitute a basis for that?
> The Court: No.[179]

The judge took the position that to do so would be exhibiting partiality, which he claimed he was scrupulously attempting to avoid in this case. Mr. Justice MacDonald however was unable to acknowledge the existing disparity between his refusal to protect Clark from allegations of impropriety while refusing to investigate the defense allegation that the Crown's actions in the matter were in breach of the rule of law and the Canon of Legal Ethics.

An example of a valid criticism regarding the Crown's position was Clark's suggestion that counsel for the Attorney General of Canada, when he appeared against the Lil'wat people, was not entitled to the presumption and corresponding credibility that results where one appears as a friend of the court. Clark referred on record to the conflict of interest the federal government was embroiled in:

> The Attorney General of Canada is an interested and compromised party. As a trustee accountable for a massive and systematic breach of trust, the federal government appears before this court if at all with unclean hands.[180]

Clark refused to alter his allegation that the two governments had conspired to commit a fraud and abuse as defined within the Royal Proclamation. Mr. MacKenzie, counsel for the

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[178] Feb. 11th, 1991 Transcript at 2.

[179] February 11th, 1991 Transcript at 3.

[180] December 10th, 1990 Transcript at 21.

Provincial government, had taken objection with Clark's characterization.[181] Clark was quick to respond with the following statement:

> I want this to be perfectly clear. I don't for one second back off that characterization, because that characterization is the guts and the essence of what's going on here. This isn't a question of an old boy's club or some gentleman's arrangement, this is the Crown committing a fraud and an abuse, and unless somebody stands up and says the King has no clothes, this monstrous game will go on forever.
> My Lord, I take the position that the most sacrosanct duty your lordship has or any judge would have is your position out of the Court of Equity, and when a fundamental fraud and abuse on a massive systematic and methodical scale is alleged, I am saying the court's heckles should rise. They should rise in two senses. If I am wrong, then I should be severely reprimanded, perhaps disbarred, but if I am right then the court should rise itself in righteous indignation and insist that justice be done and Canada's honor vindicated.[182]

Crown Counsel must perform their duties with impartiality and in a manner that is above reproach.[183] When acting as counsel on behalf of the Attorney General of British Columbia, for example, counsel has a very strict obligation and fiduciary duty towards all aboriginal people to treat them and their rights with the utmost good faith and fairness. In deciding whether to institute or stay proceedings, the Attorney General or his designate, as representatives of the public interest, must demonstrate absolute independence and arrive at their decisions objectively, impartially, and in an even-handed manner.[184]

The following example from the case provides a fifth display of the lack of the required

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[181] The Lil'wats' application before the Federal Court of Canada alleged "the breach by the Federal government of their fiduciary trust obligations and without restricting the generality of the above ....in particular that the defendants have been engaged in or facilitated an unconstitutional program of cultural genocide and territorial use against the plaintiffs..." and "...the defendants actually constructively have conspired, colluded or connived with the Attorney General for the Province of British Columbia, to commit fraud and an abuse within the meaning of the *Royal Proclamation of 1763*, by facilitating court proceedings in the B.C.S.C. contrary to the constitution and to s. 2 and 18 of the *Federal Court Act*." *Lil'Wat Aboriginal People* v. *Attorney General of Canada and Her Majesty the Queen in Right of Canada,* Action No. T-3005-90 (Fed. Ct. T.D.) Statement of Claim filed Dec. 10th, 1990 at 5.

[182] Dec. 10th, 1990 Transcript at 18.

[183] *Boucher* v. *The Queen* [1995] S.C.R. 16 at 21.

[184] *R* .v *Moscuzza* (2001) 54 O.R. (3d) 459 (Ont. S.C.).

even-handedness by both the judge and Mr. McKenzie, in his capacity as representative of the Attorney General of British Columbia. On December 14th, 1990, Mr. MacKenzie objected to my use of the word "expropriation" when characterizing the manner in which the Provincial government responded to the roadblock. He claimed on record that there was no expropriation order, but rather that there was a resumption under *Order-in-Council* 1036/1938.[185]

Ms. Pinder, counsel for the Band Council and Chief, appeared at the contempt trial to object to a statement made by Mr. MacKenzie the previous day where he stated on record that "the road was planned and carried out with the knowledge of Chief Fraser Andrew." Ms. Pinder requested to address the court. She commented:

> We were dealing with the constitutional challenge to the Province's expropriation, and I use the word advisedly and with all the legal connotation that it carries, the expropriation of Lillooet Lake Road.[186]

She took most serious exception to the statement of Mr. MacKenzie, in which he insinuated the government had the consent of Chief Andrew to build the road through the gravesite area. In response Mr. MacKenzie simply retorted:

> Mr. MacKenzie: Well, my lord, I have no reply.
> Ms. Crompton: Excuse me, my lord, does that mean he leaves it on the record?
> The Court: I take that, yes.

The judge states a few lines later: "Well, Ms. Pinder I've heard your request. I've given your friend the opportunity to reply. I can't order him to do that. You're aware of that."

This exchange demonstrates that the highest legal officer in the Province was permitted by the Superior court judge, to leave on record a statement that was simply untrue. The Crown's statement regarded the most sensitive issue in the case: the assumption of Provincial

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[185] December 14th, 1990 Transcript at 9-10.

[186] *Ibid.* at 11.

legal authority over the territory and the building of a logging road through the sacred gravesites of the Lil'wat people. Other than on the basis of a leaning in favour of the Crown, how does one explain the failure of the judge to request further explanation from the Crown for the discrepancy between his recorded statement and the flat denial of its truth by legal counsel for the Band Chief?

Counsel for the Provincial Attorney General represents the same party that failed to gain access to Lil'wat reserve land through negotiation. The independence and impartiality of the Crown's decisions must be questioned, not only in their instigation of trespass proceedings relating to the road they had expropriated three days earlier, but also in the instigation of the contempt proceeding that followed.

Additionally, Crown Counsel representing both the Provincial and Federal governments attempted in every conceivable way to prevent the evidence and legal arguments in support of Lil'wat sovereignty from being heard before any level of the domestic courts. For example, Mr. McKenzie argued on behalf of the Province that the testimony of the accused Lil'wat people was irrelevant and inadmissible in their trial for criminal contempt. On Dec. 10th 1990, he objected to the Lil'wat testimony regarding why they considered themselves to owe their allegiance to the Lil'wat Nation.[187] Also when Clark attempted to qualify some of the elders as experts on Lil'wat oral history and Lil'wat law, Mr. MacKenzie objected that they 'may not be experts':

> It will be our position that only experts can give opinion evidence, that lay witnesses cannot give opinion evidence, and that lay witnesses cannot give hearsay evidence except in certain circumstances under certain exceptions.[188]

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[187] Dec. 10th, 1991 Transcript at 14.

[188] *Ibid.* Although there may be technical merit to the specific evidentiary objections, how can it be explained by the Attorney General of British Columbia as being in the best interest of the Canadian public to prevent such crucial evidence from being heard?

Mr. Justice MacDonald avoided hearing the Lil'wat people's evidence by relying on the principle of collateral attack and by ruling that criminal contempt did not require proof of mens rea. Both of these decisions ignored his own reference in his judgment to the decisions of the Supreme Court of Canada that require courts to approach the application of constitutional rules as well as the common law to Indigenous peoples in the manner which is most favorable to them.[189]

The final example of judicial favoritism involved Justice MacDonald's inconsistency in his rulings on challenges to court jurisdiction. In *A Penchant for Prejudice* Linda Mills identified that while bias can be exhibited in reasoning as well as in decisions, the former may be difficult to reveal due to the fact that it will usually be accomplished by way of an acceptable legal principle.[190] In the Lil'wat criminal contempt case, while the judge insisted the collateral attack rule prevented his hearing of the Lil'wat jurisdiction argument he had no such difficulty when the Federal government challenged his jurisdiction *vis-à-vis* the Lil'wat juveniles. Mr. Justice MacDonald insisted on a full-day of legal argument on whether the B.C. Supreme Court or the Provincial Family Court had jurisdiction over the juvenile accused.[191]

This jurisdictional challenge was fundamentally analogous to the Lil'wat preliminary jurisdictional challenge in that, if successful, it would nullify the jurisdiction of the original order of the Chief Justice in relation to the juveniles as well as Mr. Justice MacDonald's jurisdiction over them for criminal contempt.

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[189] March 18th, 1991 Reasons for Judgment at 23-4. Mr. Justice MacDonald

[190] Mills, *supra* note 9 at 12.

[191] The jurisdictional question was whether the Young Offender's Act had placed exclusive jurisdiction for contempt of court committed by juveniles with the Provincial Family Court of B.C? Pursuant to it's inherent jurisdiction, could the Supreme Court of British Columbia also here such a case?

As to the impossibility of hearing the Lil'wat's jurisdictional challenge, the judge was so certain on this point that he interrupted Clark's opening:

> The Court: I now ask counsel for the Attorney General to proceed with his case for contempt
> Clark: My Lord, I am halfway through my opening statement.
> The Court: I recognize that.
> Mr. Clark: You are refusing these people the right to have their counsel complete the opening statement?
> The Court: I am indeed.

Clark next stated he intended to cite several cases in support of the Lil'wat's legal defense position and asked specifically whether Mr. Justice MacDonald was also refusing to let him cite those cases?

> The Court: I am indeed.
> Mr. Clark: My lord, I believe counsel would like to confer for the purpose of requesting that this court declare a mistrial because of manifest evidence of judicial bias.
> The Court: I will be happy to give you the opportunity to develop that argument, Mr. Clark [192]

Mr. Justice MacDonald added however, that as soon as Clark's argument regarding his lack of impartiality was completed, he wished to determine when the Attorney General would be in a position to proceed.[193]

Clark cited Art. 14(1.) of the *International Covenant on Civil and Political Rights* and s.11(d.) of the *Canadian Charter of Freedoms and Rights* in support of the right to an impartial hearing.[194] Clark stated that in light of the judge's refusal to let him complete his opening statement it was his opinion that an impartial hearing was unlikely due to "the court

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[192] Nov. 20th, 1990 Transcript at 49.

[193] Justice MacDonald's comment suggests a preconceived opinion that the application for a mistrial will fail. It is evidence of 'a leaning towards one party over the other' that the only perspective the judge will take of the criminal proceeding before him is that of the enforcement of the Supreme court order.

[194] See *ICCPR., supra* note 70 and *Canadian Charter of Rights and Freedoms,* s. 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982(U.K.), 1982, c. 11 [*"Charter"*].

having demonstrated the existence of a prejudgment on a fundamental issue regarding Aboriginal rights."[195]

Mr. Justice MacDonald simply held against Clark's mistrial application and his focus to completing the Crown's case of criminal contempt against the Lil'wat traditional peoples. The one exception to this focus was where the judge, in complete opposition to his ruling in relation to the Lil'wats, allowed Crown counsel on behalf of both governments, a full day's argument during which he allowed both his and the Chief Justice's jurisdiction to be legally challenged.

In relation to the Lil'wat accused he had repeatedly taken the position, that whether he liked it or not, he had absolutely no choice in the matter, whereas when the jurisdictional challenge arose between two courts within the province, he was able to conclude there was a possibility that the original injunction was a nullity. He was insistent in response to the government's jurisdictional challenge that "I'm a creature of law and bound by it so I'm going to hear the submissions of both counsel as to whether or not I can in fact exercise jurisdiction over those younger people."[196] He did not once make reference to the collateral attack rule. Instead, in his March 15th, 1991 ruling, Mr. Justice MacDonald stated if the Family Court had exclusive jurisdiction over the juveniles then these proceedings in the B.C.S.C. would be a nullity against them, precisely the finding he insisted he was absolutely precluded from making when the jurisdictional challenge originated with the adult Lil'wat accused. Other than a leaning in favor of the Crown or a particular outcome, how can the judge's discrepancy in his handling of the two jurisdiction challenges be reconciled?

By the conclusion of this case, one is left with a distinct impression that the judiciary had

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[195] November 20th, 1990 Transcript at 51.

[196] Nov. 21st, 1990 Transcript at 81.

a considerable leaning in favor of the Crown and it's position[197] as opposed to exhibiting necessary neutrality. Each of the incidents in and of themselves may not provide a sufficient basis to reach the conclusion there was judicial or institutional bias, however cumulatively these examples should make evident a bias in the judicial conduct of the proceedings as a whole, as well as demonstrating a repeated favouring of the Crown.

3.4 A Judge is Not to Make Comments that Create an Apprehension of Bias

Comments that reflect a lack of impartiality in the state of mind or attitude of the tribunal may address not only the issues before the court but the parties as well.[198] In *Yusuf* v. *Canada (Minister of Employment &Immigration),* the Supreme Court of Canada held that where "the judiciary made comments about her that created an impression of bias" the requirement of impartiality was not met.[199] Consider whether the following comments of Justice MacDonald in the criminal contempt trial create an apprehension of bias.

Throughout the several months of the proceeding, the Lil'wat people refused to identify themselves by either their Lil'wat name or their English name before a legal system that they claimed had no jurisdiction over them on their unceded territory. Mr. Justice MacDonald was referring to this position when he stated that he "appreciated it...you are entitled to be proud of that decision."[200] He acknowledged that their refusal to name themselves or to enter into an undertaking with him for their release, were viewed by the Lil'wat people as a recognition of jurisdiction that they believed the court did not have.

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[197] *A.G.* v. *Chief Fraser, supra* note 10. Statement of Claim of the Attorney General of British Columbia at para.2: "Her Majesty the Queen in right of the Province of British Columbia (the Province) is the owner of public highways within the province of British Columbia."

[198] *R.* v. *Valente* [1985] 2 S.C.R. 673, [1985] S.C.J. No. 77.

[199] *Yusuf* v. *Canada (Minister of Employment & Immigration)* [1992] 1. F.C. 629 (C.A.)

[200] April 17th, 1991 Transcript at 6.

The following exchanges with various traditional Lil'watum reveal the conflict over names.[201]

> The Speaker: I would just like to know how come you have to know the English names. Explain it more. I didn't really understand why you have to know the English names.
> The Court: There has to be an order entered as a result of what I am doing here today, or what I've done so far today...and that order must contain a name in my language, and that is the only reason I need your name.
> The Speaker: So if someone had a French name or Dutch name?
> The Court: That would be acceptable, yes, if that was the name—
> The Speaker: So you're saying a European name?
> The Court: Yes. A European name.
> The Speaker: So is my language not a language to you?
> The Court: Not to me, no. I don't understand it. It's a language to me. I have heard it spoken here. It's a beautiful language. I don't understand it, nor does my system understand it.
> The Speaker: Do you understand Dutch?
> The Court: No.
> The Speaker: So what's the difference?
> The Court: I could explain the difference if you wanted me to.
> The Speaker: Yes, please.
> The Court: The Dutch nation, unlike the Lil'Wat nation, has a system of recording which we can trace through our system to that. We can't do that to the Lil'Wats.
> The Speaker: You didn't ask.
> The Court: That's the reason. That's all.
> The Speaker: So can you explain it again. I don't quite understand what you're—
> The Court: No. I think I have explained it once.
> The Speaker: I am trying to figure out what you are saying is you are saying the reason that you will accept that is because you can look, read up a history on it?
> The Court: But the reason I am accepting Dutch or English is that it's a name, a language which my system recognizes. My system does not at the moment recognize the Lil'Wat language.
> The Speaker: Why?
> The Court: I don't know why.[202] And I am not called upon to explain why. I just have to know that that's a fact and that's why I need a name that I can recognize.
> The Speaker: Well, I am not giving my name out of will. I am being forced, blackmailed into giving my name. I would just like to say that.

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[201] The giving of their English name satisfied what Mr. Justice MacDonald insisted was a requirement at law to have them submit to the jurisdiction of his court regardless of the fact that this was in exact opposition to their sovereign position as expressed throughout each appearance of the Lil'wat accused.

[202] Perhaps the explanation for the judge not knowing why the Canadian legal system operates as it does, is because as Mills explains: "prejudicial beliefs exist in our psyches, in our unconscious". Mills, *supra* note 9 at 24.

The Court: I understand.[203]

The judge had the following exchange with Trudy Williams at the same sentencing hearing:

> The Speaker: But I don't understand why we got to give out English.
> The Court: Because of the system in which I am forced to work, that's why.[204]

A short time later at in the hearing another Lil'wat accused testified as follows:

> The Speaker: My name is Paypadoosh. (phonetic) That's my given name from my grandfather.
> The Court: What's your English name.
> The Speaker: That is my name.
> The Court: I'm sorry, if that goes on again I will have to get the sheriff to take you out of the room. I'm sorry. Please, I'm trying to be respectful. I would like you to be as well. Now, go ahead.
> The Speaker: It was given to me at birth by my grandfather. My name is Paypadoosh. (phonetic) ..... Well, that's all I have to say.
> The Court: Well, are you going to give me your English name, or aren't you?
> The Speaker: That's my name.
> The Court: Well, then, of course, you realize that if you don't, I have got to direct the sheriffs to take you into custody.
> The Speaker: Might as well take us all.
> The Court: I may have to.[205]

And finally, the exchange between Tsemhu7qw, the Lil'wat Watchman and Mr. Justice

MacDonald at the sentencing hearing:

> The Court: Number 8, the watchman.
> The Speaker: Sumquash (phonetic)
> The Court: Before you go, could I have your name, please?
> The Speaker: (speaking the Lil'Wat language)
> The Court: Your English name.
> The Speaker: (speaking the Lil'Wat language)
> The Court: I'm sorry, I don't understand it that way. Can I have your English name?
> The Speaker: (speaking the Lil'Wat language)
> The Court: I take it the answer is no?
> The Speaker: (speaking the Lil'Wat language)
> The Court: You understand the position this puts me in, do you? Mr. Sheriff, would you take that man into custody, please. I'm sorry.[206]

Following the judge's incarceration of the Lil'wats, Clark stated to the judge:

> They say their identity is Indian. Their name is them. Any insistence that they have to translate in their country their Indian identity into white man's terms is patently and consummately racist, and they prefer that this system convict itself.[207]

And a few lines later Clark added: "This process of criminalization is demeaning not only to them, but more demeaning to us who take part in the legal system."[208] Clark explained to the judge that treating the Lil'wat people in this manner is

> ...really exerting the power of our race of people over their race of people. And there is no way that we can kid ourselves when we walk out of this courtroom today because the great white father has suspended sentence that he is somehow a benefactor.
>
> A tyrant is a tyrant. And one of the most basic characteristics of tyranny is that when the underling is brought to heal, the great white father pats him or her on the head and sends them away, that ....is the most insidious, corrupting, and demeaning aspect of colonialism. It is the worst aspect of racism. It reduces proud, dignified human beings to—to a lesser state. And by doing that it not only demeans them, but it demeans us.
>
> And so I am not prepared to give this man's name.[209]

The judge responded that he had no intention that his rulings would be seen to have been humbling of anyone and he claimed that was not what he was about to do "...or what I intend to do. It's your choice."[210] Even after jailing Tsemhu7qw for his refusal to use his English name Justice MacDonald stated "I have no intention of punishing you for that stand on your

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[203] April 15th, 1991 Transcript at 57.

[204] *Ibid.* at 56.

[205] April 15th, 1991 Transcript at 37.

[206] April 15th, 1991 Transcript at 47. As to whether the judge's comments create an apprehension of bias, the reasonable person must also note the frequent judicial use of apology while making rulings, including when Mr. Justice MacDonald incarcerated Tsemhu7qw for persisting in identifying himself in his own language.

[207] April 16th, 1991 Transcript at 5.

[208] *Ibid.*

[209] April 15th, 1991 Transcript at 49.

[210] *Ibid.*

part."[211]

To watch as the Lil'wat traditional people were jailed for their refusal to name themselves in the Newcomer's language created a strong apprehension of bias in me. In fact, it was judicial positions such as this that convinced me that I could no longer participate as an officer of the court. It also indicated how deeply entwined the colonial regime was with the Superior court's process.[212]

The next comments for consideration involve Justice MacDonald's response to Clark's submissions during an application for an interim injunction on behalf of the Lil'wat people on December 10th, 1990:

> Clark: My clients have an honest and legitimate concern that irreparable damage is currently being done to their unceded Indian territory. For example, I should want your lordship immediately to hear their evidence that sacred graveyards are about to be blasted or flooded, and other non-compensable geographical environmental and ecological changes affected. I wish to persuade your lordship that this situation is critical, an interim remedy is absolutely essential pending the Christmas adjournment since it now appears practically impossible to achieve a final disposition before then.[213]

The next day, Clark summed up the judicial conduct of the case as follows:

> In a nutshell, the province molests or disturbs and the federal government turns a blind eye. When the Indians turned to the Canadian court system to insist that the rule of law be obeyed, as they did yesterday when we asked for an interim injunction from your lordship, they learned that the provincial court system is not inclined to react on their behalf promptly to forestall imminent danger and permanent destruction.[214]

Again Clark stated that there was a crisis on the land and in these circumstances "your

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[211] April 17th, 1991 Transcript at 6.

[212] The exchanges on names, in addition to providing evidence of comments that create an apprehension of bias, also provide evidence of institutional bias.

[213] December 10th, 1990 Transcript at 11. The Notice of Motion applied for an injunction against the provincial government to prevent the Province and others from transporting trees, chattels or materials used or to be used to alter the geographical, environmental or ecological condition of the traditional territory of the Lil'Wat Peoples of the Stl'atl'imx Nation.

[214] Dec. 12th, 1991 Transcript at 3.

lordship ought to issue an interim injunction at least to bind and protect the land until we return to court in January.[215]

> The Court: Mr. Clark, I have already told you that I am not going to deal with that motion on an interim basis until the end of this case.
> Mr. Clark: And your lordship understands....that I have been informed that sacred pictographs are about to be blown up and forever destroyed.
> The Court: Yes, I have heard you say that.

Where the judge responded to the Lil'wat crisis in such a detached manner while having the inherent jurisdiction to prevent the destruction of something so sacred to the Lil'wat peoples, he created an apprehension of bias.

A few days later Mr. Justice MacDonald complained that he had become impatient with Clark and his:

> ...tangents which indirectly are seeking to do the same thing. ... And in order to rule on the injunction application, for example, I would have to accept the argument that I am not bound by the order of the Chief Justice, and I come around to exactly the same issue that I am going to face when I come to the end of these proceedings, and that's why I won't deal with that application."
> Mr. Clark: Then I must have phrased my proposition very badly because I suggest, my lord, that it is patently unnecessary for you to go around the order of the Chief Justice by accepting jurisdiction on the counter-injunction application.
> The Court: Well, I disagree with you and I so ruled yesterday.
> Mr. Clark: Well, we haven't argued the point yet, though.
> The Court: You did yesterday, as far as I am going to permit you to...
> Clark: Our further submission is that—well, it just seems inconceivable to me—maybe I am wrong, but if there are actually sacred sites being blown up, doesn't that concern your lordship?
> The Court: Of course it does. But that's not what I am here to listen to.[216]

A few days later the judge again commented on his displeasure at Clark, this time for his attempt to burden him with the responsibility for the destruction of the sacred sites:

> ...in fact I did on December 14 come to regret that decision very much, because it was put to me by you on that day that unless I granted the injunction that all would be lost and the terrible onus of permitting the alleged desecration of gravesites, etc., was

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[215] Dec. 10th, 1990 Transcript at 22.

[216] Dec. 12th, 1990 Transcript at 3-5.

> put entirely on my personal shoulders or a least there was an attempt to do that and I was most upset by the...Mr. Clark. I make no bones about that. [217]

The judge appeared unwilling or unable to take responsibility for the consequences of his rulings. He had by this stage in the trial refused a great number of valid legal options to prevent the desecration that was occurring. He made evident his displeasure at the interruption of the criminalization process or being held accountable for the effect of his decisions.

On January 7th, 1991, Mr. Justice MacDonald made specific reference on record to the fact that Chief Justice Esson did not want him to hear the Lil'wat's interim injunction application. The Chief Justice apparently believed that if Justice MacDonald dealt with the interim application, it would create a perception of bias in respect to the contempt matter. Mr. Justice MacDonald stated: "...my concern about the injunction matter was that it would telegraph a view, however I tried to disguise it, of the merits of this contempt matter."[218]

Clark responded to Mr. Justice MacDonald that he regarded him as:

> ...someone who could make an historic difference in Canadian constitutional history...and I should be very, very disappointed. ...if your lordship is warned off the larger issues and I think that's what is happening.
> ...we appeared to be entering a era when substance might be granted the ascendancy over form...because finally one judge was really going to really look at what's really been happening and get down to brass tacks. [219]

When Clark expressed his disappointment Justice MacDonald stated that he "understands...but unfortunately I can't do anything about that."[220] The judge's insistence on his lack of capacity, coupled with knowledge that he had the inherent power to handle the matter justly, created an apprehension of bias.

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[217] January 7th, 1991 Transcript at 9.

[218] January 7th, 1991 Transcript at 27.

[219] *Ibid.* at 28-9.

[220] *Ibid.* at 30.

In the next example consider the judge's comments made in response to Clark's request that the judge take a view of the area in question and additionally that he agree to hear the evidence of the Lil'wat people in Mount Currie rather than Vancouver: "...in an environment that is less spiritually antagonistic, lest they be intimidated."[221]

While it is obviously more convenient for the judge, court staff and government counsel to have the Lil'wat people testify in Vancouver, the judge's comments gave greater weight to the Newcomer's convenience than to that of the Lil'wat people who have been in possession of the land without interruption for thousands of years. This created an apprehension of bias in the Lil'wat accused before the court.[222] Sharon Thevarge made this point at her sentencing when she stated:

> I mean this is ludicrous. We are sitting here in a white man's room. We have twenty sheriffs in here. And one person said: I am not going to give my name and, boom, they are all climbing in. It's stupid, stupid. I want you to come to my court and hear me out in my own court. And you cannot say we don't have it because we do...You can't tell us what we can and cannot do in our court, in our community. You can't. Those are my graves over there, my ancestors. And here we have to sit in a stupid white court and fight for it. Why? You have to come to my court, you, you.[223]

Mr. Justice MacDonald repeated his refusal to hear the Lil'wat injunction application until the contempt proceedings were 'dealt with' and added:

> I have no intention of taking a view in respect of that application because I have no intention of dealing with that application. It would be completely impractical to hear the evidence in these proceedings in Mount Currie, and I refuse to do so.[224]

At this Clark juncture sought an adjournment of the contempt trial so as to appeal to the

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[221] Dec. 12th, 1991 Transcript at 2.

[222] Needless to say, in terms of an impartial forum, the larger question is why is the Newcomers' legal system considered an acceptable forum for the resolution of the dispute, any more so than would be the Lil'wats' legal system? This will be given further consideration in section 3.6 that addresses institutional bias.

[223] April 15th, 1991 Transcript at 59.

[224] Dec.12th, 1990 Transcript at 3.

British Columbia Court of Appeal the question of whether the interim injunction application to prevent the desecration of the graves and sacred sites was a distinguishable and separate matter, or a collateral attack on Chief Justice Esson's injunctive order. Mr. Justice MacDonald refused the adjournment application telling Clark that he could do so next week when he was scheduled to be out of town on another trial. He then ordered Clark "to produce his witnesses."[225]

The judge's impatience with any legal approach that prevented him from completing the criminal trial of the Lil'wat people reveals the degree of his persistence in pursuing the criminal contempt conviction against the Lil'wat traditional peoples. He would neither hear nor adjourn, so that another judge might hear the application by the Lil'wat peoples for an injunction to prevent the imminent desecration of their ancestor's graves. The determination of the judge to complete the criminalization of the Lil'wat people leads us into a discussion of whether the judge was influenced by factors other than the evidence before him.

3.5 *Nemo Potent Esse Simul Actor et Judex:*

Judges must begin their consideration of a case from a neutral position, free from alignment with the parties involved in the case. They must not have a distinct, pecuniary, or a personal interest in the outcome of the case before them.[226] Without this position of disinterest, a judge's ability to resolve the matter is compromised. Judges who continue regardless of a conflict of interest open themselves to the charge that the case was decided on grounds other than the evidence or law before them. Kenneth Henley comments in his article "The Impersonal Rule of Law" that: "police, prosecutors, and judges offend against the rule

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[225] *Ibid.* at 6.

[226] See *Pearlman* where the SCC states: "...situations where decision makers have or are perceived to have a pecuniary interest in the outcome of the hearing before them could place their impartiality in question." *Pearlman* v. *Manitoba Law Society Judicial Committee* [1991] S.C.R. 869.

of law if they are influenced by personal interests, allegiance to class or other group, bias, or whim in the administration and application of law."[227] These principles form the basis of the legal maxim *Nemo potent esse simul actor et judex*: "no one can be at once both suitor and judge."

During the Lil'wat criminal contempt hearing Clark referred to the Latin maxim and stated:

> ...it is not appropriate for the appointees of one nation and race of people to sit in judgment in a civil dispute against an adversary race of people. ...it is no more appropriate for your lordship to presume to judge or enforce laws that make...my clients trespassers on their own unceded Indian territory than it would be for an Indian court to presume to unilaterally resolve the dispute.[228]

In *Justice in Paradise* he comments:

> The genius of the rule of law is that, by the simple device of a third party as adjudicator, it removes the corrupting influence of self-interest.[229]

The embedded conflict of interest for any Newcomer domestic court judge regarding jurisdiction over non-treaty Indigenous territory is immense. As an integral part of the system that has usurped Indigenous jurisdiction, complete detachment is unrealistic. Legislatively extending the jurisdiction of the British Columbia courts was a key manner of allegedly asserting British sovereignty over Lilwat territory. This one fact makes the domestic judiciary unable to claim they are free of a distinct and personal interest in the outcome of the case. The Lil'wats' jurisdictional challenge could be perceived as a significant threat to the superior court judiciary given that it affects the majority of the territory over which they have assumed jurisdiction.

The lack of the court's neutrality was shown near the beginning of the contempt trial. An

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[227] K. Henley, "The Impersonal Rule of Law" (1992) 5 Can. J.L.& Juris. 299-308 at para.20.

[228] January 25th, 1991 Transcript at 32.

[229] Clark, *supra* note 28 at 79.

exchange between Mr. Clark and Mr. Justice MacDonald while made somewhat in jest nevertheless contained the essential erroneous assumption that the judge proceeded upon throughout the case. Justice MacDonald was commenting on a photograph of a sign taken at the site of the roadblock:

> The Court: I would guess that that is a portion of a message that reads "Lil'Wat Territory Never Has Been Surrendered."
> Mr. Clark: Would it be fair to assume that that is not my lordship's judgment at this point?
> The Court: I think that's a fair assumption. [230]

A second more serious example of the judiciary as non-neutral occurred when Mr. Justice Braidwood of the British Columbia Court of Appeal refused to allow Clark to present the legal argument of the traditional Lil'wats at the appeal of the injunctive order relating to the Ure Creek protest site.[231] The judge addressed the Lil'wat people with the following admonishment:

> ...what you have done is to deliberately disregard the whole fabric of a law abiding society and to trample the rights of others, here loggers and road builders.
> This is no way to advance the claim you hold here. Your case becomes confused with the necessity to maintain law and order. It is the duty of this court to act upon and to apply the law as it now exists.[232]

His statements are clear evidence of his preconceived opinion as to whose rights take precedent between the logging corporation, the Newcomer public, and the original Indigenous peoples of the territory. Justice Braidwood began with the assumption that logging was the lawful activity that was being impeded by the unlawful actions of the Lil'wat

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[230] Nov. 26th, 1990 Transcript at 18.

[231] *Interfor* v. *Pascal, supra* note 32. April 15th, 1991 Transcript at 13. The Ure Creek case involved a second stand taken by Lil'wat traditional people closer to the actual gravesite area after the dismantling of the roadblock on the reserve. An injunctive order to remove the Lil'wat protestors was granted by Mr. Justice Wetmore to Interfor Logging Corporation. Clark noted that the judge in this injunction application "announced at the outset of the hearing that he would not entertain any objections based on constitutional law." Clark, *supra* note 28 at 109.

[232] Nightingale identifies that race and gender bias amongst judges affects their perceptions of wrongdoing and injury. Nightingale, *supra* note 136 at 72.

protestors.[233] His inability to remain neutral while hearing the applicable law according to each party resulted in the appearance that he was aligned with the suitor in the case.

In order to qualify or be seen as an impartial adjudicator in this criminal contempt case, the court would have to address the fundamental legal rights of the Indigenous peoples of the territory before it ordered their arrest and condoned their criminalization for peacefully asserting authority in their unceded territory. In fact, in order to provide a truly impartial tribunal in relation to a land dispute between Indigenous peoples and Newcomers, an adjudicator should not have a preference for one legal system over the other.

Clark put it this way:

> In essence, territory is off-limits to newcomers until it has been purchased by the newcomers' governments from the natives. And purchase is a question of mixed fact and law...Since the courts of the natives and the courts of the newcomers equally are interested in the answer to the purchase question, each court system, including this court, is equally biased in addressing and resolving it. For this reason, the law is that this question can only be answered as to any given territory by an outsider-an independent and impartial third party court-one whose jurisdiction does not itself turn upon a prejudgment of the very issue in contention: which court system, native or newcomer, has jurisdiction? [234]

In *Human Rights of Indigenous Peoples*, Erica-Irene Daes reveals the inappropriateness of Newcomer's assumption of jurisdiction. She claims the economic agenda of states is a doctrine of dispossession that colonists rely on to justify the dispossession of Indigenous peoples' land by non-Indigenous sovereigns.[235] She observed that this agenda drives attitudes, doctrines and policies developed to justify the taking of such lands. Youngblood

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[233] Consider Lynch, Michalowski and Groves where they conclude "the more the behavior of the powerless conflicts with the interests of the powerful the more likely it is that this behavior will be defined as crime." M. Lynch, R. Michalowski, and W. Groves, *The New Primer in Radical Criminology: Critical Perspectives on Crime, Power & Identity,* 3rd ed. (Monsey, New York: Criminal Justice Press, 2000) at 60.

[234] Clark, *supra* note 28 at 182.

[235] E. Daes, Spec. Rapp. *Human Rights of Indigenous Peoples: Indigenous people and their relationship to land.* ECOSOC, CHR E/CN/Sub.2/1997/17, 20 June, 1997 at 8.

Henderson also comments on the existence of self-interest and lack of neutrality in the courts in "Colonial Biases in Canadian Law":

> Courts need to resist the resilient structures of colonialism and its self-interest, and perform their new task in the constitutional order by accommodating Aboriginal legal analysis and expanding legal consciousness. ...To continue to invoke precedents of a biased colonial legal order in the context of Aboriginal and treaty rights is rather like suggesting that earlier debates over whether women were persons are still relevant in litigation respecting gender equality.[236]

In the eyes of the traditional Lil'wat peoples, the court's insistence on protecting the economic rights of the Newcomer public and its logging corporation was blatantly biased. To them, Justice Braidwood had revealed his lack of neutrality in the matter by privileging the Province's economic agenda. Sasquatch, one of the Lil'wat accused expressed it as follows: "...I can't make money in my own land, in our own territory, while all the other white corporations are there stripping it clean for their own benefit."[237]

Where the economic interests of the dominant society sways the exercise of the discretion of the judiciary they have lost their neutrality; they are being influenced by factors other than the evidence and the law. Throughout the contempt case the judiciary and the media focused on the right of access of the Newcomer's public, the economic cost of the interruption to the road building of the logging corporation, and the effect on non-native summer tourism at Lillooet Lake and the nearby town of Lillooet, rather than the desecration of Lil'wat graves, pictographs and spiritual sites. In opposition to Mr. Justice Braidwood's view of the superiority of the rights of loggers and road builders to those of the Lil'wat people, Youngblood Henderson observes:

> Any existing wealth and power within Canada can be attributed to the confiscation of natural resources from Aboriginal peoples and the maintenance of a virtual monopoly

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[236] J. Henderson, M. Benson & I. Findlay, "Displacing Colonial Discourse" in *Aboriginal Tenure in the Constitution of Canada* (Scarborough, Ont.: Carswell, 2000) 312-29 at 313-16.

[237] December 12th, 1991 Transcript at 31.

> over commercial enterprises. There is no moral superiority in the activities that have imposed domination and poverty on Aboriginal peoples.[238]

It is reliance on a similar bias that explains the third example of a judge identifying himself with the suitor in the case rather than maintaining his neutrality in the dispute. In the original application Chief Justice Esson found that the balance of convenience during the interim injunction period was in favor of public access for Newcomers and the continued operations of the logging corporation. In his Oral Reasons for Judgment on Nov. 5th, 1990 he also relied on 'the public interest' to add the authority for the police to arrest anyone in breach of his injunctive order, and he stated that "during the interim or interlocutory period ...the road will be kept open to traffic on the basis that it is a public road."[239] Chief Justice Esson assumed that the Lil'wats' unceded land was part of the public's Provincial highway system in spite of the existence of paramount constitutional law to support the proposition that within the enclave of a Federal Indian reserve the Provincial government lacks jurisdiction.[240] The logging company's 'rights' originated by way of license issued by the Provincial government, that in relation to reserve land, is itself a third party encroacher without a legal presumption of ownership to rely upon.[241]

The Crown relied on the fact that there is no precedent that holds that the Indigenous peoples are sovereign on their unceded lands. The Lil'wat peoples pointed to the mirror image: there is no decision that they are not sovereign. In fact, the point has never been fully argued before the court. Clark submitted that it came down to the question of which piece of

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[238] "Empowering", *supra* note 58 at 310.

[239] *A.G.* v. *Chief Andrew, supra* note 10. November 5th, 1990. Oral Reasons for Judgment. C. J. Esson.

[240] *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3., ss. 91 and 92.

[241] "Empowering", *supra* note 58 at 288, fn. 237. In addition to Clark, Henderson makes reference to the traditional legal presumption being against any implied relinquishment of sovereignty.

legislation was paramount: the Supreme Court Act or The Royal Proclamation? In order to be able to answer that question he proved that colonial governments such as British Columbia are subordinate institutions, as are its courts. Both exercise delimited authority.[242] He demonstrated that the predecessors to the Supreme Court of British Columbia were only invested with general jurisdiction in relation to territory that had been ceded to or purchased by the Crown from the Indian Nations.[243] The Royal Proclamation prohibits Crown governments such as British Columbia from granting to third parties any rights to yet unceded Indian territory:

> In sum, the significance of the King's Proclamation of 1763 is that it is the first written constitution relative to all British North America. From this overriding position of authority and influence, it affirmed the relationship of respect as the touchstone for the legal validity of all lesser laws.[244]

He concluded his submission by stating that breaches of the constitution that occur when the Province grants third party rights, cannot amend the constitution.[245] James Youngblood Henderson articulates a similar view:

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[242] See also where Henderson states: "Provincial federalism was never an original legal sovereignty. It was derivative of colonization and conventional English government." "Empowering", *supra* note 58 at 308; see also November 30th, 1990 Transcript at 23 for Clark's reference to *Campbell* v. *Hall* [1558-1774] All E.R. Rep. 252, (1774) 1 Cow. 204 (K.B.) where Lord Watson held that between the Indian and provincial government, the Indian interest was independent and paramount; see also Clark's submissions on November 30th, 1990 at 27 where he explains "...the *Proclamation* is an instrument being an Order in Council under the Great Seal like the Royal Commission itself which bears the Great Seal. It is legislation binding upon the colonial government."

[243] Clark elaborates that: "*Sublimus Deus*, 1537 settles international law and was incorporated into the constitutional common law and confirmed by the written constitution ever since the *Royal Proclamation of 1763*. To repeal or amend this law the legislation must be of international or constitutional law weight...not by ordinary domestic legislation otherwise the Province or Federal government would be above the constitution from which it drives its jurisdiction." Clark, *supra* note 28 at 42; see also at 79.

[244] Ibid.

[245] Jan. 25th, 1991 Transcript at 32.

> ...where the First Nations did not exercise their nationality and rights to self-determination in federating with the Crown, no authentic foundation or constitutional context existed for colonialism or provincial federalism.[246]
> ...In colonial law, the colonialists and their assemblies were inferior to and dependent upon the British Parliament. ...The federal method of implementing First Nations treaties was through section 91(24).[247]
>
> At the time of the treaties, the First nations were foreign countries to the confederating provinces. Thus, an imperial grant of authority to Canada to make laws in relations to "Indians, and lands reserved for the Indians" does not convey legislative or proprietary rights over First Nations. As part of their constitutional obligations to the imperial Sovereign, the federal Parliament was granted authority to carry out the limited delegated authority arising under the prerogative treaties. The main reason for this power was to protect the first Nations from the local colonialist. These are, constitutionally speaking, the federal government's administrative duties to the Crown. Neither the prerogative treaties, instructions, proclamations nor acts of the imperial Parliament ever authorized the provinces or the federal government of Canada to enact comprehensive legislative code for First Nations or their members."[248]

Clark referred to:

> ...any attempt to enforce such legislation is a breach of the rule of law due to the fact that it places a negative or reverse onus on the Indians, when the Royal Proclamation of 1763 results in a presumption at law, that the natives should not be molested or disturbed on the unceded lands until they have been purchased by us at a public assembly. That injunction was an Order-in-Council under the Great Seal. That's the opening premise upon which our society is founded.[249]

In terms of supplying a fourth example from the case of the judiciary failing to take a legally neutral position it needs to be noted that the Crown relied not upon proof of jurisdiction, but rather that it was in the public interest to refuse to hear the challenge to jurisdiction over unceded territory. According to the Crown this was due to the "the gravity of the questions posed ... a question which challenges the basic constitutional framework of this country", the "consequences", "confusion", "uncertainty" and the "disruption to the orderly function of the administration of justice in this province" that allowing the

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[246] "Empowering", *supra* note 58 at 307.

[247] *Ibid.* at 270-72.

[248] *Ibid.* at 272-73.

[249] Dec. 5th, 1990 Transcript at 46.

jurisdictional challenge would cause.[250] Mr Tyzuk noted that it was conceivable that this argument could apply to injunctions throughout the province where natives on unceded territory were involved. Thus the Crown relied on the public's interest in certainty as the basis for not hearing the law going to the Lil'wat peoples' jurisdictional challenge.[251] On January 25th, 1991, Clark referred to the Crown's "floodgate" argument as a political threat rather than a legal point. Clark advised the judge that: "contempt proceedings were designed to preserve the constitutional authority of this court, not to create a constitutional authority in this court."[252]

Once the court condoned the Crown's position that it was in the public interest to simply assume jurisdiction rather than have the law on the issue placed before the court, they aligned themselves as suitors in the contempt prosecution. This is particularly so where, as here, the liberty of the individual was at stake. Also Clark argued that the court could take judicial notice that no treaty had been entered into regarding the territory in question. The remainder of the applicable law relating to jurisdiction consisted of Imperial statues, proclamations and case law.[253]

The Crown responded by taking great exception to Clark's position that the sovereignty argument before the court was one of pure law that could be argued summarily. The Crown convinced Justice MacDonald that Chief Justice McEachern's recent decision in *Delgamuukw* decided conclusively against Indigenous sovereignty:[254]

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[250] Mar. 12th, 1991 Transcript at 5; see also Feb. 15th, 1991 Transcript at 5-10.

[251] Feb. 15th, 1991 Transcript at 5.

[252] Jan. 25th, 1991 Transcript at 17.

[253] Mar. 12th, 1991 Transcript at 21.

[254] *Ibid.* at 26.

> The Chief Justice has decided that decisively with respect to the entire province and for the entire history of the province and the colony and it affects everyone in British Columbia. ...the Chief Justice has found conclusively that aboriginal ownership and jurisdiction, if it ever occurred, was extinguished during the colonial period. [255]

What the Provincial Crown did not place on record was the fact that absolutely distinguished *Delgamuukw*. It began by way of an admission by legal counsel representing the Gitksan and Wet'suwet'en plaintiffs, as outlined in Chief Justice McEachern's Reasons for Judgment:

> In their pleadings and argument the plaintiffs admit that the underlying or radical or allodial title to the territory is in the Crown in Right of British Columbia. This reasonable admission was one which the plaintiffs could not avoid. It sets the legal basis for any discussion of title.[256]
> The reality of Crown ownership of the soil of all the lands of the province is not open to question...In my judgment, the foregoing propositions are absolute.[257]

To suggest that this approach by the judiciary of the B. C. Supreme Court is an impartial stance is simply untrue. The continuation by the judiciary to refuse to actually address the jurisdictional challenge displays a lack of neutrality through alignment with the Provincial government as a suitor.

3.6 Institutional Impartiality is a Requirement

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[255] *Ibid.* at 30.

[256] *Delgamuukw* v. *British Columbia* [1991] B.C.J. No. 525 Reasons for Judgment: Part 10 at 79.

[257] *Ibid.* at 81; see also Nightingale, *supra* note 136 at 71 where she states: "impartiality is virtually impossible where a judge's personal predispositions (biases) are viewed as objective realities." She identifies "aversive racism" as being acted out by an individual that does not see their beliefs as constituting racism because they are perceived as empirical facts; consider also where Fisher comments that "having the legal system recreate the past in its own image is not good history." R. Fisher and K. Coates, eds. *Out of the Background: Readings on Canadian Native History*, 2nd ed (Toronto: Copp Clark, 1996) at 391. Chief Justice McEachern's position on Indigenous sovereignty is not based on evidence and legal argument as required by the rule of law. It consists of an assertion of 'might' over 'right'. Essentially he ruled that Canada is sovereign because she has dominated the natives for a long period of time and the court will not hear legal argument that suggests anything else. How can this case be relied upon as resolving the issue of Indigenous sovereignty when that point proceeded by way of an admission by the plaintiffs in *Delgamuukw*?

The Supreme Court of Canada in *Ruffo* held that the right to be tried by an independent and impartial tribunal is an integral part of the principle of fundamental justice protected by s. 7 of the Canadian *Charter*. The constitutional guarantee includes the concept of institutional impartiality.[258] If the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met.[259] The determination must be made having regard to a number of factors, including but not limited to, the potential for conflict between the interests of tribunal members and those of the parties who appear before them.[260] There can be no doubt that the bias in this case is institutional. The majority of the territorial jurisdiction of the court has been usurped from the Indigenous nations and the court refuses to allow the legal basis for this jurisdictional assumption to be questioned. Clark refers to this conflict when the courts refused to hear the law regarding the jurisdictional challenge: "Part of the reason for their resistance, I suppose, is the immensity of the consequences. The unceded Indian territory in Canada is, by some estimates, 80 percent of the country's land mass, if arguably invalid Indian treaties are included."[261]

The assumption of jurisdiction is not only a problem in the operation of the courts but it also permeates the domestic legal system as a whole. The Provincial government participated in the assumption of jurisdiction by the laying of charges in relation to unceded territory. The R.C.M.P. unquestioningly participated in the enforcement operation on the unceded land of

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[258] *Ruffo* v. *Conseil de la magistrature* [1995] 4 S.C.R. 267; [1995] S.C.J. No.100. The other similar point in this case is the impression left by the judiciary that they had made up their mind on significant points before hearing all of the evidence.

[259] *R.* v. *Lippe* [1991] 2 S.C.R. 114.

[260] *Matsqui Indian Band* v. *Canadian Pacific Limited and Unitel Communications Inc.* [1995] 1 S.C.R. 3.

[261] Consider Clark's reference to the legal implication that in relation to unceded Indian territory there is no constitutional jurisdiction to tax. Clark, *supra* note 28 at 32.

the Lil'wat peoples. The validity of legislation over Indians on unceded territory is additionally assumed. Both the Federal and Provincial governments are engaged in legislating on the basis of legal fictions. Reliance upon such legislation to dispossess the Indigenous peoples of their authority over their territories results in institutional bias. For instance, in the Lil'wat dispute over the public highway through unceded territory, the judiciary upheld the Provincial government's legislation granting the right to the Province to expropriate 1/20th of reserve land where it serves the Newcomer's public interest.

Linda G. Mills referred to this aspect of institutional partiality where she stated in *A Penchant for Prejudice:* "...the rules themselves are often biased."[262] Perhaps her comment helps to explain Justice MacDonald's apology made at the sentencing hearing of the Lil'wat people:

> I recognize the fact that the legal system does not appear to be able to give you people the answer that you think you are entitled to get. I feel, and so do, I am sure, some of the other judges of this bench, although I have not talked about it to them in any detail, that there has got to be a political solution to these problems that you people face and that it is not within my power, not in these proceedings, to help you. I am sorry for that, but I have had to come to that conclusion. I have done it in what I consider to be all good faith, and I have apologized to others for that. I apologize to you.[263]

The fact that the judiciary plays a central role in the assumption of Indigenous jurisdiction appears to be the only explanation for their insistence on assuming that which an impartial tribunal is required to deduce. In *Law, Politics and the Judicial Process,* F. Morton suggests that:

> Disputes are a fact of life in political communities...typically neither party is willing to allow the other to unilaterally answer these questions, for fear that an adversary will exploit any ambiguity of fact or law to his or her own advantage. The self-interest of both parties prevents either from serving as arbiter of the dispute. What is

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[262] Mills, *supra* note 9 at 5.

[263] April 15th, 1991 Transcript at 15.

> needed is an outside third party who is independent of both disputants and thus can be expected to render an impartial inquiry and resolution of the dispute...The authority of contemporary Canadian courts still rest on the ancient requirement of impartiality.[264]

The Lil'wat people made many references to institutional impartiality. One of the convicted traditional Lil'wat women, speaking at her sentencing hearing after having been found guilty of criminal contempt of court, offered her interpretation of the court process:

> Ishmeshkeya: ...when you really look at our lives, how we fit into this Canadian system is not going to work. You can't just keep putting it back and hiding it away.[265]

It is also a lack of institutional impartiality that James Louie, a Lil'wat elder, was referring to when he stated at his sentencing hearing:

> We thought we would live in peace and harmony with Canada as we did with other nations, neighboring nations around the Lil'wat nation. But it seems to me from what I have lived, from what I have heard, that it is not going to be so because there is pressure, foreign pressure with self-serving laws, rules that are imposed upon us, conditions that are imposed on us. All it says to me is that what Canada is doing to the Lil'wat nation, to my family, is might is right.[266]

He continued by stating: "...if I have to go down, I'll go down..." The judge responded that he hoped it is not him "that does it."[267]

> James Louie: Well, okay, you're part of the action. The whole Canadian system, judicial system is a piece of the action. You can't get away from that. You're sitting there.
> The Court: I know.
> James Louie: And you are trying to say you have jurisdiction over me. You are trying to say that through colonialism that you have done away with the sovereignty. That is something the world is going to find that out. ...through the injunction in the court, okay, you are passing the buck.....you know what colonialism is?
> The Court: I think so.
> James Louie: You are part of the action. With what they are doing to us, Canada is a modern day colonial power. The world is going to find that out...And Canada is

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[264] F. Morton, "Judicial Independence, Ethics, and Discipline" in *Law, Politics and the Judicial Process in Canada,* 2nd ed., (Calgary: University of Calgary Press, 1992) at 123.

[265] Ishmeshkeya: April 15th, 1991 Transcript at 28.

[266] April 15th, 1991 Transcript at 24.

[267] *Ibid.* at 39.

> saying: We can't afford to have the world know what Canada is doing because it will deteriorate the image of Canada. It is going to find out. ...You can do whatever you want with me. That's not going to change the picture. You're doing it...We have basic fundamental human rights. You know the Charter of Rights. You know the Bill of Human Rights[268]. You know all of these rights. Your people in the United Nation sign these things for an image, not for justice, and do whatever you want.
> Until your system can admit in your hearts and in your minds that you have done wrong to the native peoples of this country, there will be no justice.
> My fate right now is in your hands. Do as you please.[269]

Another Lil'wat accused, Mr. Dick, testified on April 30th, 1991, following his conviction and right after the judge had made another apology:

> Mr. Dick "...What we're doing is taking our beatings, getting criminalized, and you're ripping my ancestors out of this earth. It's like me walking into your house, slapping your mother in the face, What you're doing, ripping my elders right out there just for your money, it's like me walking into your house, taking what I want and slapping you in the face and walking out. That's what—that's the way I feel.
> The Court: Yes, I understand that.
> Mr. Dick: Sorry, but that's the way I feel.
> The Court: Thank you.[270]

Clark referred to institutional bias when he spoke of the effect of the Canadian legal system on the Indigenous peoples in *Justice in Paradise* where he stated: "...it is the institutionalized, implacable, complacent, and artful injustice of the white man that is killing

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[268] A reference to *U.D.H.R.*, *supra* note 70.

[269] April 15TH, 1991 Transcript at 40; see also where Henderson supports Louie's perspective when he states: "Canadian rules...were imposed by arrogance, trickery and force, not by Aboriginal choice. Canadian rules have always been unconstitutional and undemocratic." "Empowering", *supra* note 58 at 307; see also where Henderson speaks of the pervasive contradiction in the rule of law of Canada: "...the colonizers' habits and the deep structure of these habits were informed by racist beliefs and practices over centuries. Once legal authority rests on habitual obedience to racism the legitimacy of any legislative act or judicial decision is assumed. In this context, Canada has a difficult time asserting itself as a non-colonial state" "Empowering", *supra* note 58 at 65; see also Rsoenberg where he refers to the dilemma caused by the fact that our "historical selves" are defined by our families and environments. This he argues obliges us to those who constitute our "historical self" generating duties of loyalty toward the families, groups, and nations that enter into our self-definition. While these loyalties require us to act with partiality, the liberal political theory requires impartiality. He notes that Fletcher's contention is that duties of loyalty already inform legal doctrines to an extent that has not been previously appreciated. B. Rosenberg, "Quando fidelis? Drawing the Line Between Loyalty and Impartiality." Cal. L. Rev. (1994) Vol. 82 717-739 at 720-26 ["Quando fidelis?"].

[270] April 15th, 1991 Transcript at 15.

the native people from within."[271]

The judge did not seem to be able to appreciate that his choice of which laws to enforce versus which to ignore, had already exercised a strong bias in favour of the B.C. Provincial government over the rights of the original inhabitants of the land in question.[272]

A revealing case for consideration on whether the domestic court is able to provide third-party adjudication is the judgment of Judge Janice M. Stewart in *United States* v. *Pitawanakwat*.[273] It is, in and of itself, 'a third party' adjudication that finds political partiality in the Canadian judicial system regarding the territorial land dispute. In this instance, a foreign judge recognized the applicability of the political offence exception. She refused Canada's request to extradite an offender convicted of mischief causing actual danger to life and possession of a weapon for a purpose dangerous to the public peace in the Gustafsen Lake armed standoff of 1995. Judge Stewart found the so-called 'crime' was politically motivated and she held that extradition would amount to unjust persecution for Pitawanakwat's political belief in Indigenous sovereignty. She held his offences rather than being criminal were "of a political character." Compare her analysis to the positions taken by the British Columbia superior court on the writ of trespass against the original inhabitants of the territory. The B.C.S.C. ordered police enforcement of a removal order, refused to question the contempt prosecution by the Provincial government and characterized the contempt as criminal rather than civil. These rulings reveal no similarity to the third party adjudication of Judge Stewart. What prevented the B.C. superior court from similarly

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[271] Clark, *supra* note 28 at 14.

[272] For instance, why does the judge focus only on the protection of the authority of the court and the enforcement of his brother judge's orders, rather than on the binding Imperial constitutional law or International covenants?

[273] *United States* v. *Pitawanakwat*, No.00-M-489 ST, U.S. Dist. Court of Oregon, Lexus 16984, Nov.15th, 2000.

recognizing the political nature of the Lil'wats' sovereignty assertion and the injustice of allowing the Provincial government's prosecution of the Lil'wat peoples for trespass on their traditional unceded lands?

There exists an insurmountable institutional bias where the judge has sworn to uphold the legislation created by one of the parties to the dispute, if the parties do not originate from the same nation. In order to illustrate this problem, on December 14th, 1990, Clark referred Mr. Justice MacDonald to a memorandum of Prime Minister Sir John A. MacDonald dated January 3rd, 1887 that stated:

> The great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the dominion as speedily as they are fit to change.

"Our legislation" refers to primarily to the *Indian Act.* Where the case involves an Indigenous person and the Canadian government, the judge of the B.C. Supreme Court has sworn to uphold the laws of the Queen and her heirs, who in this case is the Crown in Right of the Province of British Columbia, that has recently expropriated the road from beneath the Lil'wat peoples. The Provincial government claims its *Order in Council* and s. 35 of the *Indian Act* allows for such actions. Where the judge upholds the validity of the expropriation on the basis of such legislation he is party to institutional bias.

To be impartial in a case involving two distinct nations, a judge must not owe obedience to the legislation created by either of the legal systems of the parties in dispute. Once a tribunal has agreed otherwise it can no longer claim impartiality. Consider for example the fact that the Supreme Court of Canada in *Sparrow* held that the Crown had the power to unilaterally extinguish aboriginal rights or title without consent, prior to the Constitution Act,

1982.[274] Such a finding by the highest court of the land placed the domestic judiciary in the position of being a party to the unilaterally extinguishment of the rights of the Indigenous peoples.

The judiciary's resistance to hearing legal submissions in support of Indigenous sovereignty were frequently delivered with an apology for the restrictions in the system that they claimed to be unable to overcome. This frequent reliance on judicial apology is further indication of the existence of institutional bias within the criminal contempt hearing. Mr. Justice MacDonald made frequent reference to 'his duty', 'of being obliged' or as 'being bound' to make his rulings as he put it "whether I like them or not."[275] He claimed his rulings were due to the requirements of the system of law that he had sworn to uphold.[276] He stated that in contempt cases "the court tends to get involved, in the sense of upholding its own authority and enforcing its position in the community."[277] He stated that he had a responsibility to see that the administration of justice was adequately "looked after".[278] In addition to the embedded restrictions that he repeatedly apologized for, it must be remembered that the extension of the jurisdiction of the court was involved in the unilateral

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[274] *Sparrow, supra* note 58 at 1099.

[275] Dec. 14, 1990 Transcript at 31.

[276] *Ibid.;* see also where Harring states: "Even more fundamental than this, how is it that a superior court judge of the province of British Columbia can claim impartiality when the Provincial government in it's confederation agreement expressly rejected the validity of any Indian title?" S. Harring, "The Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law" (1992) 56 Sask. L. Rev. 297-364; consider also that the foundational cases that the judge considered himself bound by were decided during a period in which it was a criminal offence for natives to raise money for land claims. In fact, many cases on Indigenous rights that bind the domestic judiciary were argued between two nation states or settler parties without the Indigenous peoples as parties or legally represented. The result is the formation of case law that excludes the legal position of the original peoples of the territory in question.

[277] Nov. 19th, 1990 Transcript at 11.

[278] Nov. 19th, 1990 Transcript at 10.

assertion of British sovereignty over the territory of British Columbia.[279]

Each time the judge apologized for upholding what he claimed he was bound to do, it appeared to be an indication that the system is guilty of institutional bias. If there was not something unfair embedded in the process, why did the judiciary constantly make apologies to the Indigenous accused before them, rather than simply adjudicating according to law?

Mr. Justice MacDonald's principle concern throughout the five months of appearances was to enforce the jurisdiction of the B.C. Supreme Court, rather than to protect the rights of both parties, while the law applicable to the issues was addressed.

Early in the contempt proceeding, having stopped Clark in the middle of his opening defense submission on behalf of the jailed Lil'wat people, Mr. Justice MacDonald apologized if his ruling had created the impression that he was attempting to silence counsel:

> I had no intention of creating that impression, and if I did so I apologize ...I feel that any other judge put into my shoes will be forced to operate under the same restrictions that I am facing, and I think I am the one that has to bear the brunt of the problems that are raised by this case, and I intend to do so.[280]

I pointed out to the judge on March 12th, 1991, that rather than insisting on maintaining the authority of the court, he must consider whether or not he was engaged in the enforcement of a nullity. The distinction was explained to the judge between having jurisdiction that you exercise incorrectly versus exercising a jurisdiction that you fundamentally do not have. The first may be valid until appeal, however the later is a nullity at law. I also pointed out that it was difficult to imagine how the invalid assumption of jurisdiction could be said ultimately to maintain respect for the 'authority' of the court.

A series of apologies coupled with denials from Mr. Justice MacDonald that there existed

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[279] See *An Act for Extending the Jurisdiction of the Courts*, 1803, 43 Geo. III, C. 138.

[280] November 20th, 1990 Transcript at 6.

any inherent or intentional bias in his role is of assistance in accessing the legal system's impartiality. In this vein, at the Lil'wat criminal contempt sentencing hearing, Gualish (phonetic) spoke to the judge:

> The Speaker: You sit up there in your position as an honest position in your mind. You say you are not humbling, but if we don't give our name we go to jail.
> The Court: I hope you don't interpret it that way.
> The Speaker: That's the way it is.
> The Court: I'm sorry.
> The Speaker: You're not being truthful. You are humbling us.
> The Court: If I am it is not what I intend to do.

Each time MacDonald claimed 'he is obliged', he 'has a job to do', he does not 'intend to', he 'is bound by' the system to, 'he has no choice' but to protect and maintain the authority of the court, he provided evidence of institutional partiality.

Clark urged Justice MacDonald to rely on the inherent jurisdiction of a superior court judge to overcome this institutional conflict when he stated: "... I have faith that your lordship's love of justice constitutes a force greater than racial self-interest."[281]

The role played by the judge in maintaining the status quo has the additional difficulty that by this point in the proceedings he had full knowledge that the Lil'wat accused had been refused an appeal before any higher court.[282] To this end, the following exchange between Mr. Clark and Mr. Justice MacDonald puts his above statement regarding his obligation and duty to enforce the order of the Chief Justice "against anyone, native on unceded territory or otherwise" in a more complete context.

Clark reminded the judge that he had previously made an 'even if' arrangement:

> ...that being, even if the collateral attack rule precluded your decision on the sovereignty point, you were nevertheless going to hear the sovereignty point argued,

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[281] December 10th, 1990 Transcript at 12.

[282] Ms. Crompton: "...we also know that they have been blocked from putting forward their position at an appeal level. So the avenues for them to state their defense are very narrow and it adds importance ...to your finding on this jurisdictional issue." March 11th, 1991 Transcript at 55.

> make a decision so that that decision would be available for appeal purposes, that is, that my clients then for appeal purposes would be in the position of having a chance to get the sovereignty issue dealt with in the Court of Appeal, it having been already dealt with at the trial level.[283]

Clark informed Mr. Justice MacDonald in detail of the refusal of several other judges to hear the legal argument in support of the jurisdictional challenge so as to make clear to the judge, the tremendous practical consequences of his reneging on this agreement.[284]

> ...several other cases in which I attempted to raise the same jurisdictional point and the judges have all declined to deal with it. ...Six months we've been here.[285]

The judge simply refused to alter his ruling or to hear further submissions in this regard. Once he claimed he was unable to hear the law because of his obligations as a judge within the domestic legal system and enforced the original injunction on the basis of an assumption of the jurisdictional issue he was being asked to deduce,[286] he had more than provided the necessary evidence to support a reasonable apprehension of institutional bias.

3.7 Justice Must Be Seen To Be Done

Justice must not only be done, but must also appear to be done. The test involves asking

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[283] April 30th, 1991 Transcript at 6. Clark was referring to the comments made on December 5th, 1990 Transcript at 31 where the judge mused on record about the necessity for Mr. Clark to be allowed to intervene on the appeal of the Chief Justice's initial injunction order. Mr. Justice MacDonald worried that if he did not let Clark include the sovereignty argument at the trial level, that he would be met at the Court of Appeal with their refusal to raise the sovereignty argument there either. Justice MacDonald had expressed his concern that in a constitutional case it is necessary to insure that there is evidence upon which the B.C. Court of Appeal and the Supreme Court of Canada can decide the issue.

[284] April 30th, 1991 Transcript at 9. The argument on behalf of the Attorney General of British Columbia at the B.C. Court of Appeal level was that the jurisdictional issue was not before the judge who issued the original injunction and therefore could not properly be added at the appeal level. By the completion of this matter, Clark had knocked on forty-one tribunal's doors in his attempt to have the sovereignty argument adjudicated upon. It is reported by Clark that his legal argument in support of Indigenous sovereignty was never heard. Clark, *supra* note 28 at 212.

[285] April 30th, 1991 Transcript at 7.

[286] "The facile assumption is that the newcomers' laws and courts were drawn into a jurisdictional vacuum. Underlying this questionable premise is the unspoken and unacknowledged racist attitude that the natives were truly savages, without laws or courts of their own." Clark, *supra* note 28, at 35.

whether there were mistakes of law or irregularities in the conduct of the trial that render it unfair or create the appearance of unfairness for the accused.[287] Does the prosecution offend society's sense of justice?[288] The circumstances must be considered on a case-by-case basis to see if the error of law or irregularity played a significant role in the legal validity of the verdict or rendered the trial unfair in reality or appearance.[289]

There was no appearance of justice in the criminal contempt trial because the court would not allow the law to be placed before it. On March 11th, 1991, Clark suggested that an abuse of process would occur if the courts refused to hear the defense of the Lil'wat accused:

> ...we have gone through several different proceedings: an application to strike, an application for an injunction, application for leave to appeal, application in the Federal Court at the appeal level....but the point is made that Ms. Crompton and my clients have knocked on several doors. And ever time we go to a door we are accompanied by the Attorney General. And when the door opens a little bit every time the Attorney General says, "Don't let them in through this door. There is another more appropriate door down the hall." So the judge closes that door and says, "Go to the other door." Well, when we go to the other door the Attorney General gets the foot in first and says again, "Oh, this is the wrong door. Go to another door down the hall." And they have the effrontery when doing this to say, to pontificate that they want the Indians to have their day in court. They want sovereignty to be decided. Well it just ain't so, my lord. They are doing everything in the lawyer's trickster file to prevent that issue from coming on.[290]

Rather than remaining neutral and inquiring into the allegations made by Clark, the judge proceeded to interrupt him and told him to try "to behave himself, even if it is against his nature".[291] Clark responded:

> ...what the defendants are saying here is that the legal process is being manipulated by the Attorney General in the interests of the government of British Columbia whose interest is on behalf of a different race and nation of people, unless we blind ourselves

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[287] *R.* v. *Khan* [2001] 3 S.C.R. 823 ["*Khan*"].

[288] *Canada (Minister of Citizenship and Immigration)* v. *Tobiass* [1997] 3 S.C.R 391.

[289] *Khan*, *supra* note 288.

[290] Mar. 11th, 1991 Transcript at 60.

[291] *Ibid.*

> to that and unless we blind ourselves to the phrase frauds and abuse, then calling a spade a spade is the point. It's not a question of me not behaving myself when I say the lawyer's trickster file. That is simply the truth. And unless we can have that point understood then we never get to the understanding that what's happening here is a manipulation that is resulting in a fraud and an abuse of process within the meaning of the Royal Proclamation.[292]

Clark explained that in order for justice to appear to be done, Mr. Justice MacDonald must agree to hear the jurisdictional argument of the accused Lil'wat traditional people. The alternative would be to criminalize them without any court hearing their legal defense of territorial sovereignty.[293]

Mr. Justice MacDonald had ruled on March 18th, 1991, that the only exception to the collateral attack rule was fraud on the part of the Attorney General if they were using the court system to "get around" their constitutional obligations to the persons Clark and I represented. This description by the judge was precisely the legal position we were attempting to present and prove at law. However, as soon as Clark attempted to argue that the fraud was the result of the failure of the Attorney General of British Columbia to present Chief Justice Esson, who ordered the injunction, with the applicable law, Justice MacDonald stated: "I would not expect that disclosure obligation to extend to legal principles, particularly to as novel and sophisticated an argument, as was outlined for me."[294]

What is so revealing about Justice MacDonald's choice of descriptive words 'novel and sophisticated' is that Clark had argued nothing more novel than the principle that constitutional law is paramount, including the *Royal Proclamation of 1763*, which promises that the Crown shall not molest or disturb the natives on their unceded territory until it has

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[292] *Ibid.*

[293] *Ibid.* at 63.

[294] The judge is referring to the argument made the previous day by Clark. Nov. 20th, 1990 Transcript at 48.

purchased that territory. The description of Clark's argument as novel demonstrates the degree to which the judiciary have swayed from a neutral perspective in their application of the rule of law to an interpretation that supports the status quo.

Clark argued that the Provincial government of British Columbia had misled the Court in order to obtain the injunction in that it neglected to inform the court of the constitutional law that expressly protects the Indians. He demonstrated that it was an "existing aboriginal right" not to be "molested or disturbed' in relation to unceded Indian territory, within the meaning of those phrases in s. 35 of the *Constitution Act, 1982* and the *Royal Proclamation of 1763* respectively. He spoke of the obligation on the Attorney General in the public interest to inform the court of the basic law that applies. Clark claimed that by framing the question in trespass, the Attorney General had raised the pretense that what we were dealing with was an issue under s. 92(13) property and civil rights, a legitimate provincial jurisdiction, when in reality what we were enmeshed in was an aboriginal rights issue.[295]

When Clark attempted to explain that the Provincial government's refusal to provide the applicable constitutional law had also misled Chief Justice McEachern in *Delgamuukw*, Justice MacDonald concluded that Clark was attempting to circumvent his earlier ruling on collateral attack by alleging fraud, and refused to hear the argument:

> ...disguising by the badge of fraud... the allegations that the Attorney General has made the court an unwitting accomplice to "unconstitutional proceedings" amount to a collateral attack of the injunction in issue here . I have concluded that I should hear no further argument on the validity of that injunction.[296]

Clark responded that it was his considered opinion that an impartial hearing before this tribunal "is unlikely." In support of his statement, he cited the refusal of the judge to hear the

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[295] Nov. 19th, 1990 Transcript Vol. II at 23.

[296] Nov. 20th, 1990 Transcript, at 49-51.

opening statement of defense counsel:

> ...the court has demonstrated the existence of a prejudgment on a fundamental issue regarding aboriginal rights. In effect, the court has treated counsel's suggestion yesterday that Mr. Justice McEachern in another case may not have been adequately informed as in some fashion an attack upon either Mr. Justice McEachern or the system and on that completely untenable basis the court has concluded that counsel's position is without credibility, prima facie without credibility. My lord, let me assure you I sincerely do not want to enter into a case as important as this where the judge has prejudged the issue of counsel's credibility on perhaps the single most important issue. I am suggesting, my lord that the appearance of justice must be evidenced none the less than justice itself. I am suggesting that what has happened here is that the court has indicated, has given advance warning that it does not like the message and is therefore silencing the messenger on this pretext of no credibility.[297]

Clark repeated to Mr. Justice MacDonald the legal position of the Lil'wat people regarding the issuance of the injunction order when he states:

> ...something so important being made on a per incuriam basis for want of information, for lack of care. ... the judge simply didn't hear the law that is necessary to his decision and I'm taking upon myself that risk and making that statement on the basis of the last five years of my life looking at that law and identifying it. I know, and I'm advising the court as an officer of the court, the judge didn't have that information. And I'm suggesting that that's crucial to the whole administration of

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[297] Clark placed on record that he had specialized in aboriginal law for nineteen years and had spent the past five years obtaining a doctorate on the very issue of Indigenous sovereignty from the College of Oxford, England. He stated that he "...finds it hard to comprehend how in twenty minutes his learned friend can decide that counsel has no credibility on this issue, and for that reason I say even were justice to be done here it is manifest at the outset that it does not seem that it will be done." Nov. 20th, 1990 at 51. Clark was mentored by Professor and Dean of Law, Dr. Geofffrey MacCormack, while researching the law with respect to the issue of Indigenous sovereignty. Such credentials did not mean that Clark's legal opinions were beyond question, however they strongly suggested his arguments were worthy of judicial consideration; see also the following quote by David C. Hawkes, School of Public Administration, Carleton University where he comments on Clark's academic work: "The research is exhaustive, the sources comprehensive, and the reasoning and scholarship sound."; consider also where Clark outlined that although the Law Society of Ontario ultimately disbarred him, it acknowledged that his attempted submission on behalf of Indigenous sovereignty was a serious constitutionally critical argument on an issue of public importance, that it was not frivolous but rather the result of extensive study, and that the genocide Clark complained of was real. "We do not find his letters abusive or offensive. Nor do we find his statements intemperate or unsupported by the facts to sustain the argument. Indeed, throughout he has begged to be allowed to develop facts to sustain the argument. It is impossible to say there was no reasonable basis in evidence for the legal positions he asserted; he has always been prepared to make a thorough and comprehensive argument in each case." The review panel also noted "he has never been disciplined in 25 years of practice. The allegation of 'ungovernable' was due to his refusal to agree to refrain from asserting this same legal argument and the panel found this to be unsubstantiated." Clark, *supra* note 28 at 212.

> justice in this country for this reason. An impression is being created in the minds of a substantial minority of this country that they can't get justice at the hands of another race of people. That the white people are judges and suitors in their own cause, that they are both litigants and judge. And as one who believes in the rule of law, as I know your lordship does, and as I do, and as Crown counsel does, I'm suggesting that it's...one of those questions of transcending importance that should be sent back to the original judge and to let him decide whether or not he would have done the same thing had he been adequately informed.
> ...the judge has an inherent jurisdiction to remedy a fundamental breach of fundamental justice...what the words inherent jurisdiction of this court really mean is that the judges have the capacity to....get to the real justice of the matter.[298]

Clark explained that "it is imperative to point out to the Chief Justice that he is mistaken in his belief that the Province's power to resume reserve land is the issue at bar."[299]

After suggesting Chief Justice Esson was functus, Mr. Justice MacDonald adjourned. He returned shortly to announce that the Chief Justice sent his regrets but that he considered there is:

> ...nothing he can do about his order now.....he asked me to tell you that he could see no point in meeting with counsel because his answer was as I have indicated. So he will not entertain an application.[300]

It is this procedural catch twenty-two that provides a most obvious example of a lack of an appearance of justice. With Chief Justice Esson's insistence that he was functus we turned our focus to joining the Band Chief and Council's appeal of his injunctive order. When we attempted to seek leave to join their appeal of the injunctive order, the Court of Appeal refused our application on the basis that only the groundwork to enable argument on the

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[298] *Ibid.* at 60. Clark pointed to a number of well-known legal statements confirming the fact that Mr. Justice MacDonald had the inherent power to surmount hurdles to prevent injustice from being done including the *Sproule* case at the Supreme Court of Canada, in which Taschereau, J., stated: "... every superior court, which this court unquestionably is, has incident to its jurisdiction, an inherent right to inquire into and judge of the regularity or abuse of its process

[299] *Ibid.* at 61.

[300] Nov. 20th, 1990 Transcript at 64.

resumption question had been laid at the injunctive application.[301] This left the only legal representation of the sovereign Lil'wat traditionalists as that submitted by legal counsel on behalf of the Band Council. Mr Justice MacDonald's ruling that the injunction was not ordered ex-parte also had enormous consequences. If he had simply held that in relation to these traditional Lil'wat people the matter had proceeded ex-parte, the collateral attack rule would not have applied.

The acceptance by the judiciary of the legal position of the Band Chief and Council while refusing to hear the submissions on behalf of the traditional Lil'wat governing system, was a position that did not have the required appearance of justice.[302] Mr. Justice MacDonald had been made aware and had acknowledged on record that the traditional people before him took a fundamentally different legal position to that of the Band Council.[303] The act of recognizing an imposed structure rather than the Lil'wat traditional governing system embroiled Justice MacDonald in institutional bias. Such a finding cannot be avoided once

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[301] In fact, Clark and I had appeared before at least thirteen superior courts, none of which would hear our jurisdictional challenge. On each occasion counsel for both governments opposed the Lil'wat sovereignty argument being heard at either the trial or the appeal level of the proceedings. Both governments took the position that Clark's application for a stay on the grounds that the writ of trespass against the Lil'wats was not capable of proof was irrelevant to the contempt proceedings. The Provincial government also argued that the Lil'wat's application for a counter-injunction was completely irrelevant to the contempt proceedings. They also participated, at the judiciary's request, in having the Law Society of B.C. investigate the possibility of disbarment proceedings in relation to Dr. Bruce Clark.

[302] The Band Council system, simply put, is a creation of the Canadian government or 'white system' as Taiaiake refers to it. The court in *Muchalaht Indian Band* v. *Canada* [1990] 1 F.C. 275 acknowledged that a Band Council is "a creature of the Indian Act" and furthermore in *Norway House Indian Band* (Applicant) v. *George N. Bass, Q.C. and Florence Jean Duncan (Respondents) and Assembly of Manitoba Chiefs-Secretariat Inc.* (Intervenor) [1994] 3 F.C. 376, [1994] F.C.J. No. 328 that "the creation of Indian bands, councils, and their workings, do constitute a federal work, undertaking or business."; consider also that evidence was placed before Mr. Justice MacDonald to prove that the legal position on the part of the Band Chief was in contravention of the sovereignty instructions provided to the Band Council at a large community meeting, held approximately a week prior to the Provincial government's expropriation of the road.

[303] *A.G.* v. *Chief Andrew, supra* note 10. March 18th, 1991 Reasons For Judgment at 2. Mr. Justice MacDonald acknowledged that the Lil'wat accused wished to raise a far more fundamental issue than was raised by counsel for the Band Council Chief.

Youngblood Henderson explains that "the First Nations' source of authority was and remains the consent of the people through federated governments or councils of extended families."[304]

Even after five months of trying, the key defense argument of the traditional Lil'wat peoples was never allowed to be placed before a court in British Columbia. Mr. Justice MacDonald, on April 15th, 1991 in making his finding of guilt had this to say: "As much as I might like to accept the invitation to sidestep the somewhat unpleasant task that is before me, it is simply not open to me to do so at this stage of the proceedings."[305] As the Lil'wat's contempt trial progressed it had became abundantly clear that Mr. Justice MacDonald was not going to make use of his inherent jurisdictional power to remedy the *per incuriam* basis upon which Clark alleged that the injunction had been granted.[306]

The Lil'wat people did not believe that the court process was fair.[307] Ronald Dan, the son

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[304] "Empowering", *supra* note 58 at 255; see also where Taiaiake refers to the fact that the federally created Band Council structure is inappropriate as a substitute for an Indigenous governing system because "leadership in an indigenous system focuses on a person's ability to adhere to the values of patience, courage, fairness and generosity which differs radically from the power-wielding model which encourages the fundamentally immoral pursuit of self-interest and the acquisition of resources to secure a strategic advantage over others...the traditional system is diametrically opposed to the possessive individualism that is central to the white system. Taiaiake, *supra* note 63 at 88.

[305] April 15th, 1991 Transcript at 3.

[306] Waluchow comments: "Judges must realize that they are sometimes free, indeed required, to decide the case before them rationally in light of other considerations (e.g., the rule's purpose, general legal principles, or commonly accepted beliefs about justice). To do otherwise would be to abdicate the responsibility they, as judges, are required to exercise." W. Waluchow, "Indeterminacy: A Critical Notice of Brian Bix, *Law, Language and Legal Determinacy*" (1996) 9 Can. J.L. & Juris. 397-409 at 407.

[307] On March 1st, 2002 The Right Honourable Beverley McLachlin, C.J.C., presented a seminar to the U.B.C. Faculty of Law and Graduate Students titled "Impartiality and Neutrality in the Process of Judging." She referred to the increase of awareness in the judiciary of the Supreme Court of Canada that an appearance of justice should exist from the perspective of the parties before the court. In the discussion that followed I questioned this interpretation of impartiality principles as they relate to Indigenous peoples. Her response was that she obviously could not comment on the issue but that "the impartiality issue is a question that should be brought before the court".

of the spiritual leader of the Lil'wat People's Movement, made this point as follows:

> This beautiful feather came from my brother eagle. This is created by God. These came from the law of God. This ugly looking eagle feather is how much you destroyed our laws. This is a façade, all of this ugliness in here and crookedness of the justice system. I am going to put these side by side to remind me of the two differences. That's all I got to say.[308]

Another of the Lil'wat protestors told Mr. Justice MacDonald: "...that statue out there is scales of justice that are supposed to be equal, I guess you proved, you and your system proved that it is not equal."[309] Ishmeshkeya, made a similar point:

> ....it seems that everything that has happened so far is that they are being protected. I can't believe the biased system we live in in this court system... Every judge that I have looked at since we started to put across our words, I can't believe it. I can't believe how they are just so biased.[310]

The following exchange between Justice MacDonald and one of the Lil'wat accused, who was being forced to provide an English name as a precondition to his release, leaves a lasting impression regarding the lack of an appearance of justice:

> The Court: ...Number five. Anything you'd like to say to me?
> The Speaker: If I sign my name, would it help to obey your law?
> The Court: I can't tell you that.
> The Speaker: There is these people across the lake already drilling holes, blasting. Is that going to stop them?
> The Court: I don't think so.
> The Speaker: What can we do to stop them?
> The Court: Well, as I've said, that's not a matter that I can deal with here.
> The Speaker: Very confusing, you know.[311]

The following excerpts are further examples, from the Lil'wat peoples' perspective, of whether the need for an appearance of justice was met:

> The Speaker:---you only have one power in this room, hey. So like why? Why must only your kind of people have that kind of power? ...We respected you enough to

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[308] April 15th, 1991 Transcript at 39.

[309] *Ibid.* at 41.

[310] April 15th, 1991 Transcript at 30.

[311] April 16th, 1991 Transcript at 2.

> accept you in this country without doing you in because we are not that kind of people. And you want to send us to jail because we are fighting for our rights. We are nothing in this court.[312]
>
> Calvin Nelson: ... We are sitting here in the courts. They [the logging company] are out there blasting away at our sacred ground. They say here in the courts as long as you got evidence to show like burial ground ishkins[313] and what not. We have got it. We showed her. Last I heard they said: We will stop as long as you got something to show. And just over the rock they are drilling and blasting. There was ishkins and graves there. Two hours later after everybody left, right back to work. That's one thing I can't really understand. Nobody's just not listening out there. We are in jail. Everything goes right on. Logging, blasting, that's all I got to say. I hope somebody hears.[314]
>
> Susan Nelson: I just want to say that the system is not going to work for anybody, really, when you take a good look at it. Greed ruins everything.[315]
>
> Matthew Pierre: I just want to say I was not guilty of anything in my mind, my heart, my whole being. This was Lil'wat territory all the time, always will be. You have no legal title, you have no legal documents to say it's yours. It's still Lil'wat territory. You couldn't buy it so, you had to expropriate it. It's still stealing, no matter what legal term you use.
>
> Canada prides itself on being a democratic, peace loving country and you go in there and ...arrest the Lil'wat people for defending their own rights and territory. You put them in jail, you humiliate them, you degrade them for defending their rights. What is the reasoning in this? You're making a mockery of your own system as far as I can see.[316]

The demonstration in the Lil'wat contempt trial of the court's unwillingness to rely on its inherent jurisdiction to correct mistakes of law and prevent procedural irregularities should offend society's sense of justice as much as it disturbed the Lil'wat traditionalists who experienced it.

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[312] April 15th, 1991 Transcript at 22-3.

[313] 'Ishkins' were the underground winter homes of the Lil'wat people however during the small-pox epidemic they were used as family burial sites because of the extremely high percentage of Lil'wat people dying from the disease.

[314] *Ibid.* at 51.

[315] *Ibid.* at 55.

[316] April 16th, 1991 Transcript at 2.

3.8 Lack of Impartiality Deprives the Court of Jurisdiction

In *Making all the Difference*, Martha Minow suggests "impartiality is the guise that partiality takes to seal bias against exposure".[317] By destroying the image of judicial impartiality, the Court is deprived of jurisdiction.[318] This is due to the fact that a finding of an apprehension of bias vitiates the constitutional right to a fair hearing.[319] As P.A. Monture-Okanee, and M.E. Turpel state: "This so-called "impartiality" is the basis for the institutional authority of criminal justice officials acting on behalf of the Canadian system."[320]

As revealed in the criminal contempt proceeding there can be no question that the domestic judiciary held a preconceived opinion regarding jurisdiction over unceded territory in British Columbia. Preconception was demonstrated to exist in regard to issues of Lil'wat citizenship, allegiance, governing structure and territorial authority over traditional land. The judiciary also revealed a definite leaning in favour of the Crown's positions throughout the trial. The judicial comments threatening incarceration as a response to the Lil'wat peoples' refusal to use foreign names were sufficient in themselves to create an apprehension of bias. The numerous rulings made to protect both the public access and the logging operations of the Newcomers left a distinct impression of the judiciary as a suitor rather than as neutral adjudicator. In fact, the judiciary condoned the Provincial government's expropriation of the land in question through their acceptance of the contempt prosecution of the Lil'wat people for conspiracy to trespass. It was the judiciary that issued the order authorizing the Lil'wats'

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[317] M. Minow, *Making all the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 3.

[318] *Griffin* v. *Murnaghan* (1994), 70 O.A.C. 236, 113 D.L.R.(4th) 63 (Ont. C.A.).

[319] *Bell Canada* v. *C.T.E.A.*, 10 Admin. L.R. (3d) 116; consider also that the Supreme Court of United States in *re Murchison*, 349 U.S. 133, 136 (1955) has defined fairness as "an absence of actual bias."

[320] Monture-Okanee, *supra*, note 7 at 247.

arrest as well as deciding to proceed criminally. Through co-operation in the handling of this dispute, the Provincial government, the R.C.M.P. and the domestic judiciary succeeded in maintaining public access through traditional Lil'wat lands. Simultaneously, their actions made evident an embedded institutional bias within the domestic legal system.

It is ironic, in the context of the Lillooet Lake Roadblock contempt case, that the legal remedy for lack of judicial or institutional impartiality is loss of jurisdiction over the matter before the court. "If actual or apprehended bias arises from a judge's words or conduct, the judge has exceeded his jurisdiction."[321] This illustrates the degree to which impartiality is the cornerstone of justice. Benjamin Rosenberg similarly reflects the point in his review of *Loyalty: An Essay on the Morality of Relationships* where he states: "...the primary goal of politics is to achieve a society in which disputes are resolved impartially."[322]

A finding in the Lil'wats' criminal contempt case of an apprehension of bias results in a lack of jurisdiction in Justice MacDonald. However the bias this thesis is intended to expose extends far beyond his handling of this dispute. Through the analysis of the arbitrary actions on behalf of the domestic judiciary, the police and the Provincial government they have shown themselves to be participants in a legal system that acting as a whole lacks impartiality. From the Lil'wat perspective the resulting loss of jurisdiction in the superior court of the Province is therefore two-fold. The court simply does not have jurisdiction over Indigenous unceded territory until it obtains informed consent by way of a treaty with the original Indigenous inhabitants and additionally, due to acting as if it were impartial when it was not, the court lost any jurisdiction that it had erroneously assumed.

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[321] *R.* v. *R.D.S.* [1997] 3 S.C.R. 484 ["R.D.S."].

[322] "Quando Fidelis?", *supra* note 270 at 719.

"Not to reach the merits, of course, is not to disturb the status quo."[323]

CHAPTER FOUR

Judicial Breaches of the Rule of Law

The superior court judiciary participated in and condoned breaches of the principles of the rule of law, of constitutional supremacy, and of the honour of the Crown in finding that the Lil'wat traditionalists were guilty of criminal contempt of court.

The preamble of the *Constitution Act, 1982* refers to the rule of law as being foundational. This inclusion indicates society's agreement to be governed by clear legal rules rather than by the arbitrary wishes and desires of any individual or group. As Colin Goff states: "according to the rule of law in our system of justice there is a sense of orderliness, of subjection to know legal rules and of executive accountability to legal authority.[324] To protect our society from individual or group self-interest, the rule of law ensures that laws are created, administered, and enforced on the basis of acceptable procedures that promote fairness and equality.[325]

The Supreme Court of Canada in *Quebec Succession Reference* referred to the rule of law, constitutional supremacy, and the honour of the Crown as principles that provide the key protection for individuals from arbitrary state action.[326] The court succinctly states: "In our constitutional tradition, legality and legitimacy are linked."[327] In *Manitoba Language Rights* the court continues:

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[323] E. Gordon, "Observations on the Independence and Impartiality of the Members of the International Court of Justice" Conn. J. of Int'l L. [1987] Vol. 2: 396-426 at 419.

[324] C. Goff, *Criminal Justice in Canada*, 3rd ed., (Scarborough, Ontario: Thomson Nelson, 2004) at 34.

[325] *Ibid.*

[326] *Reference re: Succession of Quebec* [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385.

[327] *Ibid.* at para.33.

> The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. ...The principle of the rule of law, recognized in the *Constitution Acts* of 1867 and 1982, has always been a fundamental principle of the Canadian constitutional order and requires that all government action must find its authority in positive law or a legal rule, including the constitution and thereby preclude the influence of arbitrary power.[328]

The principle of constitutional supremacy requires that all government action be consistent with the constitution. The honour of the Crown exists as a legal principle specifically in relation to Indigenous peoples as a result of the assertion of British sovereignty over Indigenous lands.[329] It is to be understood generously.[330] It cannot be delegated.[331] The Supreme Court made it clear that these principles were beyond the reach of simple majority rule and political or governmental interference. It also specifically referred to the *Constitution Act, 1982* as re-affirming Canada's commitment to the protection of aboriginals as set out in s. 35.[332]

Kenneth Henley claims: "The best interpretation of the rule of law must distinguish between rule of and rule through law."[333] The following analysis of judicial rulings, comments and decisions in the Lil'wats' criminal contempt case will reveal arbitrary decisions that are in breach of principles within the rule of law. The examples include

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[328] *Reference re: Manitoba Language Rights (Man.)* [1985] 1 S.C.R. 721.

[329] "The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)." *Taku River Tlingit First Nation* v. *British Columbia* [2004] 3 S.C.R. 550 at para.24.

[330] *Haida Nation* v. *British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511.

[331] *Ibid.*

[332] *R.D.S., supra,* note 321 at para.46.

[333] Henley, *supra* note 227 at para.30.

judicial refusal to abide by the rule of constitutional supremacy, to address or apply domestic and international law, as well as reliance on procedural manipulation and improper application of case precedent. Together these resulted in the judicial condoning of arbitrary actions on behalf of both domestic governments *vis-à-vis* the Lil'wat peoples.

The purpose of considering each breach of the rule of law is to prepare the reader to answer the question of whether the Superior courts of the province provide an impartial forum for the adjudication of Indigenous territorial sovereignty or has the judiciary lost it's alleged right to adjudicate as a result of it's arbitrary rulings.

4.1 The Refusal of the Judiciary to Apply Basic Principles of Criminal Law:

According to s. 7 of the *Constitution Act, 1982,* an accused is not to be deprived of their liberty except in accordance with the rules of fundamental justice. To qualify as a principle of fundamental justice for the purposes of s. 7, there must exist a significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate. Such principles may be substantive or procedural and include the right of an accused to have their defense adjudicated upon according to law before an impartial court. The first example of a breach of the rule of law by the judiciary in the Lil'wat criminal contempt case was the refusal of the judge to hear a preliminary or threshold jurisdictional challenge on behalf of incarcerated Lil'wat individuals prior to proceeding with their criminal trial.[334] On January 18th, 1990, Mr. Justice MacDonald issued a written judgment in response to the Lil'wat preliminary jurisdictional challenge in which he reneged on his earlier promise to allow the law going to court jurisdiction to be placed on record, for appeal purposes at least. Mr.

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[334] According to the Supreme Court of Canada, "Imprisonment is the most severe sentence imposed by law, apart from death, and is generally reserved as a last resort for occasions when other sanctions cannot achieve the objectives of the system." *Reference Re S. 94(2) Motor Vehicle Act* [1985] 2 S.C.R. 486.

Justice MacDonald acknowledged that there was a difference between attacking the jurisdiction of the Chief Justice's order and the argument that he was without jurisdiction to hear the present contempt proceeding when he stated:

> You don't have to go back – while the indirect effect of convincing me that I don't have jurisdiction to find these people in contempt, might be also to say that the Chief Justice didn't have jurisdiction to grant the injunction which he granted. You don't have to go back there to make the argument, necessarily. In other words, you can say to me that as a judge of the Supreme Court, I don't have jurisdiction over these people in respect of acts on unceded Indian land.[335]

While this statement by Mr. Justice MacDonald fully acknowledged the Lil'wat defense position,[336] the judge changed his mind when he stated:

> The Court: I'm faced with an order of a brother judge, that the law tells me I cannot question, that I must take as is until a higher court does something to it, varies it or sets it aside, that I am bound by that pronouncement.
> Mr. Clark: ...I suppose what it boils down to from our perspective is on the fraud issue. You are cutting me off.
> The Court: Yes
> Mr. Clark: You have only heard half of it.
> The Court: Yes, I have.
> Mr. Clark: ...how do you know that what I am going to say next isn't going to satisfy you on the fraud?
> The Court: Well...
> Mr. Clark: Isn't that a classic case of prejudge?
> The Court: I have concluded that wherever you go, whatever you have to say, it cannot take away from the basic position that I am bound by the Chief Justice's order and the fraud you have outlined it for me is not a fraud which I can recognize as the kind of a fraud which would undermine the Chief Justice's order. In other words, the lack of adequate legal argument, ...is a matter that has to be dealt with by the Court of Appeal, not by a judge of the same court as the judge who issued the order.[337]

Clark reminded Mr. Justice MacDonald that the Chief Justice's original injunctive order was tantamount to an ex parte order *vis-à-vis* these traditional Lil'wat accused, given that the Band Chief was the only person legally represented at the injunction application. Mr. Justice

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[335] Feb 11th, 1991 Transcript at 6.

[336] Ms. Crompton: "...but...you can't find that you have jurisdiction from what happened before Chief Justice Esson. You have to find it right here with us." January 15th, 1991 Transcript at 15.

[337] November 20th, 1990 Transcript at 54-55.

MacDonald stated nevertheless:

> My problem is it having issued–not my problem. My obligation is that it having issued, I am bound by my oath to recognize it as binding upon me and it's for that reason that I chose to cut you off, if I can put it in the vernacular, because I could not see how you could get me around that conceptual difficulty.[338]

To assist the judge with what he claimed to be his dilemma, I reminded him that his inherent jurisdiction to guard against abuse of process was one manner of overriding the collateral attack rule.[339] For instance, I suggested to him that he could take note of the fact that the Province would be unable to prove ownership or possession of the land in dispute. They would therefore be unable to succeed on their writ that alleged the Lil'wat traditional people had conspired to commit trespass and public nuisance. I also urged the judge to hear the threshold jurisdictional argument so that he did not find himself in the position of enforcing a nullity.

In *Justice in Paradise*, Clark provided his interpretation of the judge's refusal to hear the law:

> Subsequently, the judge reneged on his word. Once he saw the law that proved that the natives were right, he reverted to his opening position and held, at the end of the trial, that he would not, after all, be dealing with the law they had put before him. ...The point, clearly and plainly made by the judges, was that the law is inadmissible when it indicts the judges themselves, as a class.[340]

Regardless of our protestations Mr. Justice MacDonald extended his ruling on collateral attack to apply to the cross-examination by Clark of Inspector Byam, the Head Supervisor of the R.C.M.P dismantling operation. The judge stopped Clark when he began to question whether the R.C.M.P., acting in the capacity of a Provincial police force, had obtained a legal

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[338] *Ibid.*

[339] March 11th, 1991 Transcript at 42. To insist that the surrender to the court's jurisdiction by the imposed Band Council structure rendered him unable to consider the sovereign legal position of the Lil'wat accused was an injustice that the judge had the inherent power to avoid.

[340] Clark, *supra* note 28 at 107.

opinion as to whether or not they had jurisdiction on unceded Indigenous territory. When Clark attempted to explain the legal basis for the question relating to jurisdiction, the judge prevented Clark from pursuing this line of inquiry with the following exchange:

> The Court: Well I'm not entertaining any argument on that point.
> Mr. Clark: That is part of it, not all of it as I say.
> The Court: I'm sorry, the second part of it...I refused to hear on the ruling of the second day of this proceeding.
> Mr. Clark: Well, with respect, since this is so crucial to the theory of the defense, may I pursue it a little by showing you more of the theory of the defense on the board? If you don't allow this, you are in effect denying the theory.
> The Court: That may well be, but that's my ruling, Mr. Clark.
> Mr. Clark: Well, I am only asking at this time to present the rest of the theory of the defense.
> The Court: I am denying you that opportunity. What's your next point...? [341]

Precisely at this juncture the judge breached the constitutional right not to be deprived of your liberty except in accordance with the principles of fundamental justice.[342] Clark had only begun to outline a legal argument that would provide law that demonstrates the jurisdiction of the superior court of the province is both delimited and subordinate. After acknowledgment that "the potential consequences of the Indian sovereignty argument are serious indeed" Mr. Justice MacDonald refused to hear the sovereignty and threshold jurisdictional arguments by simply ruling: "I have concluded that the jurisdiction of this court to try them for contempt is not an issue which they are entitled to raise."[343]

Given that the court's lack of jurisdiction over Lil'wat unceded territory was the substantive defense to the criminal charges, the right to full answer and defense as specified within ss. 7 and 11(d.) of the *Charter of Freedoms and Rights* does not allow a judge to

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[341] Nov 28th, 1990 Transcript at 2.

[342] A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice. Reference Re s. 94(2) *Motor Vehicle Act* [1985] 2 S.C.R. 486.

[343] March 18th, 1991 Reasons for Judgment at 28. This is yet further evidence of colonial self-interest rather than equally considering the immediate consequences of such a ruling to the Lil'wat people.

refuse to hear constitutional and international law that arguably provides a valid legal defense.[344] This is especially so given Mr. Justice MacDonald's awareness that refusals by other Supreme Court justices as well as by the B.C. Court of Appeal to hear Lil'wat applications had placed the them in the position of being denied an opportunity to offer their defense to the charge of contempt at any level of the Canadian domestic court system.

Instead of hearing the constitutional law relevant to jurisdictional authority over the land in question, Justice MacDonald insisted on returning to his single-minded focus of enforcing Lil'wat obedience to his brother judge's injunctive order that prevented them from blocking public access on a road that passed through their unceded territory without their consent.[345] He insisted that he was unable to question the validity of Chief Justice Esson's injunctive order. The consequence of his ruling was to place C.J. Esson's order above the supremacy of the constitution. His refusal to hear the Lil'wats' defense submission while upholding the injunctive order resulted in his breach of the principle of constitutional supremacy as well as the *Charter* guarantee to not be deprived of one's liberty except in accordance with the rules of fundamental justice.

Clark summarized the situation in *Justice in Paradise* by writing:

> Now in the end, it all seems so simple in terms of the principles ultimately involved. The natives were here first. The newcomers undertook legally to respect them and did not. And now the newcomers' courts are negating the rule of law by refusing publicly to address their ongoing role in the process.[346]

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[344] "The right to make full answer and defense is itself a principle of fundamental justice protected by ss. 7 and 11(d.) of the *Charter*." *R.* v. *Mills* [1999] 3 S.C.R. 668.

[345] To be fair, the B.C. judiciary held that Clark's arguments would be allowed before the court but only by submitting to the jurisdiction of the court to participate in a trial of the sovereignty issue in approximately two years time.

[346] Clark, *supra* note 28 at 40; see also Milde, *supra* note 29 at para.24 where he quotes Dyzenhaus as stating: "When recognizably commendable legal professionals insinuate, by their actions, that the rule of law is being respected, then the lay public has little incentive to believe otherwise."; consider also Moodie's statement where he reflects generally on the court's refusal: "Judicial consideration

There were many refusals by the superior court judiciary to hear the law applicable to this dispute however another prominent example occurred on February 1st, 1991, when Clark attempted to file documents outlining the constitutional law in defense of the second stance of the Lil'wat people at the gravesite area at Ure Creek. So as to continue to build their logging road, Interfor Logging Corporation made application to the B.C. Supreme Court for a second injunction at which the following exchange between Mr. Justice Wetmore and Mr. Clark occurred:

> The Court: Well, you need not file them.
> Mr. Clark: My lord, as I understand your instruction, it is that I not refer to constitutional law and I not lead evidence the relevance of which would depend upon constitutional law submissions.
> The Court: Right.[347]

In addition to demonstrating partiality by only hearing the law from the perspective of the logging corporation, the judge also breached the rule of law by refusing to consider the paramount constitutional law in support of the Lil'wats' sovereignty assertion.

In a similar exercise of judicial discretion Justice MacDonald breached the rule of law by ruling that mens rea was not a requirement of the crime of contempt. The Supreme Court of Canada stated in *Reference Re S. 94(2) Motor Vehicle Act* that "It may well be that, as a general rule, the principles of fundamental justice require proof of a subjective *mens rea* with respect to the prohibited act, in order to avoid punishing the morally innocent." The case acknowledged that:

> ...whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, there is, as a principle of fundamental justice, a

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of Aboriginal sovereignty and self-government issues has never even gotten its engine started!" Moodie, "Thinking Outside" *supra* note 58 at 37.

[347] *Interfor* v. *Pascal, supra* note 32. Feb. 1st, 1991. Injunction application by Interfor before Mr. Justice Wetmore regarding the Ure Creek site.

> minimum mental state which is an essential element of the offence. It thus elevated *mens rea* from a presumed element to a constitutionally required element.[348]

By ruling that he was concerned not on a group basis but rather on whether individuals knew of the court's injunctive order and participated in conduct contrary to it, Justice MacDonald disregarded the sworn testimony of the traditional Lil'wat people that their actions of blocking the road were as a result of their allegiance to Lil'wat law that had authority in their traditional territory.[349]

The testimony of Sasquatch before Mr. Justice MacDonald is representative of the state of mind of the traditional Lil'wat people involved in the blockade. His testimony also makes references to the lack of honour of the Crown:

> I know I'm not breaking any law because I know the federal government's got a fiduciary trust obligation to us. I can't be trespassing on my own land because I got a fiduciary trust obligation with the federal government, protects us from third party encroachments. Like if it means anything to anybody, we were going to negotiate with that federal government because we asked them all that summer, and they still never honored that. And they're the ones that have the first bid on what goes on ...in negotiations with us... No one else has a right to offer us money for that road that they wanted the right of way on, and they have no right to say they can expropriate it because we didn't accept the offer because we knew we had that fiduciary trust obligation with the federal government first, and they're the ones that should have been out there talking with us, but it never happens. We're honorable enough to be in here. Where's your guys' honour? It's pretty hard when you see they built airports on our graveyards, sacred burial grounds, go logging in the mountains and blow up pictographs just so they can make their money. They don't realize what they're destroying because they're so darn greedy.
> When we put that blockade up, it was so as that we had----we wanted that federal government to meet with us nation to nation negotiations honorable. ... And still we were there waiting to meet with them. So my obligation to the Creator was to protect our lands, territory.[350]

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[348] *Reference Re S. 94(2) Motor Vehicle Act* [1985] 2 S.C.R. 486.

[349] Nov.28th, 1990 Transcript at 3.

[350] Sasquatch: December 12th, 1991 Transcript at 34-5; see also Henderson where he speaks of the essence of the Indigenous people's relationship with the land as involving "...covenants with other life forms and their keepers. These spiritual and ecological worldviews created the context for customary management of the sacred place under Aboriginal peoples' care." "Empowering", *supra* note 57 at 263. It is respectfully suggested that the majority of Newcomers have yet to appreciate the spiritual sophistication of traditional Indigenous governing systems. As such awareness is

Figure 19. My Obligation to the Creator

Additional excerpts from the testimony of Lil'wat accused demonstrate the honesty of their belief that the Provincial government was guilty of theft in relation to the road in question:

> Ishmeshkeya (phonetics): I just want to explain to you the reasons why we have to take the action we took because we really believe, you know, that there …is a theft of land involved in what is happening with us. ...The road that we stood on has been illegally in use for 42 years by the province of British Columbia.[351]
>
> Sasquatch: I understand that I put that roadblock up there. I helped them out to stop that logging that's going on in our territory, illegally done. Stop making highways through our lands when they haven't even been properly negotiated. They're supposed to come to the people.

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acquired it will add weight to the realization that the present Band Council structure is an inadequate device through which to obtain consent in relation to the surrender of Indigenous territorial sovereignty. It may also add to the realization that Indigenous jurisdiction on unceded territory is not for sale.

[351] April 15th, 1991 Transcript at 25.

> ... And my—in my heart I believe I wasn't breaking the province law they say they have because I know that the federal government have that fiduciary trust obligation to us, and they wouldn't have had to incarcerate us all if the federal government was honourable enough to negotiate with us as we were asking all that summertime we were out there at that roadblock. And that's all they had to do, was come and negotiate, and never once did we see them do that.[352]

Another traditional Lil'wat accused attempted to assist the judge in understanding that it is not the Lil'wat people who are in breach of their obligations. One after another they remarked on their state of mind at the time of the offence and the lack of honour of the Crown:

> Matthew Pierre: I just want to say I was not guilty of anything in my mind, my heart, my whole being. This was Lil'wat territory all the time, always will be, You have no legal title, you have no legal documents to say it's yours. It's still Lil'wat territory. You couldn't buy it so you had to expropriate. It's still stealing, no matter what legal term you use.[353]

Mr. Pierre's comment directed at counsel for the Provincial government reflects the Supreme Court of Canada's statement that legality and legitimacy are entwined in addition to revealing that subjectively the Lil'wat people saw themselves as morally innocent.

Rather than providing proof of the necessary *mens rea* for criminal contempt, the testimony of the Lil'wat accused repeatedly expressed their adherence to Lil'wat law. They spoke of the obligations and responsibilities they carry in relation to their territory when explaining their actions rather than a motivation to act in defiance of Canadian law. From their perspective it is non-existent because of its lack of jurisdiction in unceded territory.[354] In addition to Justice MacDonald's insistence on the assumption of court jurisdiction, he also found it necessary to infer defiance into the minds of the Lil'wat people. Their sworn

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[352] Dec. 12th, 1990 Transcript at 31-2.

[353] April 16th, 1991 Transcript at 2.

[354] Inspector Byam of the R.C.M.P., in charge of dismantling the roadblock agreed in cross-examination that the natives on the roadblock appeared sincere when they were chanting "RCMP has no jurisdiction". November 27th, 1990 Transcript at 63.

testimony had provided ample evidence that Lil'wat law obliged them to protect the resting places of their ancestors.[355] If he had considered British Imperial constitutional law, Justice MacDonald would have found that without purchase through nation-to-nation negotiation, the court had no jurisdiction *vis-à-vis* unceded territory. From the Lil'wat perspective the only law with legitimacy in unceded Lil'wat territory is their own.

Immediately prior to convicting them, Justice MacDonald commented that he accepted the righteousness of their cause and the genuineness of their beliefs.[356] Whereas the general principle of criminal law requires a finding of a guilty intention in regards to the *actus reus* of a crime, Mr. Justice MacDonald relied upon *Toth* to hold that he required only notice of the Chief Justice's injunctive order and an action contrary to it.[357] His earlier characterization of the contempt as criminal had the consequence of creating the necessary inference that the Lil'wat peoples' actions were sinister and threatening *vis-à-vis* the administration of justice. Only by assuming jurisdiction, inferring an intention contrary to the Lil'wats' sworn testimony, and applying case precedents relating to Canadian citizens on ceded territory was Justice MacDonald able to find the Lil'wat people guilty as charged.

As to whether the judge was in breach of the rule of law that insists on constitutional supremacy, consider the following explanation by Youngblood Henderson in "Empowering Treaty Federalism":

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[355] Justice MacDonald in his Reasons for Judgment issued on March 18th, 1991 relied upon *Bridges* for it's description of contempt which he applied to the Lil'wat assertion of sovereignty: "In the whole spectrum of conduct classified as contemptuous, there can be none more sinister or more threatening than that of organized, large scale, deliberate defiance of an order of the court." *R.* v. *Bridges (No. 2)* 61 D.L.R.(4th) 155 (B.C.S.C.).

[356] April 15th, 1991 Transcript at 31.

[357] *R.* v. *Toth*, 1991 CanLII 184 (B.C.C.A.) March 12th, 1990 Transcript at 22. The Crown suggested the Lil'wat people were motivated to block the road by their obligation to the Creator and by their belief in Indian sovereignty however this spoke only to motive and was legally irrelevant to criminal responsibility.

> Indian country in the West was under the general protection of the Crown pursuant to the Royal Proclamation and the Rupert's Land and North-Western Territory Order. Under these prerogative documents the First Nations were protected against encroachments from the colonial governments and the settlers, but the First Nations had no consensual relationship with the Crown.[358]
> ...Under treaty federalism, any Aboriginal right not delegated to the Crown is retained by the First Nations... All legitimate British authority in North America is derived from the compacts and treaties with First Nations. Any Crown authority over First Nations is limited to the actual scope of their treaty delegations. If no authority or power is delegated to the Crown, this power must be interpreted as reserved to First Nations, respectively, and are protected by prerogative rights and the common law since neither can extinguish a foreign legal system. The ability of the First Nations to delegate authority to the imperial Crown does not by itself affect First Nations' territorial authority.[359]

Other than personal or institutional bias, what explains the inability of Mr. Justice MacDonald to accept the blockade as a justifiable act based on Lil'wat territorial sovereignty in relation to unceded territory? Correspondingly, what prevented him from viewing the traditional native accused as acting in obedience of Lil'wat law rather than in defiance of the Newcomer's foreign law?

Justice MacDonald's rulings were also inconsistent with the principle that requires the Crown to be held to a high standard of honourable dealing with Indigenous peoples.[360] Clark summarized the situation by writing:

> ...the judges' assumption that they had jurisdiction to shift the legal burden of proof onto the Indians by requiring them to make a land claim which the judges could then judge the validity of, was not merely illegal, but treasonably, fraudulently, and genocidally so; and the Indians are entitled to third-party adjudication and do not have to prove anything before this judge.[361]

The judiciary also breached the constitutional guarantees relating to the presumption of innocence and the right to full answer and defense. Justice MacDonald refused to require

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[358] "Empowering", *supra* note 57 at 259.

[359] *Ibid.* at 24.

[360] *Guerin* v. *The Queen* [1984] 2 S.C.R. 378 [Hereinafter *"Guerin"*].

[361] Clark, *supra* note 28 at 104.

proof of each element of the offence of contempt. As an element of the crime of contempt I requested that the Crown be put to strict proof of whether or not the court was an authority over these accused. For the Crown to prove the court was an authority over the Lil'wat accused on unceded territory Mr. Justice MacDonald needed to hear the jurisdictional argument. A challenge of whether the court was such an authority at law was a valid legal issue requiring argument and adjudication. Logic speaks to the difficulty of being found guilty of disobeying a court order the authority of which has not been established. I urged the judge on March 22nd, 1991 that by hearing the jurisdictional argument as an element of the offence, he had an alternative to breaching the collateral attack rule that he considered himself bound by.[362]

The simple fact that the Lil'wat people have lived in and been in continuous possession of the land in question for several thousands of years ought to have been a sufficient basis for the judge to accept this basic request by the defense. In this regard, consider the Dyzenhaus' statement that the legitimacy of the positivist approach depends on a democratic theory that says the people speak through their elected parliamentary representatives.[363] Only as a result of this feature of democracy do judges have the authority to apply the statues enacted so as to best approximate what these representatives actually intended. Given that the vast majority of Indigenous peoples refuse to participate in any manner whatsoever within the foreign Canadian parliamentary system, their challenge as to whether the court was a valid legal authority over them was a legitimate argument according to basic democratic theory. Justice MacDonald responded:

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[362] March 22nd, 1991 Transcript at 4.

[363] Milde, *supra* note 29 at para.13.

> ...it is my view that I have indirectly, if not directly, concluded that I have authority that in this narrow context of contempt proceedings. Having ruled that the sovereignty issue cannot be put before me, I have indirectly, if not directly, concluded that I have the authority to deal with the contempt proceedings.[364]

The judge's refusal to hear the constitutional law affecting his jurisdiction, to additionally consider whether he was an authority over the Lil'wat accused and his ignoring of the Lil'wat testimony that explained their allegiance to Lil'wat laws in their territory, are three discretionary judicial decisions that lead one to question whether the judge was being affected by a reason other than a given reason in the exercise of his discretion. As D. Patterson writes in *Epistemology of Judging*:

> ...there is an important distinction between the factors that effect judicial reasoning and the reasons that are used by Judges to justify their decisions. ...the fear is that within the range of defensible strategies, judges may effect and justify almost any outcome.[365]

The judge was in breach of the rule of law by predetermining that he would not adjudicate upon the Indigenous sovereignty defense and was engaged in whatever decisions were necessary to uphold this position.

4.2 The Refusal of the Judiciary to Address Substantive Lil'wat Defenses and Relevant Evidence:

Qwetminak repeatedly referred to the rule of law at her sentencing hearing for criminal contempt:

> ...if that rule of law is not going to be found in these courts, where is it going to be found? That is my question. I want to know where do we go? ...How do we get the rule of law followed in this country? ...We are supposed to be protected people. It's your rule of law.

The following submission made to Mr. Justice MacDonald by Bruce Clark, was one of

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[364] April 15th, 1991 Transcript at 4.

[365] D. Patterson, *Epistemology of Judging* (Boulder: Westview Press, 1992) at fn.16.

several attempts to convince the superior courts of British Columbia to hear legal argument addressing the Lil'wat sovereignty defense:

> ...the Indians are seeking justice only, not generosity,...the whole essence of our position is that the rule of law technically...in a black letter law sense is on their side. We are not asking for your lordship to listen on the contempt proceeding to sovereignty evidence as a way of doing some kind of favor. We are not asking for a favour. We say that your lordship should listen to that evidence because that is your duty...And if we can't persuade you that it's your duty, we say don't do us any favours. And the reasons that is, my lord, is because it's important, there are political overtones to this case.[366]

Clark and I tried a number of approaches to having the jurisdictional argument in support of Indigenous sovereignty heard. These included an application for habeas corpus, an application for a non-suit, an application for a counter injunction against the logging company, an application to appear before the judge who issued the injunction on the basis that it was issued *per incuriam*, an application for leave to join the appeal of the original injunctive order, and a declaration from the Federal Court that the Federal government was in breach of it's fiduciary obligations. The judiciary denied each of these motions without hearing the constitutional legal argument of the Lilwat accused.

Clark writes of his astonishment in *Justice in Paradise*:

> To me, it was inconceivable that, in a matter of such obvious importance and notoriety, the judge could simply state that he was not prepared to listen to the law going to jurisdiction. But it was that simple. ...Accordingly, I applied to the Chief Justice of British Columbia for a review...of the first judge's injunction and his refusal to reconsider in light of law that previously had not been presented. That

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[366] Consider in this regard Henderson's comment in where he states: "Colonial values informed the rule of law only so long as Treaty First Nations and Aboriginal people were not permitted to complain to the courts. First Nations' resistance to those who act in the name of the Crown revealed constitutional contradictions. They forced these governments to justify the exercise of public power over Aboriginal peoples." "Empowering", *supra* note 57 at 298; consider also that for decades the natives were forbidden by law to raise funds for land claims therefore they did not participate in the development of the case law that is binding on the domestic judiciary who claim to have authority over them.

> application, too, was blankly and flatly refused. I attempted to appeal these arbitrary refusals to listen to law to the British Columbia Court of Appeal.[367]

In fact, Clark continued in his pursuit to have the jurisdictional argument heard and appeared on more than 41 occasions "without it ever being determined by any court."[368] He was intent upon having the legal argument adjudicated upon by the Supreme Court of Canada. After more than twenty refusals he obtained leave to appear before Chief Justice Lamer. There he was advised that his suggestion that the judiciary's insistence on its refusal to hear the law rendered them complicit in genocide, was the most preposterous submission the Chief Judge had ever heard and that Clark was a disgrace to the bar for making such a remark.[369]

As to the domestic court's refusal to hear the Lil'wat defense arguments, it should be noted that in addition to refusing the Lil'wat accused the opportunity to make the jurisdictional argument, Mr. Justice MacDonald also refused arguments regarding the defense of necessity and the Supremacy of God as contained in the preamble to the Constitution. When Clark began to outline the latter argument Mr. Tyzuk responded that *R.* v. *Bridges No. 2* was a precedent that prevented it.[370] This case involved a protest at an abortion clinic where those who breached the injunction order not to interfere with the operation of the clinic relied on their belief in God's law as their defense. Justice MacDonald

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[367] Clark, *supra* note 28 at 102; see also at 132 where Clark refers to his unsuccessfully pursuit of hearings on the jurisdictional argument before the United Nations Human Rights Committee as well the International Court of Justice. He concluded that: "politics, not law, also governed in the international arena, and the United States and Canada had the politics and diplomacy in their pocket."; see also where Henderson refers to the difficulty with applications by Indigenous peoples to the International Court of Justice: "There is little opportunity to establish self-determination for Aboriginal peoples in international jurisprudence because only states have standing at the International Court of Justice." "Empowering", *supra* note 58 at 298.

[368] *Ibid.* at 212.

[369] *Ibid.* at 222.

[370] Mar. 12th, 1991 Transcript at 20.

agreed with the Crown's submission and responded to Clark: "I have to tell you that I can't entertain that argument. I'm sorry but I can't."[371]

To prevent having to address the argument, the judiciary again refused to distinguish the legal position of traditional Lil'wat peoples on unceded land from that of other Canadian citizens.[372] To have any validity or authority in relation to non-treaty Indigenous peoples the Canadian legal system must first be grounded in the notion of a social contract. Monture-Okanee and Turpel in "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" remind Newcomers that:

> We are not necessarily culturally, linguistically, or historically part of Canada or Canadian legal and political institutions. We are different and separate, set apart by our cultures, languages, distance and histories.[373]

On the basis of the legal assumption that the imposition of Canadian citizenship was valid, Mr. Tyzuk reduced the Lil'wat assertion of sovereignty to an attempt on their part to argue that they, like the abortion clinic protestors, preferred the law of God above the law of the state. Mr. Tyzuk misrepresented the point. It is not that the Lil'Wat traditional peoples preferred the rule of God to the rule of the state but rather that they owed allegiance to Lil'Wat law. Accordingly their obligation to the Creator was to protect the land and the graves of their ancestors.

When the Lil'wat accused were refused the opportunity to make submissions relating to the principle of the Supremacy of God, Clark responded by stating once again "our client's s. 7 rights are being denied …that we have not been granted the opportunity to adequately state

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[371] Nov. 28th, 1990 Transcript at 8.

[372] If, as the Supreme Court of Canada states, aboriginal rights are sui generis why does the judiciary condone the Provincial government's reliance on cases relating to non-Indigenous persons?

[373] Monture-Okanee, *supra,* note 7 at 259.

our case in a situation where the clients' liberty is at stake."[374]

In addition to the court's refusal to hear defense arguments, as soon as we began calling the Lil'wat accused as defense witnesses, evidentiary objections to both relevancy and admissibility were made by counsel on behalf of both governments.[375] The Lil'wat accused were attempting to explain their sovereignty as the basis for blocking the road through their unceded territory as well as to clarify that their only purpose before the foreign court was to continue to create a historical record of their sovereign position.[376]

While Mr. Tyzuk argued their evidence regarding sovereignty amounted to a collateral attack on the Chief Justice's order and was irrelevant as it went to motive rather than intent, Mr. MacKenzie objected that the Lil'wats' *viva voce* evidence should not be heard on the basis of lack of relevancy as well as arguments regarding:

> ...oral evidence, the admissibility of Indian law and legends and the admissibility of evidence as to reputation, irrelevancy, speculative evidence, general hearsay evidence and evidence that really consists of argument rather than factual evidence.[377]

Not only did the court rule in favour of the Crown's opposition to our making arguments on substantive issues, but also the Crown's objections to the admission of the Lil'wat *viva voce* testimony were ultimately upheld.

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[374] November 19th, 1990 Transcript at 12.

[375] January 7th, 1991 Transcript at 2-3. Clark was able to convince the judge to allow the evidence be admitted for the purpose of creating a complete record for appeal purposes but not in support of any Lil'wat defense to the charge of contempt.

[376] Such traditional assertions of Indigenous sovereignty are in keeping with the comment by Christie, where he states: "It must be kept in mind, however, that it is not judicial recognition that validates this notion of sovereignty." G. Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 (1) *Queen's Law Journal* 143 at fn. 22.

[377] Jan. 7th, 1991 Transcript at 25. Clark responded by reminding the judge that Indian cases are *sui generis* and it is not a question of applying standard evidentiary rules. He therefore suggested the judge approach the admissibility issue in a unified manner rather than compartmentalized as suggested by Mackenzie.

4.3 Judicial Manipulation of Process

As one of many attempts to have the law placed before the court, we made a request for Mr. Justice MacDonald to hear argument as to the lawfulness of the Lil'wats' detention by way of a habeas corpus application. He responded: "I'll certainly hear from you in the appropriate time for that to be raised. So the answer is a qualified yes, I will hear that but not at this time."[378] A few moments later for clarity I confirmed with him "...you have made it clear on the record today that you will listen to an argument as to lawfulness of the detention," to which he responded: "Yes."[379]

However, Justice MacDonald continued to refuse to allow us to bring the application even though the B.C. Court of Appeal had made it clear that the habeas corpus rested solely with him. I continued to pursue a hearing of the application:

> ...so there's no other viable...available place for us to take the habeas corpus argument but to you and as I understand the record right now, you are denying us that application.
> The Court: At this time in this trial, yes.[380]

The judge's position on this specific application had changed within a few days. Whereas on November 20th, 1990, he mentioned that in the circumstances we may wish to open our defense with the habeas corpus application, by November 28th, 1990, he stated:

> ...you do not have the right to interrupt these kind of proceedings by habeas corpus, that you must exhaust your other remedies first, i.e. adduce the defense which you have here.[381]

The right to challenge the lawfulness of the detention of an accused through a habeas corpus application is a constitutional right available to anyone being detained or incarcerated by the

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[378] November 20th, 1990 Transcript at 56.

[379] *Ibid.* at 67.

[380] November 21st, 1990 Transcript at 110.

[381] Nov. 28th, 1990 Transcript at 6.

authorities.[382] Additionally in the context of this case, justice delayed was justice denied. The original inhabitants of the territory remained incarcerated while the provincially licensed logging corporation continued to blast a road through the Lil'wat peoples' burial grounds. There is a point at which the manipulation of procedure so as to avoid hearing argument as to the lawfulness of their detention became an abuse of process. I reminded Mr. Justice MacDonald of this on March 12th, 1991, in my threshold jurisdictional argument where I referred to his inherent jurisdiction to avoid irregularities that result in injustice.[383]

Mr. MacDonald also ruled that he did not consider himself seized of the habeas corpus application. However, he refused our application to adjourn so that Clark and I could argue it before another Supreme Court judge. At this point Clark stated on record:

> Your lordship has said that you will entertain a habeas corpus application in these proceedings. Having said that, in your next breath you take it away and you say you won't listen to the theory of the defense on that subject, and you have foreclosed the possibility of the defense putting onto the record its evidence which is absolutely essential to the habeas corpus application.[384]

Due to what we concluded was a manipulation of process we sought an adjournment to discuss with our clients whether there was any point in proceeding with the defense of the action, since it would appear that the habeas corpus application was effectively being forestalled.[385] From the perspective of the traditional Lil'wat people, if their defense was not going to be heard, it became questionable whether or not they should continue to participate

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[382] *Charter, supra* note 194 at s. 10. Everyone has the right on arrest or detention (c.) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

[383] March 12th, 1991 Transcript at 2; Clark was still beseeching the judge on April 17th, 1991 to "Stay the blasting and clear cutting of the sacred valley until the Court of Appeal will at least listen to the law upon which my clients rely. ...Tell Crompton her faith in you was not in the end misplaced."

[384] November 28th, 1990 Transcript at 6.

[385] Nov. 28th, 1990 Transcript at 5.

in what had become a criminalization process.

Another example of manipulation of process occurred on March 15th, 1991, when Mr. Justice MacDonald stated:

> ...simply because I have characterized these as criminal proceedings because really the underlying issue here is the action for trespass and nuisance, a civil action. That admittedly these proceedings have a criminal flavor, if I can call it that, because of the consequences that could flow from it, but that doesn't take away from the underlying basis on which the Attorney General's action is originally brought...the fact the constitutional argument proceeds on the basis that these are "criminal proceedings" is not going to flow over into the argument on the threshold jurisdiction issue.

By holding that in respect of the threshold challenge to jurisdiction the matter was civil in nature, Mr. Justice MacDonald was able to lessen his obligation to hear the challenge from that required in a criminal proceeding. Here the Lil'wat accused were incarcerated and faced criminal records if convicted because Justice MacDonald himself had characterized the contempt as criminal. Why did he insist that their preliminary challenge to jurisdiction was to proceed on a civil basis? What purpose did it serve in this one instance to insist on viewing the matter as a civil writ of conspiracy to commit trespass and public nuisance, while in all of our other attempts to present the jurisdictional argument to insist that the matter before him could only proceed as a criminal enforcement matter?

Another example of manipulation of process occurred when Clark attempted to file a notice of motion to strike the writ of summons as frivolous, vexatious and disclosing no reasonable cause of action. The judge was quick to respond:

> The Court: Now, I'm going to react to the third document immediately without hearing from your friends. ... I view the motion to strike out the Writ as simply another way of phrasing the argument or the position that because of the sovereign status of the Lil'Wat people this court has no jurisdiction over it. In other words, it becomes a question of semantics. Either this court can deal or it can't with these people in this situation.[386]

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[386] Dec. 10th, 1990 Transcript at 6.

When the judge indicated his awareness that the motion may be an alternative ground of attacking the allegations against the arrested persons Clark answered:

> Your second conclusion might then be to strike the Writ and thus remove the scandal of prosecuting people for breaching an interim injunction where there is no action with reference to which the injunction is capable of being interim.[387]

Clark set out the grounds for striking the writ as follows:

> 1. As a matter of fact "no purchase" by the Crown within the meaning of the Royal Proclamation has been pleaded by the plaintiff in their writ of summons.
>
> 2. As a matter of law it is impossible for the defendants to be liable in trespass on their own unceded Indian territory until they have indicated that they are "inclined to dispose" of their land and a "purchase" by the Crown has been concluded.
>
> 3. The Supreme Court of British Columbia has no jurisdiction over the territory in question since that territory prima facie is unceded Indian territory for constitutional law purposes.
>
> 4. If any non-native court has jurisdiction, which is not admitted but denied, in virtue of ss. 2 and 18 of the *Federal Court Act* it can only be the Federal Court of Canada.

The judge refused to hear the motion to strike on the basis that he perceived it to be a collateral attack on the Chief Justice's order. Although he had suggested he would hear the motion during argument on the merits of the case, he had once again changed his mind by the time we reached that point in the trial process.

Such procedural manipulation must be confronted in our consideration of whether the court in the Lil'wat criminal contempt trial was acting arbitrarily or in accordance with the rule of law. The domestic judiciary insisted on relying on legal fictions, adamantly refused to allow substantive legal arguments or to consider relevant evidence. These judicial actions in combination with judicial manipulation of process amounted cumulatively to a breach of

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[387] Dec. 10th, 1990 Transcript at 7.

natural justice that consists of procedural fair play and due process.[388]

4.4 Judicial abuse of process:

From the defense perspective the domestic court's repeated refused to hear valid defense arguments, relevant evidence and associated applications had reached the point of constituting an abuse of process. Clark asked on February 8th, 1991:

> How can the Provincial government get away with stealing their [Lil'wat] lands when the constitution in very straightforward terms expressly prohibits this? The white society is evading the rule of law. It is achieving this in virtue of its control of the legal process. That is the white judges are stonewalling the simple legal question, and thus preventing the rule of law from functioning.[389]

The court reacted vehemently to this suggestion by Clark. The more stridently Clark objected to the court's insistence on the assumption of jurisdiction[390] the more vehement became the reaction of the bench to him. What began with the judiciary asking counsel for the Attorney General of British Columbia to have the Law Society consider disbarment proceedings against him, escalated eventually to a B.C. Provincial Court Judge ordering Clark held for thirty days in a psychiatric institute for examination of whether his mental state was such that he was fit to practice.[391] In the end, Clark's insistence that the courts address the law resulted in his disbarment as a member of the Law Society of the Province of

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[388] The judge included as an example of procedural fair play, that all parties are to be given the opportunity of being heard. *Salem* v. *Air Canada* [1999] N.S.J. No. 13; Doc. S.H. 1498/10 (N.S.S.C.)

[389] Feb. 8th, 1991 Transcript at 23.

[390] December 10th, 1990 Transcript at 18. In answer to a request from the Crown for particulars of which specific pieces of legislation Clark was calling into question, he responded: "...what would be the point of me listing every single Statute and every single Section? The point is far more basic than that. What's necessary is to stand back and in order to see the forest through the trees realize that what we are saying is, this is sovereign Lil'wat territory protected as unceded Indian Territory for constitutional purposes. That simple point drives everything else. It's not necessary to list sections. Take it as a given, that all Federal and Provincial legislation that molests or disturbs within the meaning of the Royal Proclamation is inapplicable."

[391] Clark, *supra* note 28 at 167-68.

Ontario.[392]

As identified in the following comment by Doug Moodie, it was not the lack of a legitimate legal argument that prevented the Lil'wat sovereignty position from being heard, but rather, the judicial insistence on particular assumptions or myths regarding the legal relationship between the Newcomer state and Indigenous nations. Moodie concluded in his article that:

> ...the supremacy of the Crown is not up for debate. The judiciary for almost two centuries has shown unquestioning allegiance to the concept of Crown sovereignty. ...notwithstanding the existence of persuasive legal arguments in support of the concepts of Aboriginal sovereignty and inherent self-government, the judiciary has traditionally adhered to certain entrenched "legal fictions".[393]

The unconstitutional refusals to hear applicable law and relevant evidence, the manipulation of process to avert defense opportunities and the inexplicable favoritism shown to the Crown in the exercise of Justice MacDonald's discretion amounted to an abuse of process by the domestic judiciary.

4.5 Judicial Condoning of the Crown's Lack of Honour

On December 10th, 1990, Clark was finally in the process of filing five legal instruments as part of the habeas corpus application, when, without notice, Mr. Goldie appeared on behalf of the Provincial government.[394] He rose and objected to the court proceeding any further

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[392] Clark, *supra* note 28 at 218-24. The Report recommending his disbarment is dated Dec. 17th, 1998.

[393] Moodie, *supra* note 58 at para.6; see also Hunter's statement that: "While on a normative level it is fair to question whether the Crown's assertion of sovereignty was legitimate, it seems clear that the mainstream legal system views it as such." C. Hunter, "New Justification for an Old Approach: In Defense of Characterizing First Nations Treaties as Contracts" (2000) 62 U.T. Fac. L. Rev. 61-83 at 74.

[394] Mr. Goldie was lead counsel for the Provincial government in the *Delgamuukw* trial that was about to be decided by Chief Justice McEachern of the British Columbia Supreme Court.

with the hearing of the Lil'wat application on the basis that Chief Justice McEachern in *Delgamuukw* had heard much more extensive argument on the same points that Clark was trying to argue. Mr. Goldie advised Justice MacDonald that he should therefore adjourn the Lil'wat case and await Chief Justice McEachern's decision, which was expected shortly. He was also insistent that the Supreme Court of Canada in *Sparrow* had decided against the native's sovereignty argument and that it was not open to the court to decide that *Sparrow* was wrongly decided.[395]

> The Court: "What you are attempting to demonstrate, as I understand it, is that the issues which Mr. Clark wishes to raise before me in these proceedings are before, squarely before the Chief Justice in the Gitksan case.
> Mr. Goldie: That is correct.[396]

Clark responded by advising Justice MacDonald that Mr. Goldie was attempting to prevent Indian sovereignty, for the first time in history, from having its day in court.[397] At that point Mr. McKenzie, also appearing on behalf of the Provincial government, added:

> ...counsel do have a responsibility to object to my friend's characterization of the Chief Justice's judgment, even before its come down or even after its come down, as being *per incuriam*.[398]

Clark was quick to respond that the native's position in *Delgamuukw* and *Sparrow* was totally distinguishable from the present Lil'wat peoples' position,[399] and that *Sparrow* most

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[395] Mr. Goldie in Dec. 5th, 1990 Transcript at 9 outlines the infringement principle recently enunciated by the Supreme Court of Canada in "*Sparrow*" *supra* note 58: "First, is the limitation within the legislation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the rights of their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation... If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right."

[396] Dec. 5th, 1990 Transcript at 26.

[397] *Ibid.* at 48-51.

[398] Dec. 10th, 1990 Transcript at 11.

[399] See *Sparrow*, *supra* note 58, in which the natives attorned to the jurisdiction of the court and argued that the Federal fishing regulations did not apply due to their constitutionally protected

certainly did not decide the question of sovereignty:

> The parties assumed without the issue being argued that the court did have jurisdiction and the court went on in the absence of all the necessary precedents and legislation as a reconciled entity. Having started with the opening assumption that the federal and provincial governments had jurisdiction, the court pre-judged the whole sovereignty issue without addressing it.[400]
>
> What's really needed is for the judges to step back and to put themselves in the seat of the Imperial government, to go across that ocean and to see a continent, to see British North America from an Imperial perspective because that's where the law is made.[401]
>
> We are reaching to a more basic, a more basic and underlying question that has not yet been addressed. ...this case here before your lordship is about the jurisdiction of the court. This case is not about a specific piece of legislation like a provincial enactment.[402]

Regarding the Gitskan case Clark stated:

> I've tried to get the information out to prevent a horrible miscarriage of justice and it's just fallen on deaf ears. The only way that justice can be done, I'm suggesting, is that for your lordship to come in and save the day, and I'm beseeching you to do that.[403]

Unlike the Lil'wat accused before Mr. Justice MacDonald, the Musqueum, Gitksan and Wet'suwet'en had attorned to the jurisdiction of the court and, and by doing so conceded that Provincial and federal laws applied to them. The Lil'wat people emphatically asserted that the federal and provincial legislation molested and disturbed them on their unceded territory. In a detailed submission Clark demonstrated the fundamental difference between the Lil'wats' argument and those made to date on behalf of Indigenous peoples. Clark also

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aboriginal right to fish. This case resulted in the infringement principle that allows 'significant interests' of the Canadian public to be considered paramount on unceded territory. Henderson refers to this infringement test as "the judicially created interference standard." "Empowering", *supra* note 58 at 281. This decision of the Supreme Court of Canada provides support for the Lil'wat traditional people's belief that self-interest is exhibited not only through the abuse of procedure within Canadian courts but also by their final judgments.

[400] Dec. 5th, 1990 Transcript at 40-42.

[401] *Ibid.* at 73.

[402] *Ibid.* at 44.

[403] *Ibid.* at 50-1.

repeatedly stated that aboriginal title is not "a matter of federal common law", identifying this legal fact as "perhaps the most important perception in aboriginal rights law."[404]

Clark insisted that:

> ...counsel for the natives in *Delgamuukw* was dead wrong when he argued that it was. ...When he made that statement... Indian sovereignty was... doomed. And the reason for that is locked in the word "federal". ...Aboriginal rights are not a matter of federal common law. They are a matter of Imperial common law and legislation. That makes all the difference in the world.[405]
> ...They were relying on colonial government law, not relying upon the law that restricts the colonial government.[406]

Clark explained to the judge that the position taken by counsel for the natives in *Delgamuukw* allowed for the federal government to simply legislate pursuant to s. 88 of the *Indian Act*, which provides for the application of Provincial law of general application to Indians. This meant you could simply legislate over the common law of aboriginal rights. Clark concluded bluntly: "The Gitksan case will solve nothing about Indian sovereignty except attend to the burial."[407] He concluded by submitting that provincial governments are unable to give themselves a jurisdiction over Indians in relation to unceded territory, which the constitution denies them.[408] He singled out the telling phrase in the *Sparrow* judgment that Goldie relied upon:

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[404] *Ibid.* at 51.

[405] *Ibid.*

[406] *Ibid.* at 57.

[407] *Ibid.* at 58.

[408] It is interesting therefore to see the following statement by Mr. Justice MacDonald: "Whether or not this is a court of general jurisdiction in relation to 'unceded Indian territory" remains to be determined in this action, although the outcome of that question appears hardly in doubt unless and until *Delgamuukw* is reversed on appeal." Reasons for Judgment: March 18th, 1991 at 32. The insistence by the judiciary in the misuse of case precedent is unexplainable given the lengthy education process during the five-month contempt trial in which the distinguishing factors between *Delgamuukw* and the Lil'wats' position were clearly set out before Justice MacDonald.

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.[409]

Clark viewed this judicial statement as an accurate assessment of policy, however he wished to place the law on the issue before the court. Clark continued to advise the court, in increasingly frank language, that it was about to decide the issue of sovereignty without having addressed the law and therefore it was crucial to the existence of the rule of the law that the Lil'wat challenge to jurisdiction be argued before the court.[410]

For example, consider the following Clark submissions:

> Indian sovereignty depends upon letting the record now show the truth before, not after the Gitksan case is decided. I am saying that Indian sovereignty was not adequately defended in that case. I am saying that Indian sovereignty was not-even placed before the court in that case. To the contrary, the plaintiffs in that case were the aboriginal people. By taking that position, they attorned to the jurisdiction of the court of British Columbia. They were not there to dispute the jurisdiction of the court. These defendants are here for that purpose.[411]
>
> ...the system...the rule of law...doesn't have to be conned, that your lordship can blow the whistle on this game. This is a fraud and an abuse of the most heinous kind because it is a fraud and abuse that results in the tyranny of one race over another race, and with all its smugness in our white faces we sit back and we talk about points of procedure when the issue is justice.[412]

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[409] See *"Sparrow", supra* note 58; see also Foster's comment on the Sparrow quote where he states: "...in law the claim that there was never any doubt is often a sign of distant rumblings. ...We are never told what 'from the outset 'means, nor are we told how sovereignty and title could, without conquest ...be unilaterally transferred." H. Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases." (1992) 21 Man. L.J. 343-389 at 344-46.

[410] See where Moodie outlines the history to date of the Canadian court's unquestioning acceptance of absolute and exclusive sovereignty in the British Crown. Moodie, *supra* note 58 at 1-41.

[411] Dec. 5th, 1990 Transcript at 39-40. The legal maxim that a decision only has implications for cases which conform precisely with the facts which gave rise to the action, is simply ignored by the judiciary; see also where Harring illustrates that the misuse of precedent in the judge's legal reasoning appears to be a common occurrence in the foundational Ontario cases involving assertions of Native title and rights. He also confirms that in the majority of cases affecting Indigenous law, the native parties were either not present or present without legal counsel. Harring, *supra* note 277 at 36.

[412] *Ibid.* at 76-7.

Clark again demonstrated to the court the fundamental difference in the Lil'wats' legal position when he stated:

> ...rather than the onus being on the Indians to demonstrate infringement of an aboriginal right in a habeas corpus motion the onus is on the Crown to establish that the detention is lawful.[413]

The judge responded that he would not accept that there was an onus on the Attorney General to prove the court has jurisdiction,[414] to which Clark countered: "When the court's jurisdiction is questioned, there's no onus on anyone, of course. The court has to satisfy itself that it has jurisdiction."[415]

Clark suggested that without hearing the law, there was every chance that the sovereignty of the Indians may well slip through the cracks. Again Clark stated the reason Mr. Goldie was present was to ensure that it does happen and in effect, to insure that a fraud and an abuse within the meaning of the *Royal Proclamation, 1763* occurred. At this point a third Crown counsel for the Province jumped to his feet and objected indignantly to the Court:

> Mr. Prowse: My Lord, I think this language is uncalled for, and I object to it being presented to you.
> The Court: It's pretty strong stuff. You can use that to me, Mr. Clark, but I don't think it's fair to use it to your friends.
> Mr. Clark: My lord, thank you for allowing me to use it to you, and I use it advisedly, and I use it because it is the truth, and it is time for the truth, whether it hurts or not, to be told.
> The Court: The truth can be stated in a much more polite form than that, Mr. Clark. I'll thank you not to use those terms referring to your friends.[416]

This exchange between counsel for the Province, counsel for the Lil'wat accused and the

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[413] Dec. 5th, 1990 Transcript at 45.

[414] *Ibid.* at 46.

[415] See also submissions by Ms. Crompton to which the judge responded: "What your saying is that in each of those cases relied upon [by the Crown] there is an express finding of jurisdiction. The very point that you're making to me is I don't have it. And it's a hurdle I've go to get over to deal with this matter." March 11th, 1991 Transcript at 68-70.

[416] Dec. 5th, 1990 Transcript at 43.

judge illustrates the judicial condoning of the Crown's misapplication of case precedent to prevent the sovereignty argument from occurring. Justice MacDonald had previously refused to hear the Imperial constitutional law that would prove the Provincial government was a third party encroacher on unceded land. Here he refused to provide Clark with an opportunity to prove that his use of the words 'fraud and abuse' were legally valid. If, as Clark argued, a fraud and abuse were about to occur, the acceptance by Justice MacDonald of Goldie's reliance on fundamentally distinguishable precedents, resulted in the judiciary becoming complicit in a lack of honour being demonstrated on the part of the Crown.

A similar example arises out of the Lil'wat traditional peoples' application for a counter-injunction to prevent the destruction of their sacred gravesites and pictographs. Crown counsel, representing both the Provincial and Federal governments, had objected to the admissibility of the testimony of the Lil'wat people as being irrelevant to the contempt case.[417] In fact, on January 7th, 1991, Mr. Haig, counsel for the Attorney General of Canada, advised the court that the Federal government took the same position as the Attorney General of the Province in that it wished to recall all defense witnesses for the purpose of cross-examination. He then stated that "...his government and he is sure the Provincial government, consider their application to challenge the admissibility and relevance with respect to sovereignty very seriously."[418]

The Supreme Court of Canada had held in *Sparrow* that:

> ...the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-

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[417] See January 7th, 1991 Transcript at 2 for an example of the Federal government doing everything possible to prevent the admission of the sworn statements of the Lil'wat accused. Both the Federal and Provincial Crown took adversarial positions. They argued that Lil'wat testimony referring to their allegiance to Lil'Wat law was irrelevant. From the Crown's perspective, the Lil'wat law that insists on the protection of the graves of their ancestors was irrelevant to the contempt proceedings.

[418] January 7th, 1991 Transcript at 3.

> like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[419]

Why does the court condone the adversarial attempt to have the Lil'wats' testimony held to be irrelevant and inadmissible when the Federal government's relationship with the Indigenous peoples is to be "trust-like"?

Justice MacDonald had before him evidence of the repeated refusal of the Federal government to enter into negotiations with the Lil'wat people regarding this dispute over public access through their lands. He also ignored our repeated requests that counsel for the Federal government as fiduciary join Mr. Clark and I in defending Lil'wat lands from third party encroachment. Consider the federal government's obligation at law that results from the statement in *Guerin:*

> Where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[420]

Claire E Hunter in "New Justification for an Old Approach: In Defense of Characterizing First Nations Treaties as Contracts", suggests that "in its holding in *Guerin*, the SCC did not create a fiduciary duty that would be owed in the future, but rather declared that such a duty had always been owed."[421]

When Clark wished to rely on the Lil'wat viva voce testimony to support the Lil'wat's injunction application the Provincial government argued that additional affidavits must be filed. Next they required that the logging company be joined and served with the application. Clark complained that if Mr. MacKenzie's position were accepted, procedure would be

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[419] *Sparrow, supra* note 57 at 1108.

[420] *Guerin, supra* note 357 at 384

[421] Hunter, *supra* note 393 at 70.

allowed to defeat substance. From the Lil'wat perspective, given that the blasting of the graveyards of their ancestors was continuing while they were in court, they could not understand what prevented the court from simply instructing lawyers for Interfor to attend and allow *viva voce* testimony in open court rather than the cumbersome process of requiring affidavits to be served.[422] Clark stated on record:

> ...to some extent there is an illusion here. What we really have are two sides of the story. There is the Indian side and the white side, and lined up on white society there is the Crown represented by the federal government, the provincial government and International Forest Products Limited... [who] purports to have rights in the area ...on the basis of an authority granted via [the] Crown. I suggest what is really happening is an attempt to gain time to avoid the interim injunction application coming on and being dealt with in a most expeditious way, the proceedings being manipulated to give those adverse in interest two...or three bites at the apple.[423]

Regardless of the time sensitive situation facing the Lil'wat people the court agreed with the Provincial government and held that there was a necessity to join Interfor and proceed by way of filing and serving affidavits.

The judicial insistence on participating in an adversarial criminal enforcement process rather than hearing the law and expediently serving justice is revealing. Rather than administering justice in an effective manner the judge continued to allow, condone and participate in the government's abuse of process. By doing so, the judge thereby joined the Province in its breach of the principle of the honour of the Crown and became a party to the use of coercion against the Lil'wat peoples.

4.6 The Refusal of the Judiciary to Remedy Breaches of the *Charter* and Applicable International Law

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[422] January 7th, 1991 Transcript at 6.

[423] *Ibid.* at 7.

Simultaneously with the court's refusal to hear submissions regarding domestic law, it denied defense counsel the opportunity to make submissions regarding the breaches of international human rights law that were occurring as a result of the criminalization of the Lil'wat peoples.[424] Consider the following comments by Monture-Okanee and Turpel:

> It is our firm belief that the Canadian criminal law cannot be unilaterally imposed upon aboriginal peoples prior to a formal and complete definition of their pre-existing and inherent aboriginal rights, treaty rights, without regard to Canada's international human rights obligations. International law requires the protection of group rights and the promotion of the rights of all people to self-determination.[425]

Youngblood Henderson suggests:

> No valid justification exists for the federal government to refuse to apply the Human Rights Covenants to Aboriginal peoples, especially those living on lands reserved for Indians and federal territories.[426]

Included with a Lil'wat application for a mistrial were allegations of breaches of the Canadian *Charter* and International covenants. I expanded our earlier list of breaches of the *International Covenant on Civil and Political Rights* to include Articles 1, 2, 7, 12, 14, and 15.[427] As well I made reference to breaches of sections 2, 7, 9, 10(c.), 11(d.), 11(e.), 11(g.),

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[424] See March 22nd, 1991 Transcript at 5 and March 11th, 1991 Transcript at 50 for defense requests to call evidence and submit legal argument on breaches international law, including the right to nationality, the right to subsistence, and the right of self-determination in addition to evidence of genocide and ethnocide.

[425] Monture-Okanee, *supra* note 7 at 257.

[426] "Empowering" *supra* note 57 at 301.

[427] Nov. 20th, 1990 Transcript at 66; see also *ICCPR., supra* note 70, at Art. 1(1.) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 1(2.) ...In no case may a people be deprived of its own means of subsistence. Art. 7. No one shall be subjected to ...degrading treatment or punishment. Art. 12(1.) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement... Article 14(1.). ...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. 14(2.) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Art. 15(1.) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

12, 14 and 25 of the *Charter of Freedoms and Rights*.[428] I also submitted that because of Canada's ratification of the International Covenant the superior court of the Province was an appropriate tribunal through which the Lil'wats were entitled to seek effective remedies. Additionally, pursuant to s. 24 of the *Constitution Act, 1982*, the B.C. Supreme Court was a court of competent jurisdiction to hear the *Charter* arguments.

The judge interrupted my submission to ask what did these breaches have to do with the application for a mistrial. I responded that s. 7 of the *Charter* guarantees the right not to be denied your liberty except in accordance with the principles of fundamental justice, which incorporates the opportunity to adequately state your case. I also made reference to s. 9 of the *Charter* and argued that because of the judge's prejudgment in this case, the Lil'wat traditionalists were being arbitrarily detained. I next included reference to the right to the presumption of innocence until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. Justice MacDonald simply denied the Lil'wat application for a mistrial and concluded the day's hearing by advising counsel for the Provincial Attorney General that he should be ready to complete his proof of the criminal

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[428] *Charter, supra* note 194 at s. 2. Everyone has the following freedoms: (a.) freedom of...religion. s.7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. s.9. Everyone has the right not to be arbitrarily detained or imprisoned. s.10 Everyone has the right upon arrest or detention: (c.) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful. s.11 Any person charged with an offence has the right (d.) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. (e.) not to be denied bail without just cause. s.12. Everyone has the right not to be subjected to cruel and unusual treatment or punishment. s.14. A party or a witness in any proceeding who does not understand or speak the language in which the proceedings are conducted...has the right to the assistance of an interpreter. s.24(1.) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. s.25. The guarantees in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal or treaty right, or other rights that may pertain to the aboriginal peoples of Canada. Including (a.) any rights or freedoms that have been recognized by the *Royal Proclamation of October 7, 1763*; and (b.) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

contempt the following day.[429]

Again on March 22nd, 1991, I asked the judge:

> ...to consider whether or not you will hear evidence and legal argument as to the international breaches under the *International Covenant on Civil and Political Rights* and I will refer you to Part II, Article 2 and you will see there that each State party, that being Canada, is obliged to provide a judicial remedy...[430]

I outlined that the Lil'wat peoples alleged that their right to a nationality and their right to subsistence were being breached as well as their right to self-determination.[431] I specified that their right to self-determination included economic, political, social and cultural aspects. We also advised Mr. Justice MacDonald that we wished to call evidence in support of allegations of ethnocide and genocide as defined by International law that was binding on Canada.[432] The judge promised that he would consider my request on behalf of the Lil'wat traditionalists the next time we met in court.

April 5th, 1991, I requested that the judge address the outstanding issue of the breaches of binding international covenants. He simply noted at that time that these international covenants: "...may have to be dealt with in some way."[433]

On April 15th, 1991 I referred the judge to the fact that earlier in the proceedings I had

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[429] Nov. 20th, 1990 Transcript at 72.

[430] March 22nd, 1991 Transcript at 5.

[431] Henderson notes that the International Court of Justice has stated that "the right of self-determination is recognized as a legal right in the *Charter of the United Nations*...and that this right is the basis for the process of decolonization." "Empowering", *supra* note 58 at 299; he continues: "Without explicit terms in a treaty, the Human Rights Covenants should be the minimum standards used to scrutinize inherent Aboriginal rights. These standards have already been ratified by the federal government. ...The Human Rights Covenants are another source of proper conduct toward Aboriginal peoples in Canada, still neglected by Canadian leaders and lawyers." "Empowering", *supra* note 58 at 304.

[432] The imposition and encroachment of an imposed governing system by way of the Band Chief and Council in opposition to the self-determination of traditional Indigenous governing systems causes extreme mental anguish to a significant proportion of Indigenous people as well as playing a central role in causing Indigenous suicide.

[433] April 5th, 1991 Transcript at 2.

requested him:

> ...to consider whether or not he would hear any [evidence] or make any decisions regarding the international breaches that we have been alleging since our opening argument.... including imposing nationality, denying subsistence,...theft of their unceded territories and the resources on those unceded territories. It includes the denial of their self-determination in all four ways listed: that is economically, politically, culturally and socially. And the final breach is, of course, that all of this constitutes genocide.
> ...actually...you had agreed that you would advise me ...as to whether or not you would make findings in relation to these issues. Has your lordship concluded in his own mind what his position would be?[434]

Not surprisingly the judge refused the Lil'wat peoples the opportunity to make submissions regarding any of the above arguments:

> The Court: ....the very narrow scope, as I have so defined them, of these contempt proceedings bars me from a consideration of those sort[s] of thing...these contempt proceedings are not the event at which those sort of arguments can be put before the court.
> Miss Crompton: Even if the original order is a breach of international law?
> The Court: Yes. Even if that is the case.
> Miss Crompton: It seems to me we end up with procedure overriding substance and a lack of justice resulting.
> The Court: That may well be.[435]

How does one explain the judiciary's involvement in enforcing the court's original injunctive order while persistently refusing to hear defense submissions as to the applicability of international law that Canada has voluntarily ratified? Youngblood Henderson's comments help to place the judge's refusal in legal perspective:

> The Aboriginal peoples' choice of self-determination is no longer abstract; it is a matter of existing positive law. It is an integral part of their constitutionalized Aboriginal and treaty rights, and it is also an explicitly recognized human right that the federal government affirmed when it ratified the UN Human Rights Covenants.[436]

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[434] April 15th, 1991 Transcript at 5.

[435] Ibid. at 6.

[436] "Empowering", *supra* note 58 at 304; see also fn. 179 where Henderson comments: "Under the *Charter of the* United *Nations*, self-determination became one of the controlling purposes of the international order."

> International law and domestic law are independent domains, and the fictions or operations of domestic law cannot affect the validity or meaning of international obligations.[437]

When the judge placed the Chief Justice's injunctive order above guaranteed *Charter* rights that would have protected the Lil'wat peoples, he was in breach of the rule of constitutional supremacy. When he additionally refused to hear or grant effective remedies for breaches of binding international law he breached the rule of law. Justice MacDonald's insistence on enforcement of the removal order of his brother judge through coercion was arbitrary. It became impossible to characterize his rulings as neutral judicial behaviour in accordance with the principles of the rule of law, of constitutional supremacy, and the honour of the Crown.

4.7 Judicial Condoning of Federal Government's Breach of its Fiduciary Trustee Obligations.

Deborah A. Demott, in *Beyond Metaphor: An Analysis of Fiduciary Obligation*, refers to

> ...the requirement of the fiduciary to be loyal to the interests of the beneficiary. The fiduciary's duties go beyond mere fairness and honest; they oblige him to act to further the beneficiary's best interests. The fiduciary must avoid acts that put his interests in conflict with the beneficiary's. ...In transactions between the fiduciary and the beneficiary, therefore, the fiduciary must be candid and must evince utmost good faith.[438]

Additionally she outlines that the fiduciary's duty of loyalty to the interests of the ward requires an accounting of any profits made through the use of the ward's property.[439] She explains that this is required due to the fact that a fiduciary's position of power enables them

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[437] *Ibid.* at 21, fn. 21; see also *Electtronica Sicula S.P.S (ELSI), (United States of America v. Italy)*, [1989] I.C.J. Rep. 15 at 50-51.

[438] D. Demott, "Beyond Metaphor: Analysis of Fiduciary Obligation" (1988) Duke L.J. 879-917 at 882.

[439] *Ibid.* at 891.

to indulge their own interest and injure the beneficiary.[440] Compare this description of the law with the position taken by the Federal government throughout this dispute, first in their refusal to negotiate public access with the Lil'wat peoples and then in their alignment with the adversarial approach of the Provincial government throughout the contempt trial.

According to Leonard Rotman, the duty of a fiduciary trustee requires:

> ...a higher standard of morality than the ordinary contractual standard of good faith. ...nobler and subtler qualities: loyalty, fidelity, integrity, respect for confidentiality and beneficiary. While acting in a fiduciary capacity, fiduciaries may not place their personal interests, or those of third parties, ahead of or on par with their beneficiaries' interests.[441]

Here the Federal government aligned with the Provincial government. It is not possible to reconcile the positions taken by legal counsel on behalf of the Attorney General of Canada with the fiduciary trust obligations that exist in relation to Indigenous peoples and their lands. Fundamental fiduciary trust law provided the basis for Justice MacDonald to appreciate the validity of the Lil'wat peoples' challenge to the Federal government acting in opposition to, rather than as a protector of, the Lil'wat interest in the land. It will come as no surprise at this

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[440] *Ibid.* at 895.

[441] L. Rotman, Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in Badger and Van der Peet" (1997) 8 Const. Forum Const. 40, at para.20. ["Hunting"]; see also evidence of conflict with the legal obligations of a fiduciary in the Federal Government 1995 Policy Statement: Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government (Ottawa: Minister of Public Works and Government Services Canada, 1995) referred to in the R.C.A.P. Report, vol. 2 pt. 1, at 205 (Ottawa: Canada Communication Group, 1996) In this document the Federal government sets out it's parameters on the policy for self-government. The document states which jurisdictions in Canada's opinion can or cannot fall within Aboriginal jurisdictional power and has suggested when, and to what degree, Federal or Provincial laws could override Aboriginal jurisdictional power; consider also Moodie's conclusion that it is: "Absolutely fundamental to this federal parameter-setting process is the ideological position that Aboriginal self-government does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states" and that Aboriginal self-government must exist "within the framework of the Canadian Constitution." He continues: "Many Aboriginal groups and individuals have a starkly different view of the nature of Aboriginal sovereignty." Moodie, *supra* note 58 at 9. How is the Federal government able to claim it is acting in their beneficiary's best interest when it is intent upon limiting Indigenous sovereign rights in such a self-serving fashion?

point in the analysis, that Mr. Justice MacDonald refused to address the concern of the Lil'wat peoples regarding the legality of the federal government's adversarial actions against it's beneficiary.

The traditionalist Lil'wat people repeatedly advised Mr. Clark and me that the current interpretation of this fiduciary/ward relationship by the Federal government is an illegal one. Consider Youngblood Henderson's comment where he states:

> ...the Court has been clear that the "protectorate relationship" did not extinguish Aboriginal sovereignty, or abolish their governmental powers or make them dependent upon federal law. Treaties of protection have been judicially construed as an Aboriginal nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting, as subjects, to the laws of a master.[442]

The original protective relationship has been transformed over time into an invalid basis for present day federal legislation with the aim of complete domination over Indigenous territory and peoples regardless of the whether there is a treaty in existence or not. Henderson quoted a passage from *Worcester* v. *Georgia* to increase the understanding that:

> ...the taking of protection was perceived by the Indians to be only what was beneficial to themselves...an engagement to punish aggressions on them...it merely bound the nation to the British Crown, as a dependent ally...without involving the surrender of their national character.[443]

The traditional Lil'wats were insistent that they do not consider themselves as wards but rather as the Lil'wat peoples of the sovereign Lil'wat Nation. They refuse to have surrendered their Lil'wat national character through the unilateral acts of a foreign power without it first having obtaining their informed consent through their hereditary governing

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[442] "Empowering", *supra* note 58 at 284.

[443] *Ibid.* at 44; consider also submission by Ms. Crompton: "And you've heard from these people ...that their traditional government has survived and their fundamental law that they have spoken very clearly to you of is their obligation to the Creator and to everything in creation. Now, that's law over that territory. And there is nothing that this court and more pointedly nothing that the Province as a plaintiff using this court can do to surrender their nationhood." March 11th, 1991 Transcript at 21.

structure. This case analysis has shown in detail how both domestic governments continued to treat the Lil'wat people as surrendered wards legally bound by the positions taken by the imposed Band Council system.

The Lil'wat accused attempted on numerous occasions to bring to the court's attention that according to the domestic rule of the law, the Federal government was legally their protector and guardian. To illustrate the entrenched view within the domestic court of the Federal government as adversary, consider Clark's comments made before Mr. Justice MacDonald on December 13th, 1990:

> My lord, I might, for the record, advise my friend Mr. Partridge, who is appearing here for the Federal government, and who is sitting with the provincial government lawyers, that there is room on the Indian side of the counsel table if he would prefer to be on the appropriate side.[444]

On January 7th, 1991, I also placed on record my difficulty with the federal government's alliance with the position of the provincial government. I questioned why they were not appearing on our side, calling witnesses to assist the Lil'wat peoples' position, as their legal duty obliged them to do:

> ...it just shocks me every time they stand up and take the position that they are going to cross-examine the Indians, in other words be on the wrong side of the table. I put that on the record and I continue to do so. Thank you.[445]

In fact, the proper role for the Federal government, according to both British and international law, originates in their role as a protector of a weaker nation and the intention to prevent the encroachment by settlers of the colony into unceded native territory[446]

On Dec. 10th, 1990, when Clark attempted to file a copy of the Lil'wat peoples' Statement of Claim in an action commenced in Federal Court that sought a declaration that

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[444] Dec. 13th, 1990 Transcript at 28.

[445] Jan. 7th, 1991 Transcript at 18-19.

[446] *Royal Proclamation, 1763* (7 October 1763), Privy Council Register, Geo. III, vol. 3, at 102.

the Federal government was acting in breach of its fiduciary trustee obligation in the criminal contempt case, both counsel for the Provincial and the Federal governments objected to it's relevancy to the contempt proceedings. Once again such positions on the part of both governments stand in direct opposition to the Supreme Court's statement in *Sparrow* that "the relationship between the government and aboriginals is trust-like, rather than adversarial."[447] Mr. Justice Iacobucci of the Supreme Court of Canada in *Osoyoos Indian Band* v. *Oliver* made it clear that the Crown could not cite competing considerations such as pubic access as a defense to its failure to fulfill its fiduciary duty to Aboriginal peoples.[448]

Here, the Province is a third party encroacher on what domestic law considers a federal enclave or reserve. By condoning the alignment of the Federal government with the Provincial government's expropriation of Lil'wat land that is both a federal reserve and unceded traditional Lil'wat territory, the domestic judiciary rendered themselves complicit in the government's breach of fiduciary obligations.

However the judiciary refused to question the constitutionality of legislation that is in breach of both aboriginal rights and fiduciary obligations such as the *Order-in-Council 1036/1938.* The Provincial government alleges that it allowed for the surrender of Provincial lands to be held in trust by the Federal government for the Indians, providing up to 1/20th of such lands could be resumed for a public interest.

In support of the Lil'wats' complaint of fiduciary breach of trust Leonard Rotman points out:

> Once a prima facie inference of a fiduciary duty and its breach are properly demonstrated in light of the facts of a particular interaction between the Aboriginal claimant and the Crown, a rebuttable presumption is thereby created which the Crown

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[447] *Sparrow, supra* note 58.

[448] *Osoyoos Indian Band* v. *Oliver* [2001] 3 S.C.R. 746.

> has the onus to refute, either by demonstrating that no such duty exists or that the duty does exist, but was not breached.[449]

Rather than placing an onus on the Federal government to demonstrate that it was acting according to the obligations of a fiduciary trustee Justice MacDonald would not question either the Federal government's refusal to negotiate the issue of Provincial access through the Lil'wat land or it's alignment with the Provincial government's expropriation and adversarial approach.[450] The judge's refusal was in breach of fiduciary trust law that allows a beneficiary to question positions taken by their trustee that are adverse to their interest. One cannot help but agree with Leonard I. Rotman, where he states: "The use of fiduciary rhetoric by the judiciary is rendered meaningless without a commitment to enforce its application in practice." Rotman continues:

> In defining the "fiduciary duty" of the Crown, the Supreme Court restored the concept of holding ministers to a standard of fairness that demands forethought as to what conduct lends credibility and honor to the Crown, instead of what conduct can be technically justified under the current law.[451]

With the breach of the federal government's fiduciary obligations in mind, on what legitimate basis did Justice MacDonald refused to question the propriety of the federal

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[449] L. Rotman, "Case Comment: *Wewaykum*: A new Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004) 37 U.B.C. L. Rev. 219-258, at fn.10; see also *Wewaykem Indian Band* v. *Canada* (2002), 220 D.L.R. (4th) 1, [2002] 4 S.C.R. 245.

[450] Evidence submitted by the Lil'wat accused showed that the federal government refused to respond to their repeated pleas, made verbally and in written correspondence, that indicated their desire to negotiate a peaceful resolution to the Lil'wat jurisdictional land dispute. The Lil'wat people refused to accept a cash offer of $124,000 for the surrender of the land required to complete the Provincial "public highway" through the Mount Currie Indian Reserve. The offer was made by D. I. F. MacSween, Chief Property Agent, on behalf of the Provincial Ministry of Transportation and Highways, on Sept. 10th, 1990. Their refusal resulted in the expropriation of the road. Given the fundamental believe within traditional governing systems of an inalienable relationship with the land, the concept amongst the traditional people that they would relinquish the land for monetary reward was non-existent. The Lil'wat people were at all times willing to negotiate access for the Canadian public however not on the basis of extinguishment of their title to the land in question. The expropriation and use of force by the Provincial government was ultimately condoned through the criminalization of the Lil'wat peoples by the domestic judiciary.

[451] "Hunting", *supra* note 441 at 44-5.

government's participation in the criminalization of the Lil'wat people?

If the judge was not yet convinced that the federal government was in breach of it's fiduciary trust obligations by it's alignment with the Provincial Crown in the criminal contempt of court proceeding, then the following exchange with Mr. McKenzie on March 11th, 1991, should have finalized the court's conclusion in this regard. Mr. McKenzie attended to advise the court that there had been a judgment handed down in *Delgamuukw* that held that the *Royal Proclamation* did not apply to British Columbia.[452] Mr. McKenzie had earlier characterized Clark's argument as relying for its foundation on the *Royal Proclamation of 1763* where he stated:

> Mr. McKenzie: ...it's clear from...Mr. Clark's argument, that his sole basis for his jurisdiction argument is the *Royal Proclamation*."
> The Court: "Or if I may put it in these words: that is the foundation on which his argument is built and from which his argument flows."
> Mr. McKenzie: Yes, that's correct, my lord.
> The Court: ....if the *Royal Proclamation* does not run in this province, then Mr. Clark's argument must, of necessity, fall.
> Mr. McKenzie: Yes, yes, my lord.[453]

He attended on March 12th, 1991, to advise Mr. Justice MacDonald that he was bound on this point by the recent *Delgamuukw* decision[454] and therefore it would be 'academic' to hear the

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[452] The Lil'wat people suggest that whether the *Royal Proclamation* applies to B.C. is of little importance since it is not from the *Proclamation* that their sovereignty originates.

[453] March 12th, 1991 Transcript at 27.

[454] A further concern of the Lil'wat traditional people was their knowledge that a number of Provincial government counsel in the Delgamuukw case were law partners of Chief Justice McEachern prior to his appointment to the bench. When his former partners appeared before him in a trial as prominent as Delgamuukw, the Chief Justice should have recused himself so as to assure the appearance of justice. Margo Nightingale claims that "judicial bias is ever present but invariably unacknowledged." Nightingale, *supra* note 136 at 74; see also the Supreme Court of Canada decision in *Catcheway* where the trial judge's previous law firm had acted for certain groups within a native reserve. This fact alone was sufficient for Mr. Justice Iacobucci in an oral judgment to order a new trial before a different judge. ..."we find that the trial judge's prior involvement raised a reasonable apprehension of bias in accordance with the well-established jurisprudence on the issue." *R.* v. *Catcheway* [2000] 1 S.C.R. 838

threshold jurisdiction argument or the collateral attack argument.[455] He added that the Federal government in the *Delgamuukw* case had adopted the arguments of the Provincial government relating to the non-applicability of the *Royal Proclamation* to the territory of British Columbia.

Once the Attorney General of Canada on behalf of Federal government is allowed to proceed in an adversarial manner against it's beneficiary,[456] and take legal positions in breach of it's fiduciary trust obligations, the judiciary itself has breached the rule of law. They have lost the necessary neutrality to maintain the right to adjudicate regarding Indigenous unceded territorial disputes.[457]

One of the Lil'wat accused puts it succinctly at her sentencing hearing where she states:

> Ishmeshkeya: I can't believe the biased system we live in in this court system. Every judge that I have looked at since we started to put across our words, I can't believe it. I can't believe how they are just so biased. I think that the Federal Government should be forced through this court if not—if this court is going to do anything, to meet with us, to come out with some agreement.[458]

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[455] Transcript: March 11th, 1991 at 8. He then urged the judge "to carry on with the substantive part of the criminal contempt proceedings, apart from these issues which have been raised by the defense counsel." Clark responded: "this point is for too crucial to be finessed, as my learned friend would have it." See March 11th, 1991 Transcript at 3 where the judge followed the procedure suggested by the Crown.

[456] How is it in keeping with the honor of the Crown to argue against the applicability of the *Royal Proclamation* in light of Guerin where the Supreme Court of Canada held that the land rights of the natives are a pre-existing right not created by the *Royal Proclamation*, by s. 18(1) of the *Indian Act* or by any other executive order or legislative provision. *Guerin, supra* note 357 at 379. From the Lil'wats' perspective the *Royal Proclamation* represents British recognition of their autonomy as well as a promise to protect their lands from encroachment by British subjects. The reasonable person must ask themselves why is it that *Guerin* alone was not a sufficient basis for the judiciary to hold the injunctive balance of convenience in favour of the original and continuous inhabitants rather than the logging corporation and the Canadian public. Henderson provides one explanation: "Where the Indians make significant legal victories ...the common response of the Department of Justice to *Guerin* ...was an attempt to minimize and ignore the decisive terms of the government's obligations, arguing that the decisions only had implications for cases which conform precisely with the facts which gave rise to the action." "Empowering", *supra* note 58 at 70.

[457] March 12th, 1991 Transcript at 21. I argued if the judiciary condoned the Province's characterization of the case as "an attack of the jurisdiction of the Province and on the RCMP" the court would lose its neutrality.

[458] April 15th, 1991 Transcript at 30.

It is important to conclude this Chapter by clarifying the Lil'wat peoples position regarding the non-applicability of Canadian domestic law to the dispute involving unceded territory. They instructed me that they would remain sovereign until, according to their Lil'wat law, their people reached a consensual agreement to enter into a nation-to-nation treaty with Canada.

They do ask, however, in the meantime, that Canadians obey their own rule of law including their fiduciary trust obligation. Although the reason for their refusal to accept Canadian jurisdiction is founded upon their unsurrendered sovereignty, they see the additional wisdom of this stance due their observations of embedded bias in the judicially developed case law.

An example of this is that even where the court upholds the fiduciary obligations of the federal government towards the natives it ultimately interprets the principle so that it favours the Canadian public interest over the Indigenous interest in the unceded lands. On the one hand, the Supreme Court of Canada confirmed that the fiduciary duty extended to the expropriation of native land and rejected the Crown's argument that it owes no fiduciary duty where such a duty conflicts with the Crown's public law duties. On the other hand, in *Osoyoos Indian Band* v. *Oliver,* the Supreme Court of Canada held that the expropriation of unceded Indigenous land by the government to build an irrigation canal for agricultural development in Southern British Columbia was not a breach of fiduciary trust.[459] It simply insisted that a minimal amount of land be taken so as to impair the rights of the Band as little as possible.

The constant acceptance by the courts of both Provincial and Federal government infringement of unceded territory is now, unfortunately, embedded in the case law of the

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[459] *Osoyoos Indian Band* v. *Oliver (Town of)* [2001] 3 S.C.R. 746.

Canadian legal system. The assumption of jurisdiction is perpetuated by reliance on undemocratically passed legislation and the application of unrelated case law. In the case at bar, the enforcement by the judiciary of the status quo that allowed for public access through unceded Lil'wat lands revealed Newcomer self-interest and should create an apprehension of bias in a reasonable, uninvolved person. From the traditional Lil'wats' perspective, the domestic Canadian courts have proven themselves unable to provide an impartial forum in which to settle Indigenous territorial disputes.

CHAPTER FIVE:

Colonialism and legal education

5.1 Understanding the Foundational Myths of Colonialism and Colonial Institutions:

Albert Memmi, in his famed book *The Colonizer and the Colonized*, argued that the core purpose of colonialism is to profit from the land and the resources of the colony. "Accepting the reality of being a colonizer" he wrote "means agreeing to be a non-legitimate, privileged person, that is, a usurper."[460] The colonizer will construct myths in order to continue in their role as dominator,[461] and "no matter what happens he [the colonizer] justifies everything—the system and the officials in it."[462] He endeavors to falsify history, he rewrites laws, he would extinguish memories—anything to succeed in transforming his usurpation into legitimacy.[463]

The Lilwat criminal contempt trial reveals that in order to accomplish this transformation, the institutions of the Newcomer race rely upon a number of colonial myths. The first of these relates to the fiction that in fundamental Indigenous issues, law and politics operate autonomously. In this regard Joel Bakan, in *Just Words* comments:

> Internal law is rigorous, and elegant on occasion, but it implicitly defends a method that presumes, rather than questions, law's autonomy from politics and society.[464]

The Lil'wat trial provides evidence that both the provincial and federal governments, in conjunction with the superior court judiciary, were engaged in political acts to sustain their legitimacy in the name of the 'public interest' and the 'authority of the court'.

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[460] Memmi, *supra* note 143 at 52.

[461] *Ibid.* at 32.

[462] *Ibid.* at 46.

[463] *Ibid.* at 52.

[464] J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 6.

Representatives of all three institutions sought to perpetuate the fiction that Canadian sovereignty and the accompanying jurisdiction of the domestic courts extend over unceded Indigenous territory.

On the basis of this assumption of sovereignty, the courts ruled that Lil'wat peoples' interference with the Canadian public's right of access through unceded territory or the logging corporation's right to construct roads for the purpose of extracting resources from Lil'wat territory, was a criminal act, rather than an assertion of Lil'wat authority.

The courts were not neutral arbiters, but the Attorney Generals of both the provincial and federal governments and the judiciary of the superior court of the province participated in upholding the myth that the domestic court is able to provide an impartial forum for the resolution of such territorial disputes between Indigenous peoples and the dominant Newcomer society.

The pretence of the existence of legitimate constitutional authority in Canada emerges as a consequence. As Indigenous scholar, James Youngblood Henderson explains:

> Modern legal consciousness is tormented by a set of interlocking contradictions derived from the colonial legal regime. Those legal thinkers, who identify constitutional law in Canada only with the appearance of prerogative or parliamentary delegations to the colonialists, face a dilemma with legitimate constitutional authority in a patriated Canada...By ignoring Aboriginal and treaty rights, these thinkers have unjustly bestowed power, wealth and privilege onto themselves. In the process, they made the First Nations their political hostages, depriving them of the right to self-determination and human rights under their treaties.[465]

When Bruce Clark attempted to prove this point at law, the most telling evidence of the court's reliance on fiction was demonstrated by the reaction of the judiciary. Clark insisted

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[465] "Empowering", *supra* note 57 at 65. The fact that the Lil'wats are pre-Treaty serves to emphasize their sovereign status. Whereas many Indigenous nations argue that their treaties were peace alliances rather than a surrender of sovereignty, the Lil'wat Nation has yet to enter into treaty negotiations in their history with the dominant society. At present they stand by their *Lil'wat Declaration of 1911* contained in Appendix II at 219.

that the domestic Canadian courts recognize the existence of Indigenous sovereignty by acknowledging the provision for its protection within British Imperial law.[466] By the end of his determined attempt, the judiciary of the British Columbia courts had him shackled, handcuffed, incarcerated, and ordered examined in a psychiatric hospital for the criminally insane.[467] This behavior on the part of the judiciary speaks volumes on the matter of whether law and politics are autonomous.[468] The truth is the domestic judiciary refused to hear the legal argument in support of Indigenous sovereignty because to do so would result in a collision with the fictions that underlie Canada's claim to both sovereignty and jurisdiction over unceded Indian country.[469]

That Clark was ultimately disbarred for his attempt to assert Indigenous sovereignty in the colonial court system would not come as a surprise to Memmi, who cautions the colonial:

> Having discovered the economic, political and moral scandal of colonization, he can no longer agree to become what his fellow citizens have become; he decides to remain, vowing not to accept colonization. [470]

In Clark's case his extremely well researched legal argument struck at the legitimacy of constitutional authority in Canada over Indigenous peoples and their lands. Memmi warns such an individual that:

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[466] See where Anthony Hall quotes Ramsay Clark, former Attorney General of the United States, as "characterized this decision as a very deliberate attempt to falsely brand as potentially "crazy" an erudite, if slightly eccentric formulator and messenger of a very important legal argument." A. Hall, *The Bowl With One Spoon: The American Empire and the Fourth World* (Montreal: McGill Queens University Press, 2003) at 6.

[467] Clark, *supra* note 28 at 167-8.

[468] According to the judge the purpose of this order was so as to establish whether or not Clark was suffering from a mental disorder before allowing him to proceed further in his arguments.

[469] See McCue's doctrinal analysis of Canada's reliance on dispossession theories where she convincingly deconstructs their legitimacy. J. McCue, *Treaty Making From an Indigenous Perspective: A Ned'u'ten-Canadian Treaty Model* (LL.M. Thesis, Faculty of Law, University of British Columbia, 1998) at 50-120.

[470] Memmi, *supra* note 143 at 21.

> ...it is not easy to escape mentally from a concrete situation, to refuse its ideology while continuing to live with its actual relationships.
> ... If he persists, he will learn that he is launching into an undeclared conflict with his own people which will always remain alive, unless he returns to the colonialist fold or is defeated. Wonder has been expressed at the vehemence of colonizers against any among them who put colonization in jeopardy. It is clear that such a colonizer is nothing but a traitor.[471]

Memmi must have had someone like Clark in mind where he continues: "Otherwise, he must not expect to continue to harass them undisturbed. They will take the offensive and return blow for blow."[472] Clark's aim was focused at the judiciary for their refusal to hear the law while continuing to participate in a process of criminalization that was clearly an abuse of fundamental justice. The blow dealt Clark in return resulted in the termination of his relationship with the legal profession. Herein lies the point. If, as an officer of the court, you threaten the legal base of colonial privilege it will take whatever steps necessary to silence you.

James Youngblood Henderson mirrors Memmi's point regarding the key aim of colonialism, where he speaks of the implicit rule of 'the colonial promise of abundance to the individual colonizers'. He concludes:

> If such an implicit rule can extinguish the rule of law, then the rule of law is questionable. In such a situation, the generic legitimacy of legal authority is shifted to

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[471] *Ibid.* at 21-22.

[472] Consider in relation to Bruce Clark's disbarment the recent article by Richard Foot, "Criticizing the Judges" *The Globe and Mail* Saturday, (17 Jan 2005) A.12. It involved a prominent Newfoundland defense lawyer, Jerome Kennedy, facing a disciplinary hearing before the Law Society of Newfoundland for publicly stating that some trial judges are biased or incompetent, partly because they owe their jobs to political patronage. The comment resulted from the refusal of an inquiry to consider the role of the judiciary in the occurrence of wrongful convictions in Canada during the period 1989-1995. Peter Russell, a political scientist at the University of Toronto and a leading constitutional scholar, expressed outrage that any lawyer in Canada might be sanctioned for criticizing judges. "All around the democratic world now lawyers are free to criticize the judiciary. If Mr. Kennedy is punished, they would be acting in a very reactionary way."; see also Richard Blackwell, "Nfld. Lawyer cleared of charge" *The Globe and Mail*, (13 Dec 2005) A.9: "The Law Society of Newfoundland and Labrador has dropped a complaint against a lawyer who said unqualified judges are one of the causes of wrongful convictions."

> the purposes of colonization-to manifest the colonizers' needs, self-interests and abundance...[473]

The analysis of the participation of the judiciary in this case demonstrated such a shift. At all times it was the need of the colonizers' need for public access and to extract resources that the court protected. In terms of the refusal for the domestic judiciary to abide by the rule of law and adjudicate upon a challenge to jurisdictional legitimacy there is truth in Memmi's observation that "it is too much to ask one's imagination to visualize one's own end, even if it be in order to be reborn another; especially if, like the colonizer, one can hardly evaluate such a rebirth."[474] An examination of this case has demonstrated the degree to which the domestic court is a partial and therefore inappropriate forum for evaluation of the Newcomer/Indigenous relationship. The display of embedded self-interest by the colonizer's court when forced to address it's own usurpation was shocking.

As to an additional fiction that allows for the denial of Indigenous human rights one must confront another myth that lies hidden and invisible to most who take part in it. It has been meticulously demonstrated by Steven Newcomb and provides a significant key to understanding Newcomer/Indigenous relations. It involves the fact that European settlers as Christians were considered full human beings with legal capacity while Indigenous peoples as non-Christians were categorized as heathens or infidels and thus subject to subjugation and appropriation of their lands.[475] It is this fundamentally racist distinction that lies underneath the Newcomer's present day insistence on holding Indigenous lands in trust in the name of the Queen, while constructing the Indigenous peoples who inhabit those lands as

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[473] "Empowering", supra note 58 at 69.

[474] Memmi, *supra* note 143 at 40.

[475] "Christian Nationalism", *supra* note 31 at 314; see also S. Newcomb "pagans in the promised land: a primer on religious freedom" © 1992, 1995 Eugene, Oregon at 1.

wards of the state. Steven Newcomb refers to the "age old proposition that Christian nations had the divine right to take possession of and to assume dominion over non-Christian lands" as "the Christian/heathen distinction from which the discovery doctrine originated."[476] He concludes that Chief Justice Marshall's judgment in *Johnson* v. *McIntosh* (1823)[477] 'quietly adopted' this archaic, Judeo-Christian religious doctrine, now known as the doctrine of discovery, that assumes Christian dominion based upon the distinction between the paramount rights of Christian people and the subordinate rights of heathens or non-Christians.[478] He demonstrates that this principle "constitutes the tacit, underlying basis of all subsequent determinations of Indians rights."[479] In a short article, "Papal Bulls Burning! Five Hundred Years of Injustice: The Legacy of Fifteenth Century Religions Prejudice", Newcomb claims:

> Thus, the ancient doctrine of Christian discovery and its subjugation of "heathen" Indians were extended by the federal government into a mythical doctrine that the U.S. Constitution allows for governmental authority over Indian nations and their lands.[480]

While there were differences between the American and Canadian relationships with Indigenous nations, the same Christian/savage distinction is the foundation for the Newcomer's claim to sovereignty over discovered lands within both states. In Canada, the federal government, due largely to the dramatic increase in the presence of settlers, has been able over time to unilaterally transform the duty of a stronger nation to protect it's weaker

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[476] "Christian Nationalism", *supra* note 31 at 304.

[477] *Johnson* v. *McIntosh* 8 Wheat.543 (1823).

[478] See also B. Trigger, *Natives and Newcomers: Canada's "Heroic Age" Reconsidered.* (Montreal: McGill-Queen's University Press, 1985) 3-49 for a summation of the image of the 'Indian' in nineteenth century social thought.

[479] "Christian Nationalism", *supra* note 31 at 304.

[480] S. Newcomb, "Papal Bulls Burning! Five Hundred Years of Injustice: the Legacy of Fifteenth Century Religious Prejudice", online: <http://ili.nativeweb.org/index.html > (1992) at 3. ["Papal"]

ally into full plenary power over Indians lands and resources as set out in federal legislation.[481] It is upon this most iniquitous myth of human/subhuman differentiation grounded in religious doctrine, that the current assertion of the federal government's plenary power is based. James Youngblood Henderson suggests that:

> "The basic idea was that Aboriginal peoples were at various stages in their evolution from "savages" to "civilization." Under the concept of historical process, the Europeans were civilized, the Indians were not. These false ideas were mutually reinforcing false ideas that were hopelessly intertwined in the federal administration. They not only began the devastating movement of cognitive assimilation, they also justified systematic political and cultural subjugation of Aboriginal peoples.[482]

The analysis of the Lil'wat contempt case entitles one to add 'legal' to 'political and cultural subjugation of Aboriginal peoples'. The Federal government's reliance on the fiction of Indigenous peoples as not fully developed humans is reflected through it's unilateral incorporation of such notions as ward and continued insistence on posing as a fiduciary trustee. It is this Christian/savage myth that provided the original justification for constructing a legal system that remains imbued to the present with the assumption of European/Christian superiority.[483] The embedded racist notion is " a belief that some races are by nature superior to others".[484] This is the only basis, other than eventual might, that can possibly explain the unilateral assertion of Canadian sovereignty over distinct territories

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[481] It should also be noted that it is from this illegitimate base that the federal government through s. 88 of the *Indian Act*, attempts to subject all "Indians" to provincial laws of general application.

[482] "Empowering", *supra* note 58 at 275.

[483] "Papal", *supra* note 480 at 4 refers to " ...the underlying, hidden rationale of "Christian discovery" –a rationale which holds that the "heathen" indigenous peoples of the Americas are "subordinate to the first Christian discoverer," or its successor." Newcomb focuses on the unconstitutionality of the lack of separation of church and state and penalizing native people on the basis of their non-Christian religious beliefs and ceremonial practices. Concluding that it upon this basis that the native people were stripped of most of their lands and most of their sovereignty, he refers to "the monumental violation of the "natural rights' of humankind, as well as the most fundamental human rights of indigenous people."

[484] Merriam-Webster Dictionary, (New York: Gulf and Western Corporation, 1974), *s.v.* "racist".

inhabited and governed by Indigenous peoples at the time of their supposed 'European discovery'.[485]

5.2 Challenges Inherent in Current Legal Education: Positivism as Justification, Law School Curriculum and The Colonial Box:

Given that colonialism is embedded in the domestic legal system it makes sense to consider legal education as the source of its perpetuation. Paul Hamlin suggests that "...law is a function of the ideas held by those who practice it and their ideas are very largely governed by the quality of their education."[486]

As a result of this case study, one can safely presume that the legal education of the judiciary who actively participated in the denial of the Lil'wat people's human rights, is faulty. The fault results largely as a consequence of the existence of this sixth myth of Christian superiority embedded in colonial ideology.[487] Linda Mills, building on Joseph Singer's work, reveals that a judge's ideology critically influences both his or her individual

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[485] "Christian Nationalism", *supra* note 31; consider also conclusions of bev long where she states: "...none of the acquisition doctrines (or colonial rationalizations) are sufficient in themselves to actually support the asserted legitimacy of the sovereignty of the canadian state. Consequently, racist ideologies of justification based on the racialization of indigenous peoples as "uncivilized" and "inferior" emerged to supplement the doctrines in an effort to rationalize and legitimate the process of colonization. These racist ideologies were then incorporated into colonial law through the doctrine of discovery." b. long, "when injustice becomes law: indigenous sovereignty and canadian jurisdiction" (April, 1999) [unpublished, archived at the Faculty of Law, University of B.C.] at 6.

[486] P. Hamlin, *Legal Education in Colonial New York* (New York: Da Capo Press, 1970) at xvii.

[487] See Smith's explanation of his work as "an effort to elaborate on the textual strategies employed by judges to bolster the legitimacy of their decisions, of the legal system and, ultimately, of the existing matrix of unequal power relations...Ultimately, this comment represents part of a much broader struggle currently being conducted at the cultural level—in the mass media, within state and social institutions, and in the interactive practices of everyday life—to disrupt, and begin to displace, the taken-for-granted meanings and common-sensical assumptions that inform human behavior in a "society structured in dominance." M. Smith "Language, Law and Social Power: *Seaboyer*; *Gayme* v. *R.* and A Critical Theory of Ideology" (1993) Univ. of Toronto Law Review Vol. 51, 118-155 at 154.

judgments, as well as patterns of decisions.[488] This must be what accounts for the judicial position that Clark refers to in *Justice in Paradise* where he comments:

> The trial judge declined to address the law going to jurisdiction, but he did make a finding on jurisdiction. He found that he did have jurisdiction because he had been exercising it for some time, and therefore it was ridiculous to allege that he did not have it. He held that it would be a waste of the court's time to listen to my argument.[489]

Other judges found the suggestion that they were without jurisdiction 'ridiculous' and even 'preposterous'. It was this same base of colonial superiority that prevented the courts from considering the actions of the Federal government as being in breach of their fiduciary trustee obligations when they joined with the Provincial government's criminal case against its wards. It was also this embedded colonial superiority complex that lay behind the court's insistence that the accused provide Christian names or be incarcerated.

The difficulties of the domestic Canadian judiciary are linked directly to the domestic Canadian law school curriculum from which the judiciary emerge. Traditional curriculum holds consistently to the proposition in its basic legal training that all possible jurisdiction in the territory known as Canada is exhaustively divided between the Federal and Provincial governments by the British North America Act of 1867.[490] Clark summarized the consequences of such preconditioning on the minds of the vast majority of participants in the domestic legal system:

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[488] Mills, *supra* note 9 at 16.

[489] Clark, *supra* note 28 at 157. It will also be recalled that Mr. Justice MacDonald took a similar position in the contempt trial.

[490] The key assumption that all authority has been divided between the Federal and Provincial governments of Canada is prominent in the judgments of McEachern, C.J in Delgamuuk as well as in the appeal of the contempt conviction before Mr. Justice MacFarlane, J.A. Both judges relied on this basic proposition for their finding that the existence of Indigenous sovereignty is impossible; compare A. Hall, *The Bowl With One Spoon: The American Empire and the Fourth World* (Montreal: McGill Queens University Press, 2003) where he elaborates on the military alliances between the British Crown and the Indigenous Nations and the British Imperial constitutional promises made to facilitate the settlement of the colonies.

> If and when the natives complain, the mass of complaints fall upon the lawyers' psychologically pre-programmed ears. If and when the natives turn to the common law remedy of self-help, they are arrested as troublemakers, and taken before judges who are in a profound conflict of interest.[491] They end up stigmatized, trivialized, and discredited as criminals. [492]

He also expressed the additional complication that each time domestically trained lawyers surrender to the jurisdiction of the Newcomer's courts while acting on behalf of Indigenous people in relation to their traditional territory, they are bolstering the erroneous assumption that the laws of the Canadian governments have jurisdiction over unceded Indigenous lands.

The judiciary considered themselves bound by a positivist system to apply the law as stated in legislation or as interpreted in supporting case law. In this positivist system, Mr. Justice MacDonald attempted to justify his adherence to an extremely narrow enforcement approach of an individual judge's order. His claim that it was his duty to protect the court's authority at all costs appeared to be an attempt by him to severely limit the law he was required to confront, address or uphold. His misapplication of case law supports this view. Others such as Chief Justice Esson or Mr. Justice MacFarland, demonstrated their prejudgment of the issue of Indigenous sovereignty through their assumption of the validity of a Provincial *Order-in-Council* that they relied upon as having extinguished unsurrendered Indigenous rights. What the judiciary demonstrated as a whole was its willingness to manipulate the rule of law to ignore paramount British Imperial constitutional legislation and precedents, domestic constitutional and fiduciary trustee law, as well as International

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[491] Clark, *supra* note 28 at 81.

[492] *Ibid.* at 185. For example, the Sundancers, the self-declared defenders of the Shuswap Nation, asserted sovereignty on their unceded territory and armed themselves to defend their lands. The Attorney General of British Columbia referred to them publicly as "terrorists". See A. Hall, "The Making of an Indian fighter and a Canadian Premier" (March, 2000). [unpublished, archived at the Department of Native Studies, University of Lethbridge].

covenants and optional protocols voluntarily ratified by the Canadian nation.

Furthermore, the reliance by the judiciary on the doctrine of positivism as justification for their role in the Lil'wat criminal contempt case is mistaken as it ignores the fundamental premise that "the underlying aim of positivism is to be morally and politically neutral..."[493] Neither the application of legislation issuing from the imposition of a non-consensual foreign parliamentary system, nor Canadian case law, created largely without legal representation of the Indigenous peoples, can be relied upon by the Canadian judiciary as neutral. This is due to the principle that "law gains a moral legitimacy by coming from a source that has political legitimacy."[494] How can it be argued that in relation to traditional Indigenous peoples there is either neutrality or legitimacy in the domestic judiciary's application of legislation or domestic case law?

Upon reflection, William Hughes' comment from his critique of *Hard Cases in Wicked Legal Systems* by David Dyzenhaus, is applicable to the case at bar:

> The fact that judges always view their decisions, even in hard cases, as being legally grounded, exemplifies the distortion of the reality of judicial reasoning as it appears to those engaged in it...[495]

The distortion of reality in the case at bar reached such lengths that the traditional Indigenous peoples were found criminally guilty on the basis of a writ of trespass on their ancient unceded lands. In Hughes' discussion of approaches to the exercise of judicial

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[493] See where Hughes distinguishes between the plain fact approach and the common law approach to judicial discretion. In the Lil'wat contempt case, Justice MacDonald, claims to be bound by the former, described by him as his duty of fidelity to the law. Analysis of his rulings throughout the contempt hearing provides evidence of the degree of distance he maintained from the common law approach that Hughes describes as having the aim of screening out interpretations of legislation that violate the principles of reasonableness, justice and fairness embedded in the common law. W Hughes, "Conscience and the Law: A Critical Notice of David Dyzenhaus" (1992) 5 Can. L.J. & Juris. 369-381. Book review of David Dyzenhaus' *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991) at para.19.

[494] *Ibid.* at para.1.

[495] *Ibid.* at para.22.

discretion, he mentions the superiority of the common law approach versus the plain fact approach due to the fact that:

> Plain fact judges are predisposed by their view of judicial obligation to accord legal status to the immoral policies of an evil government. This means that they give such regimes the imprimatur of abiding by the ideal of the rule of law. Plain fact judges, therefore, play into the hands of evil governments who wish to present themselves to the world as a government that abides by the rule of law while at the same time seeking to destroy many of the moral values that are embedded in the common law.[496]

Perhaps this explains why Mr. Justice MacDonald used the following words, when he convicted the Lil'wat people for contempt of court: "The Court: I find myself obliged to find those persons before me in contempt of court."[497]

The wording chosen, indicates a striking similarity of thought between him and Chief Justice McEachern of the B. C. Supreme Court, who stated in *Western Forest Products* v. *Dempsey Collision, Chief of the Skidegate Indian Band*:

> It is further obvious that the court has been placed in the invidious position of dealing with a specific problem arising in a much larger dispute. The Haidas particularly, based almost all of their arguments in submission in these proceedings, on the assumption that their claims justify their actions, when they know that that is something I cannot take into account.
> I hope everyone in the Province of British Columbia will understand that the Court's responsibility is to uphold, protect and defend the rule of law and that the parties to this dispute leave the Court no choice as to what must be done.
> The court has no choice however, but to respond to breaches of the law...[498]

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[496] *Ibid.* at para.22-24.

[497] April 15TH, 1991 Transcript at 6. The difficulty, as noted by Dyzenhaus is that "...the legitimacy of an approach which requires judges to ignore in their interpretation of the law their substantive convictions about what the law should be, requires a substantive commitment at a deeper level to the intrinsic legitimacy of that law." D. Dyzenhaus in *Judging Judges, Judging Ourselves*: *Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 2003) at para.166. This applies to the Lil'Wat situation given that natural, international, British and domestic constitutional law point to the fact that prior to having legitimate legislative power over unceded Indigenous territory, it must first be purchased or ceded by way of a treaty. Any other approach....such as a reliance on discovery and occupation plus an imposition of citizenship, does not provide the justification required by democratic theory.

[498] *Western Forest Products* v. *Dempsey Collision, Chief of the Skidegate Indian Band* (unreported) Vancouver C854987, Nov. 29, 1985 (B.C.S.C.). McEachern, C.J.

The lack of 'even-handedness' in the exercise of judicial discretion is displayed by judicial prejudgment of the Indigenous issues in both cases. The judges are able to decide the outcome of a dispute through their choices as to which rule or law, they will, or will not, uphold. The statements of justification by the judiciary, only serve to confirm the lack of neutrality in their view of the issue, where it involves the assertion of Indigenous sovereignty on traditional territories in the Province of British Columbia. The judge's colonial legal education, with its embedded ideology of superiority has preconditioned the judiciary. The result is a bench that is lacking the capacity for neutrality that is a requirement of an impartial forum, both individually as well as institutionally.

It is such embedded superiority, that Alfred Taiaiake, a Mohawk scholar writing about Indigenous governance, refers to in *Peace, Power and Righteousness.* He concludes: "questions of justice–social, political, and environmental, are best considered outside the framework of classical European thought and legal traditions."[499]

As to the future of the domestic legal system in relation to assertions of Indigenous sovereignty, we are at a turning point. At present we are proceeding *as if* the rule of law is being followed. The institutions of the dominant society are obviously hoping that they do not have to confront the assertion of jurisdiction of Indigenous peoples. Those members of the legal community involved in assuring the maintenance of the status quo hope the Supreme Court of Canada's enunciation of consultation and justification of infringement principles will enable them to circumvent the jurisdictional issue. Most fortunately, during the fifteen year period since the Lil'wat assertion of sovereignty in the colonist's courts, several scholars have convincingly demonstrated that the authority of the Canadian legal system is founded upon fictions and faulty assumptions regarding Indigenous peoples on

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[499] Taiaiake, *supra* note 63 at 21.

unceded territory. Their research has proven that such fictions form an invalid base for any acceptable mode of acquisition from an international legal perspective.[500]

Due to the lack of an international perspective in their legal education, the Canadian judiciary does not hesitate to rely on an assumption of British sovereignty and title over any Indigenous territory in question. It is through their acceptance and ultimate enforcement of such invalid assumptions that the judiciary are participating in the fraud that Canada has validly extinguished Indigenous territorial sovereignty. As Clark expressed, in *Justice in Paradise*:

> Once the law was addressed, it would be obvious to everyone that the constitutionally responsible rulers and public officials, including the judges of British Columbia, had endemically broken the law for a long time.[501]

bev long's study of domestic jurisdiction displays that not only Clark sees through the thin fiction covering the Canadian court's assertion that British sovereignty over unceded Indigenous territory is beyond question. She states:

> ...canadian sovereignty is not rooted in any legitimate moral, political or legal foundation, and therefore a new relationship must be sought between indigenous peoples and colonizing peoples.[502]

We are at a crossroads in Indigenous/Newcomer relations. If the domestic legal institutions are to retain any legitimacy, the Canadian judiciary needs to confront the myths and assumptions underlying its biased approach to Indigenous issues. All domestically trained judges should at this point simply admit that colonial assumptions remain so deeply embedded in the ideology, curriculum, legislation, case law and legal doctrines that form the base of their legal training that they are unable, either personally or institutionally, to provide

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[500] See McCue, *supra* note 469 at 50-120.

[501] Clark, *supra* note 28 at 110.

[502] long, supra note 485 at 8.

an impartial forum for the resolution of the Indigenous/Newcomer territorial sovereignty dispute.

It is as Ishmeshkeya and James Louie described in the previous Chapter. It will be through those who value international law that the world will ultimately come to know the truth of the continuing subjugation of the international human rights of the Indigenous peoples by the legal institutions of the Canadian state.

For the survival of any respect in the notion that the Canadian government or its domestic 'legal' institutions are true expressions of democracy, it is incumbent for Canada at this stage, to surrender the Indigenous territorial sovereignty challenge to a mutually agreed upon, impartial forum.

CHAPTER SIX

Decolonization of the Domestic Judiciary and Legal Practitioners

6.1 The Critical Need to Increase Awareness

There is an urgent need for increased awareness that the domestic legal establishment is engaged in a process that extinguishes the territorial sovereignty of Indigenous nations, without their consent.

On November 20th, 1990, Mr. Justice MacDonald expressed his concern that the incarcerated Lil'wat people were "languishing in jail."[503] As a result of their refusal to recognize his authority over them on their unceded territory, they had served 25 days in custody. According to the judge, this was in excess of the time he would have incarcerated them, had he found them guilty and sentenced them for the crime. At this juncture in the contempt trial, we had just applied for an adjournment to allow us to research the case law in support of an application, simultaneously before the Federal Court of Canada, for a declaration regarding the Federal government's fiduciary trustee obligations. It was our hope, this declaration would operate so as to force the Federal government to assist, rather than oppose, the Lil'wat people in preventing the British Columbia Supreme Court from proceeding with the current criminalization process.

In refusing the adjournment, Justice MacDonald repeated that he was "most disturbed"[504] regarding their length of incarceration. He added that it was as a result of the Lil'wats' refusal to accept his jurisdiction that they might be held in jail longer than if sentenced for the crime. Clark suggested that the court had the inherent jurisdiction to release them at any

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[503] Nov. 20th, 1990 Transcript at 57.

[504] *Ibid.*

time. The judge, after complimenting the Lil'wat traditional people on their good demeanor and thanking them for that, responded to Clark: "But I have a task to perform and it does not accord directly with the wishes of the people who are here before me. But I can't help that."[505]

James Louie's concluding remarks records his disagreement with the judge's view of his role. At his sentencing hearing for criminal contempt, speaking as the head of his family within the hereditary Lil'wat governing system, he again refers Mr. Justice MacDonald to the domestic legal system's lack of recognition of his human rights and resulting jurisdiction in his homeland:

> James Louie: The system that is there is what I think was recognized as colonialism. And as living colonial rule relating to discovery, the judicial system, the *Indian Act* to civilize us and to keep us in line to supercede our claims as being people in our own right.
> ...I am here as one person on behalf of my family, but Canada doesn't recognize me.[506] It doesn't want to recognize me because we have what Canada wants and that is jurisdiction. And I will say for evidence Canada has no jurisdiction. [507]

Mr. Justice MacDonald certainly did not view his participation in the case as biased, and in fact indicated that he had been scrupulous so as to maintain the court's impartiality. He was unable to appreciate his role in the criminalization process, a role that clearly

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[505] Nov. 20th, 1990 Transcript, at 59.

[506] How do the judiciary of the Canadian courts continue their refusal to recognize the human rights of Indigenous peoples given that from a domestic judge's perspective, the *Charter, supra* note 194, applies to aboriginal people, and the highest court of the land interprets the s.15 equality section as follows: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration." *Andrew v. Law Society of British Columbia* [1989] 1 S.C.R. 141 at 175. Mr. Justice McIntyre; consider also Smith's statement: "To consider indigenous peoples as not fully human enabled distance to be maintained and justified various polices of either extermination or domestication." Smith, *supra* note 52 at 26.

[507] April 15th, 1991 Transcript at 24. The writer has in her possession a resolution signed by James Louie in which he states that "as a citizen of the Stl'atl'imx Nation I subscribe to the Lil'wat nation's laws, values and traditional systems of government to the exclusion of all other jurisdictions which seek to impose alien, and assimilative regimes."

demonstrated his favour for the protection of the status quo and thereby condoned theft of Indigenous land and resources.

If we wish for the law to play a role in the inevitable decolonization process, each participant in the Canadian legal system must confront his or her contribution to sustaining colonialism. Practitioners and judiciary alike must undertake to increase their awareness of the breach of both domestic and international law that flows from their non-consensual usurpation of the jurisdiction of the original inhabitants over their territory.

In looking for a solution to the self-interest of the domestic courts, Clark pointed to the decision of the Judicial Committee of the Privy Council in *Mohegan Indians* v. *Connecticut.* The court concluded that in controversies with Indian tribes they were neither controlled by the laws of England nor by the colonial laws but rather by "a law equal to both parties, which is the law of nature and of nations." The court recognized the lack of impartiality in the Connecticut court and held:

> "The Indians, though living amongst the King's subjects in these countries, are a separate and distinct people from them, they are treated with as such, they have a polity of their own, they peace and war with any nation of Indians when they think fit, without control from the English. It is apparent the Crown looks upon them not as subjects, but as a distinct people, for they are mentioned as such throughout Queen Anne's and his present Majesty's Commission by which we now sit. ...And it is as plain...that their lands are not, by his Majesty's grant of particular limits of them for a colony, thereby impropriated in his subjects till they have made fair and honest purchases of the natives."[508]

Clark refers to the resulting *Order-In-Council (Great Britain) of March 9th, 1704* and comments:

> By never mentioning the order, the judges and lawyers of the domestic legal establishment have managed to oversee the greatest land theft in human history, all the while pretending to be serving a rule of law society. Under the *Proclamation*, that

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[508] *Mohegan Indians* v. *Connecticut*, in Smith, J.H., *Appeals to the Privy Council*, 422-42. Case quotes from the Certified Copy Book of Proceedings Before Commission of Review 1743 (1769) at 191-192, confirmed by the Privy Council in 1771.

> theft constitutes treason and fraud. But there has never been a prosecution, precisely because the criminals have also achieved a monopoly over the legal process. It is the perfect crime, precisely because the crime is master-minded by the legal establishment. The consequence of the crime has been the genocide of a race and culture.[509]

As Clark explains, this case confirmed the legal recognition of the Indigenous nations' right of self-determination as culturally separate peoples and as subjects of international legal rights and duties rather than as mere "objects" of domestic law.

Regarding the role of the judiciary in the Lil'Wat contempt trial, Bruce Clark on numerous occasions, identified that their participation in the refusal to hear the applicable law rendered them guilty of fraud and treason and complicit in genocide. He argued that the death of a people is the inevitable outcome of the extinguishment and domestication policy currently in place in the Canadian legal system. The domestic judiciary has condoned the theft of Indigenous land and resources. The bench has been oblivious to the invalidation and superceding of Indigenous governing structures by the Canadian Band Council system. The judges have participated in the criminalization of Indigenous spiritual practices and participated in the denial of the existence of authority in Indigenous nations' law and jurisdiction over their territories, resources and people. How can the final consequences of such judicial acceptance be referred to as less than the condoning of genocide?[510] Participation in this colonial legal system perpetuates the subjugation of the original peoples

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[509] Clark, *supra* note 28 at 90-2; consider also that the Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948 makes it a crime against 'humanity" to create conditions leading to mental harm or destruction of an identifiable human group, as such; see also D. Stannard, *American Holocaust: Columbus and The Conquest of the New World.* (New York, Oxford University Press, 1992).

[510] See M. Turpel and C. Tennant, "The Application of International Human Rights Norms and Procedures to Indigenous Peoples: A Case Study in Genocide" (1990) 59 Nordic J. of International L. 287 and R. Strickland, "Genocide-at-Law: A Historic and Contemporary View of the Native American Experience"(1086) 34 U. Kan. L. Rev. 713.

within the territory referred to as British Columbia, and is legally, morally, and politically unjustifiable.

Michael Milde, in addressing the role of the individuals in apartheid in South Africa, commented specifically on the role of the judiciary:

> ...the role of all the relevant players needs to be reviewed including advocates, Attorney Generals (prosecutors), bar associations, legal teachers and academics...there are important reasons why more attention would inevitable be focused on the judges of South Africa... given that judges had both the capacity and the opportunity to resist the injustice, except in a few notable instances, why did they fail to do so?[511]

A similar question must be asked here given the inherit jurisdiction of the superior court judiciary to see that justice is both done and seen to be done. Milde offers the additional fitting observation that: "Answers to these kinds of questions are bound to be complex since they are liable to unite institutional, conceptual, social and personal elements."[512]

All participants in the domestic legal establishment must confront the profound relationship between one of the highest suicide rates in the world amongst young Indigenous males and the judicially condoned lack of self-determination within the so-called 'Canadian democracy' for Indigenous peoples.[513]

Once this is understood, the legal community carries the obligation from legal, political and justice perspectives, to ask how to bring an end to its present role. What is it that actually prevents each domestic judge from acknowledging the existence of a conflict of interest

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[511] Milde, *supra* note 29 at para.5.

[512] Ibid. at para.6; see also Bakan's statement: "As social theorists of law have long insisted, strictly internal legal analysis cannot lead to an understanding of how law actually works." Bakan, *supra* note 464 at 5.

[513] *Royal Commission on Aboriginal Peoples, Special Report on Suicide Among Aboriginal People* at 10-18. "Commissioners regard suicide, and self-destructive behavior generally, as an index of personal and collective despair; see also Preface, at ix. "It is hard to imagine a public responsibility more pressing than to stop them."

when their assumption of jurisdiction is challenged by the Indigenous people, as it relates to unceded territory?

Other than an embedded colonial mentality within the institution he has sworn to uphold, what prevented Mr. Justice MacDonald from acknowledging that it was legitimate to argue that the onus of proof of ownership and title rested with the Province in an allegation of trespass against the original peoples in their uninterrupted possession of their traditional territories? In fact, what prevents the domestic judiciary from fulfilling the Newcomer's original agreement of Peace, Friendship and Respect by simply recusing themselves from further adjudication of foundational Indigenous cases now that they can no longer claim they are unaware of the profound depth of the conflict of interest in which they are embroiled.

What prevents the judiciary's voluntary relinquishment of their alleged jurisdiction into the hands of an impartial, mutually created, internationally overseen, cross-cultural tribunal so that principles of fundamental justice may once again be present in the forum involved in the resolution of Newcomer/Indigenous relations?

6.2 Suggestions

A forum of cross-cultural mediators would assist lawyers in creating a process free from the unenviable position of acting in opposition to the sovereignty instructions of their Indigenous clients. Advocates on behalf of Indigenous peoples would be able to form their arguments free from the restrictions resulting from colonial ideology. They would not have to contend with what Doug Moodie refers to where he states: "It is curious to see how entrenched and unwavering remains the "conqueror" mentality in many segments of

Canadian society."[514]

At present, the majority of counsel, as a result of the limits of their legal education and the colonial embedded bias in the domestic law and institutions, surrender Indigenous disputes regarding unceded territory to the domestic forum and a partial judiciary.[515] With rare exceptions where counsel acting on behalf of Indigenous peoples are able and allowed status to assert Indigenous rights through international forums, the vast majority of foundational Indigenous cases are domestically decided. Canadian trained lawyers appearing on behalf of Indigenous peoples regarding issues relating to their unceded traditional territory believe they have little option but to surrender to the jurisdiction of the domestic legal system.

Bruce Clark spoke of the dilemma lawyers find themselves in when faced with attempting to represent Indigenous clients in accordance with their instructions:

> I knew that if I were to file papers in the court system in which I worked, I would automatically be relinquishing the very sovereignty they had retained me to assert. The more I pondered the dilemma, the clearer it became that I could not simultaneously relay their assertion of sovereignty, which supposedly gave them exclusive jurisdiction over their homeland, and at the same time file papers which, by

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[514] He makes this comment in reference to Chief Justice McEachern's trial judgment in *Delgamuukw* v. *British Columbia* (1991) 79 D.L.R.(4th) 185, [1991] 3 W.W.R. 97 (B.C.S.C.).

[515] Mar. 15th, 1991 Transcript at 5. Bruce Clark submitted as an academic that British criminal law extended itself into native territory by virtue of legislation in 1803 and 1821 however on record he stated that "he is under some certain pressure as a lawyer, that perhaps I wouldn't be under if I was an academic, to really examine whether my own proposition on the extension of the criminal jurisdiction is valid." Shortly thereafter, I made an intervening statement regarding my sovereignty instructions. Crompton: "....behind all of that, and this always needs to be said ...behind all of that, that being the British position, the Indian position behind all of that, is they have surrendered nothing, nothing of their criminal jurisdiction, and nothing molests or disturbs [them] more than the encroachment in the criminal jurisdiction ...and so often in court the Indian legal—the Indian law position gets lost behind arguing about the British one. Thank you." Mar. 15th, 1991 Transcript at 8; see also April 5th, 1991 Transcript at 3 where I state: "I act exclusively for 13 of the people. I also act for everyone. I have never at any time received instructions from any of them to surrender their criminal jurisdiction. I think I've made that clear on the record throughout but that is a contrary position to what Mr. Clark took. I have been informed repeatedly since court broke to emphasize that on behalf of all of my clients. ...Because it's something of tremendous concern in the presentation of their sovereignty that it be complete. The Court: Yes. I understand.

> the very fact of being filed, acknowledged that the invaders' court system had acquired jurisdiction.[516]

The one lawyer who relentlessly refused to accept this misrepresentation of the rule of law was disbarred for his attempt to have it otherwise. Clark was intent upon having both British and international law on the issue of Indigenous territorial sovereignty addressed by the court. In *Justice in Paradise* Clark wrote that he was willing to apologize for his unprofessional comment that the court was a kangaroo court,[517] but was not prepared to withdraw his opinion that the judge's assumption of jurisdiction is treasonable, fraudulent, and genocidal.[518]

The legal principle that must be considered in relation to Clark's contempt and disbarment is set out by the Supreme Court of Canada. *R.* v. *Duncan* confirmed that "that Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court."[519]

As to the reasonableness of Clark's legal argument against the judiciary's assumption of jurisdiction over unceded Indigenous territory, there are several legal scholars in basic

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[516] Clark, supra note 28 at 25.

[517] For a more complete version of Clark's disbarment for what he describes as "his attempt to have the rule of law obeyed", see Clark, *supra* note 28 at 210-25. It was for his refusal to withdraw his legal opinion rather than his 'unprofessional remarks' about the court that Clark was sentence to three months imprisonment for contempt. In the Gustafsen Lake case he eventually appeared as an expert witness rather than as counsel in the case. After giving evidence as an legal expert on British and domestic constitutional law as it relates to Indigenous peoples, the trial judge instructed the jury that it was settled law that Clark's theory was invalid. The jury was further instructed not to accept that Clark's clients believed what Clark told them about the law either.

[518] Clark, *supra* note 28 at 210.

[519] *Re: Duncan*, (1957) 11 D.L.R. (2d) 616 (S.C.C.) Kerwin C.J.C., Taschereau, Rand, Kellock, Cartwright, Fauteux and Abbott JJ. concurring on the point.

agreement with Clark's position.[520] They place similar reliance on British Imperial constitutional legal arguments as well as making frequent reference to breaches of applicable international human rights law.[521] One is left with serious questions regarding the actual motivation behind the disbarment of Bruce Clark from continuing the practice of law.[522]

The scrutiny that Clark received should also be focused on the professional conduct of counsel who appear for the Provincial and Federal governments who allegedly act on behalf of the public interest. Legal counsel representing the Attorney General of British Columbia and the Attorney General of Canada asserted positions throughout the contempt hearing, as well as in each of the associated applications, that were both procedurally and substantively aimed to deny the adjudication of the law regarding the existence of territorial Indigenous sovereignty. Other than an indication of further institutional Newcomer self-interest, why is it that the court allowed these adversarial legal positions to be taken in the name of the highest governmental authority on behalf of the public interest? This point may be considered from within the perspective of Canadian domestic law, which insists on assuming Indigenous persons are Canadian citizens with constitutionally protected Aboriginal rights.

A further conflict exists for the majority of lawyers as well as the judiciary, in their acceptance of the imposed Band Council structure as having the legal capacity to represent an Indigenous nation. The condoning of the imposed foreign governing system is only exacerbated by the fact that the only available funding for legal representation of Indigenous

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[520] Youngblood Henderson, Alfred Taiaiake, Anthony Hall, Patricia Monture-Okanee, and John Borrows to name a few.

[521] It is also relevant that an official statement issued by Mr. Greenwood, while acting as a representative of the Ontario Law Society, confirmed the sincerity of Clark's belief in the validity of his legal argument and the sincerity of his belief in the rule of law.

[522] A complete analysis of the Clark disbarment process is the subject of another detailed study; one that I highly recommend be undertaken in order to further consider the reactionary response of the domestic judiciary.

issues is, in the vast majority of cases, through the Band Council system. This colonial system has been extremely successful in preventing the traditional peoples' voice and legal position from being asserted within the established Canadian legal system. This is a serious problem given that the sovereignty position represents the understanding and belief of most Indigenous persons living within the territory known as Canada.

In addition there exists the impossibility of providing a truly impartial hearing where some parties have unlimited resources (the Provincial government and the logging corporation) and others (the traditional Indigenous peoples) are without funds or access to funding other than Provincial legal aid funds which in keeping with their sovereign position they requested that I not accept.[523]

What prevents the Federal government, as fiduciary trustee on behalf of Indigenous peoples, from being held by the courts to be obliged to co-operate in an internationally overseen nation-to-nation dispute resolution process? If the court in *Mohegan* was able to acknowledge that a concern over impartiality required that the territorial boundary issue must be heard by a third party, why is it impossible for the same order today? Such an internationally overseen forum provides the only possible resolution of outstanding Indigenous territorial sovereignty given the existence of the conflicts that the legal establishment and the domestic governments are embroiled in.

During the exact time frame of the Lillooet Lake roadblock, the Canadian Human Rights Commission expressed the 'urgency' for reform in Aboriginal affairs. They concluded that we needed to: "apply ourselves to the long-neglected task of redesigning the aboriginal and

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[523] My work in the contempt trial was done on a *pro bono* basis as the traditional community leaders wished me not to accept funds from the Legal Aid Society of British Columbia. To have their opponent in the case provide legal fees for their counsel was from their perspective, in conflict with their assertion of sovereignty.

non-aboriginal relationship in a spirit of collaboration and good faith. This process should get under way immediately and should tackle the fundamental questions in a thorough and innovative way."[524]

Sixteen years later little has come of this 'urgent' finding on the part of the Commission. In fact within the past few months, the N'Quatqua people erected a roadblock in Darcy, approximately 20 miles to the north of the Lil'wat territory, because of unauthorized logging within their traditional territory. The sophistication of the extinguishment methods within the domestic legal system that are relied upon to allegedly obtain authority over unceded land appear to be all that has changed significantly.[525] The colonial regime in many situations has now been able to recruit Indigenous people themselves to participate in the frauds that are perpetrated to obtain Indigenous consent.[526] The divisions within Indigenous communities that this creates cannot be overstated. It is one level of oppression to be subjugated by a foreign power, yet another to be exposed to the insult of subjugation imposed by your own people.[527]

Other than self-interest, what prevents the creation of an internationally overseen cross-cultural mediation process so as to address the obvious co-existing claims of sovereignty over unceded territory and engage in "redesigning the aboriginal and non-aboriginal relationship in a spirit of collaboration and good faith" as suggested by the Canadian Human

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[524] "A New Commitment: Statement of the Canadian Human Rights Commission of Federal Aboriginal Policy" (Nov. 21st, 1990) at 2.

[525] In this instance the Chief of the Band Council is also a Director of the logging company that failed to adequately consult with the N'Quatqua people regarding the current logging operation on their traditional territory within the St'at'imc Nation.

[526] "Without Consent", *supra* note 63. The methods employed are constantly changing and require continuing study so as to be able to discern them as they manifest.

[527] Consider Taiaiake's observation: "The co-optation of our political leadership is a subtle, insidious undeniable fact and it has resulted in the loss of ability to confront the daily injustices of native life." Taiaiake, *supra* note 63 at 70-5.

Rights Commission?

Martin Wright's comments regarding the process involved in mediation are applicable to the Indigenous/Newcomer territorial sovereignty issue. He claims that conflicts arising from certain relationships are simply too complex to be justiciable:

> Law is a structure, in which a set of norms is defined; mediation is a process, commonly directed, not towards achieving conformity to norms, but toward the creation of the relevant norms themselves.[528]

He demonstrates how, since mediators claim no authority, they can empower people to regain control over their own relationships, rather than assume that all social order must be imposed by some kind of "authority".

> Mediation's central quality is it's capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.[529]

The mutual involvement in the creation of the mediation process, rather than the imposition of one, may be of assistance in providing the necessary respect for both Indigenous and non-Indigenous paradigms, as well as allowing for the vision of each other's future to be heard and considered. Out of this comes the possibility of a mutually created solution.

In conjunction, law schools must be required to revamp their curriculum so as to replace the current domestic colonial approach to that of an international perspective, in recognition of the inherent right of Indigenous nations to self-determination on their traditional lands. As Henderson explains:

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[528] M. Wright, *Justice for Victims and Offenders: A Restorative Response to Crime* (Philadelphia: Open University Press, 1991) at 49.

[529] *Ibid.*

> Aboriginal self-determination is a constitutional reality that must be respected. Colonial and racial thought has to be eliminated in Canada and replaced with legal relationships.
>
> Existing federal and provincial laws cannot be perceived as impersonal or neutral public rules, for these are the exclusive voice of the colonialist. Treaty First Nations have never formally participated as equals in the implementation of these federal laws nor have they consented to them. These laws, like most provincial laws, are seen as embodying only the goals and values of the colonialists. This is a major problem. The validity of federal laws, such as the Indian Act and the Criminal code, [are] challenged by Aboriginal treaty rights.[530]
>
> When the relations between the Crown and First Nations are not covered by the treaty obligations, they ought not to be governed by Canadian law. Until authentic federalism and democracy is created in Canada, treaty federalism should be governed by general principles of international human rights law, a law equal to their mutual consent.[531]

It may be that some of the judiciary's resistance to the existence of Indigenous jurisdiction over unceded territory is unconscious. Although providing no excuse, it appears that colonialism frequently hides its effect from the participants engaged in the domestic legal system.[532]

Rupert Ross, in *Dances With a Ghost*, explained that until we realize that we see another culture "through our own", there is no chance to see the other clearly.[533] In order to move past this stage of misinterpretation, we must first become aware of the conditioning through which we see. We can then understand that it is through this filter, based on invalid assumptions, that we often erroneously interpret the behavior of the other. Ross enhances our understanding, by adding the insight that reliance on mistaken assumption is accentuated by

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[530] "Empowering", *supra* note 58 at 318.

[531] *Ibid.* at 296.

[532] It is apparent that a lack of awareness does not excuse colonial oppression. In fact, when I discussed this point with my Lil'wat mentor she stated that she was not so quick to believe a claim by the colonizer of lack of awareness for, as she put it: "It has been five hundred years."

[533] R. Ross, *Dancing With a Ghost: Exploring Indian Reality* (Markham, Ontario: Octopus Books, 1992) at 4.

cultural difference.[534]

In his book published in 1992, Ross explained that we were at the beginning of an understanding of how far apart the Indigenous and settler realities really are.[535] He discussed the fact that while we may see their lack of progress as limiting he suspected:

> ...that they had no such sense of limits. In fact, they may have perceived their lives as holding a virtually limitless scope for challenge and accomplishment. We don't see this, if only because we don't share the same definition of accomplishment. As I suggested in an earlier chapter, their lives did not centre on building things but upon discerning things. Life's challenge lay in observing and understanding the workings of the dynamic equilibrium of which they were a part, then acting so as to sustain a harmony within it rather than a mastery over it. One aspired to wisdom in accommodating oneself to that equilibrium, and that pursuit quite clearly promised unlimited scope for exploration and self-development...In short, although Natives' physical lives may well have fallen within Hobbes's vision of life in nature, it is just as likely that their mental, emotional and spiritual lives permitted challenges and rewards that were richer than those most of us know in our late twentieth century lives."[536]

A cross-cultural process is an absolute necessity. The retraining of the domestic judiciary so as to transform their thinking from a Eurocentric or colonial perspective to that of a cross-cultural, international, and impartial perspective would be lengthy. The deprogramming of their embedded colonial thinking may not be fully possible. This realization lends much support to the requirement that persons involved in resolving the outstanding jurisdictional issues between the two races should at this point be cross-cultural. One other alternative that has potential is team mediation where both cultures are represented within a group of mediators.

If there was truly no self-interest operating within the Canadian legal system regarding Indigenous sovereignty claims, why is there such resistance to allowing a neutral outsider or

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[534] *Ibid.* at 5.

[535] *Ibid.* at 94.

[536] *Ibid.* at 92.

an impartial third party tribunal sit in it's place?[537] If, as it is argued, the Canadian domestic adjudication system is truly impartial and abides by the rule of law, then would the resolution or outcome of the jurisdictional land dispute by a *different* impartial tribunal not be similar? The degree of Canadian resistance to placing the matter before a third party tribunal appears, in and of itself, to lend support to the Indigenous allegation of the existence of bias in the domestic legal system.

In 1995 the only request of the Ts'peten Defenders in the Gustafsen Lake standoff was for an impartial tribunal. Clark attempted to follow in the legal footsteps of *Mohegans* and petitioned Queen Elisabeth II directly for access to a third-party court outside the domestic legal system:

> ...that the petition dated January 3rd, 1995 be addressed publicly by an independent and impartial third party tribunal, one that is neither Canadian nor Indian, such as the special constitutional court established by Queen Ann at the request of the Mohegan Indians to which court the petition is addressed:
>
> (a.) Is the popular assumption, that the Canadian courts and police have jurisdiction, legal?
>
> (b.) Or is that assumption criminally treasonable, fraudulent and complicitous in the genocide of the Aboriginal peoples of Canada as alleged in the petition? [538]

The domestic Canadian courts once again refused to allow the Gustafsen sovereignty defense to be argued or to consider the breach of the federal government's fiduciary trust obligation when it employed the National Army against the traditional Ts'peten peoples, in the largest Canadian military operation on land since the Korean War. In his video *Above the Law,* created from R.C.M.P. training footage filmed at the Gustafsen Lake standoff, Mervin

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[537] For further evidence and analysis of the Provincial government's self-interest see Hall's study of Attorney General, Ujjal Dosanjh's handling of the Gustafsen Lake Standoff as the main episode that launched him towards the premiership of British Columbia. A. Hall, "The Making of an Indian Fighter and Canadian Premier", (March, 2000) [unpublished, archived at Department of Native Studies, University of Lethbridge] at 1-3.

[538] Clark, *supra* note 28 at 165.

Brown alleges that in excess of 77,000 rounds of ammunition, as well as land mines, were used in the Canadian military assault on the seventeen Indigenous people, including traditional Elders, women, children, and young men that asserted the legal paramouncy of unceded Indigenous territorial sovereignty.[539]

This brings to mind the comments of Michael Milde, in his "Critical Notice of *Judging the Judges, Judging Ourselves*" where he states:

> What is particularly striking is that gross human rights violations were permitted, even approved, by legal institutions that appeared to respect such fundamental legitimacy-conferring principles as the rule of law and judicial independence...staffed by functionaries many of whom had unimpeachable credentials as advocates of human rights. So how could this justice system have produced such iniquitous results?[540]

The answer may partially lie in his further statement that:

> Once even the liberal judges act as though an unjust law is legitimate, the general (white) public can avoid confronting the iniquities of the system. When recognizably commendable legal professionals insinuate, by their actions, that the rule of law is being respected, then the lay public has little incentive to believe otherwise. [541]

For instance, the Attorney General of British Columbia justified the military assault at Gustafsen Lake as necessary to maintain law and order in the province.

bev long, in referring to the Gustafsen Lake case concludes:

> ...for asserting their rights and beliefs the Ts'pet'en Defenders were subjected to a campaign of inflammatory and derisive rhetoric and violence orchestrated by the provincial and federal governments, the largest police operation in R.C.M.P. history, the Canadian military, and a ruthless and racist media campaign. Finally, against such relentless forces, the Defenders were eventually forced to abandon their stand, whereupon they were met with extensive criminal charges. Many were held in custody though the pre-trial period.
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> Through such tactics, the legitimate assertion of sovereignty on the part of the Defenders was delegitimized and ultimately criminalized by the Canadian system. It is only at this point–in a long line of highly developed repressive state tactics–that the

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[539] Brown, M. "*Above the Law, Part 2. The Other Side*". (Video).

[540] Milde, *supra* note 29 at para.3.

[541] *Ibid.* at para.24.

> judicial system takes over to perform its unique role in the suppression of the dissent of indigenous peoples. Such is the full power of the Canadian colonial establishment to silence (and distort) any challenge to its authority.[542]

Finally, to conclude our reflection on the colonial box in which the domestic legal system finds itself when faced with Indigenous challenges to jurisdiction over unceded territory, it may be helpful to consider the results of the past twenty years of advancing Indigenous issues through what Canada insists to have been impartial courts.

The superior court of the Province has refused to allow any question of British sovereignty, authority or jurisdiction over the entire territory of British Columbia. However, as a result of this assumption of jurisdiction, the judiciary has supplied the reasonable person with considerable evidence of Newcomer self-interest that is the antithesis of the impartiality required of the bench. When the Newcomer's court system does adjudicate on aboriginal rights, the self-interest revealed in the justification list detailed by former Chief Justice Lamer of the Supreme Court of Canada must be considered.[543] The highest judge of the domestic court simply specifies a list of self-interested justifications that allow for Newcomer infringement of Indigenous lands when he states:

> 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 and, in principle, can justify the infringement of aboriginal title.[544]

That this infringement principle resulted where a sovereign Indigenous nation surrendered to the jurisdiction of what Canada alleges to be an impartial forum, only adds substance to the main allegation within this thesis. From the Indigenous perspective such a holding represents

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[542] long, *supra* note 485 at 13.

[543] The judgment of Chief Justice Lamer, was concurred in by Cory, McLachlin and Major, JJ.

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

a judicial avoidance of obedience to the Imperial constitutional law requiring the consent of the Indigenous nations prior to being 'molested or disturbed' on their unceded lands.

bev long's comment on jurisdiction reveals what becomes of an assertion of full Indigenous sovereignty when presented within the Canadian legal system[545] and adds one final consideration for the informed person who must think the matter through, prior to their determination of the apprehension of bias test:

> ...canadian courts have succeeded in imposing an interpretative framework for "aboriginal rights" according to which "rights" associated with the land and "rights" associated with people are conceptualized as distinct. Then, filtering each of the concepts independently through colonial constitutional law and legal reasoning, indigenous territorial sovereignty is transformed into "aboriginal title," while indigenous political sovereignty is transformed into "self-government." The net result is that the original relationship between the two–that is, between land and people–is depreciated. This effect...is achieved and simultaneously constitutionalized by section 35(1).
>
> The separation of indigenous claims to territorial and political sovereignty is not the only consequence of section 35(1). The section operates, through subtly transforming the inherent and true nature of indigenous sovereignty into rights consistent with canadian sovereignty, to depoliticize and ultimately domesticate indigenous peoples and indigenous resistance movements generally. That is, the powerful and empowering assertion of indigenous sovereignty, is drastically diminished in scope, content, and potential in the process of being transformed into distinct "rights" compatible with canadian sovereignty and therefore "legitimate". Ultimately, section 35(1) operates to diminish as much as possible the impact of indigenous claims on the canadian social, economic, political and legal status quo, and as such poses some significant barriers to decolonization.[546]

This interpretation of s. 35 of the *Charter of Rights and Freedoms* is of assistance in deconstructing the myth of the ability of the Canadian judiciary to provide an impartial forum.

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[545] long explains that her paper focuses on specific jurisdictional challenges by Indigenous persons "primarily to comprehend the mechanisms embedded within canadian law that act as barriers to the ultimate realization and affirmation of inherent indigenous political sovereignty. ...The manner in which canadian courts confront (or avert) such challenges is extremely revealing of the extent to which canadian law is steeped in the colonial project." long, *supra* note 485 at 3-4.

[546] *Ibid.* at 2.

The contempt case analysis provided in the previous chapters is sufficient to illustrate the roles being played within the domestic legal establishment in the attempt to reduce Indigenous territorial sovereignty over traditional territory to a right of infringement on behalf of Newcomer society. Such parameter-setting, extinguishment tactics that the Canadian legal system is embroiled in are an abuse of process and simultaneously a breach of the rule of law, both domestic and internationally. Until Canadian governments and the domestic judiciary surrender the legal position that there can be only one holder of sovereign powers within a nation, and in Canada, those powers rest exclusively in the Federal and Provincial Crowns, the resolution of such foundational issues as Indigenous/Crown relations will continue to be illusive for Newcomers, as well as the Indigenous peoples.

Each time the court allows the governments to take such positions while simultaneously disallowing the fundamental legal argument that needs to be addressed, they are adding evidence in support of the allegation of individual and institutionalized bias. It is particularly relevant to this discussion to recall:

> ...early judicial perspectives on the sovereignty issue did not attempt to engage in any legal analysis of why Aboriginal sovereignty, and the corresponding right to self-government, apparently ceased to exist at some point or points along the continuum of European occupation of North America.[547]

Professor June McCue's conclusion is that the refusal of the Canadian court system to:

> ...ascertain the legitimacy or validity of Canada's sovereignty assertion over indigenous peoples has a nullifying effect over aboriginal rights while at the same time ascertaining the boundary of the court's authority to supervise Crown assertions of sovereign power.[548]

As has been suggested by this thesis, the rigid refusal by the Canadian judiciary to

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[547] Moodie reminds us that Marshall C.J., in *Johnson* v. *McIntosh*, expressed the opinion that courts could not meddle in matters of national sovereignty. That was politics, not law. In Marshall's opinion it was a matter beyond the jurisdictional reach of the judiciary. Moodie, *supra* note 58 at 15.

[548] McCue, *supra* note 469 at 104.

address the law on Indigenous territorial sovereignty results ultimately in the loss of jurisdiction over the ongoing dispute. This clearly justifies the involvement of the international realm to create the needed resolution process for the overlapping claims of territorial sovereignty.[549]

Linda Tuhiwai Smith argues that such decolonization is necessary for Newcomers to recover "the space in which to develop a sense of authentic humanity."[550] This is particularly true given the Christian/savage distinction upon which to date the Newcomer's oppressive stance has been based.

In conclusion it is as James Youngblood Henderson states:

> Where there is a treaty vision of Canada, there is a nation-to-nation relationship. Where there is a treaty vision, the stranger becomes a guest and the stranger's government and towns become partners in human empowerment. There is no meaningful alternative to this sacred vision within Aboriginal society in North America.[551]

In keeping with this statement, John L. George, the highly respected Hereditary Chief of the Squamish Nation, told me that "the day the white man treats us as his equal, is the day we can begin to talk about a process to settle the issues that exist between us."[552] It is submitted that the request of the Hereditary Chief 'to be treated as an equal' can best be fulfilled through the voluntary creation of an impartial, internationally overseen, mediation style dispute resolution forum to formally address Canada's constitutional relationship with

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[549] "Constitutional Law", supra note 46. This article aids in the realization that the law has been formulated without the inclusion or consideration of an Indigenous perspective let alone giving such a perspective equal weight. The behavior of the parties in the case at bar reveals that the time required for the Canadian judiciary and government representatives to 'decolonize their thinking' is time unnecessarily lost. The wisdom of creating a truly independent, impartial, and mutually agreed upon dispute resolution process that is without a history of involvement in the issue must be emerging.

[550] Smith, *supra* note 52 at 23.

[551] "Empowering", *supra* note 57 at 78-79.

[552] John L. George in a discussion with the author in approximately 1987.

Indigenous peoples that began with the agreement of Peace, Friendship and Respect. As scholar John Borrows notes:

> There has been, and will continue to be, resistance of some within the legal community to relinquish the power that disregarding the *Proclamation* has bestowed upon non-First Nations people and institutions.[553]

Such domestic judicial resistance must not be the end of the inquiry into the impartiality issue. To accept the status quo in Newcomer/Indigenous relations is to accept a domestic legal system that perpetuates genocide.

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[553] "Borrows argues for a recognition of the imbalance of power in defining First Nation's rights through such principles as resolving doubtful expressions in their favor and taking into account the native's "natural" or "supposed" understanding of events. Constitutional Law", *supra* note 46, at 40. Due to the entrenched lack of impartiality it is suggested that more is required than these principles are able to produce.

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Appendix I

Chronology of Contempt Case and Associated Applications.

DATE	DESCRIPTION OF ACTIVITY	COURT	JUDGE	OUTCOME
1960-1990	Negotiations between the Province and the Lil'wat Band Council			
Sept. 26th, 1990	Lil'wat refusal of Provincial government's offer of $124,000 for the public right of way through the Mount Currie reserve.			
Aug, 1990 to Nov. 6th, 1990	The Lillooet Lake roadblock was erected by the Lil'wat Peoples Movement in August, 1990. It was dismantled 116 days later, by the R.C.M.P. acting pursuant to an enforcement order of the B.C.S.C.			
Sept. 28th, 1990	Expropriation documents signed by the Minister of Highways and the Lieutenant Governor of B.C.			
Oct. 3rd, 1990	Attorney General of B.C. filed Writ of Summons in the B.C.S.C. alleging trespass and nuisance against the Lil'wat traditional people	B.C.S.C.		
Oct. 22nd, 23rd, and 24th 1990	Interlocutory injunction application on behalf of the Attorney General of B.C.	B.C.S.C.	Chief Justice Esson	Reserved Judgment
Oct. 30th, 1990.	Injunction Order issued by the Chief Justice of the Superior court.	B.C.S.C.	Chief Justice Esson	Granted
Nov. 5th, 1990	Application by the Attorney General of B.C. to add enforcement powers to arrest.	B.C.S.C.	Chief Justice Esson	Granted

Nov. 19th, 1990	Crown's Opening address in the contempt hearing	B.C.S.C.	Mr. Justice MacDonald	
Nov. 19th, 1990	Judge rules the matter will proceed as criminal contempt rather than as civil contempt of court	B.C.S.C.	Mr. Justice MacDonald	Ruling
Nov. 20th, 1990	Defense Opening	B.C.S.C.	Mr. Justice MacDonald	Refused to allow counsel to complete an outline of the theory of the defense
Nov. 20th	Defense application for a Mistrial due to manifest evidence of judicial bias	B.C.S.C.	Mr. Justice MacDonald	Denied
Nov. 20th, 1990	Defense application for an Order for Habeas Corpus	B.C.S.C.	Mr. Justice MacDonald	Adjourned Indefinitely and at least until the completion of the Crown's case
Nov. 20th, 1990	Defense application for the matter to be placed back before Chief Justice Esson	B.C.S.C.	Mr. Justice MacDonald	Refused Mr. Justice MacDonald advised counsel that Chief Justice Esson considered himself functus.
Nov. 20th, 1990	Defense application for Prohibition to prevent the B.C.S.C. from proceeding	B.C.S.C.	Mr. Justice MacDonald	Refused
Nov. 20th, 1990	Defense application for an adjournment to enable Lil'wat counsel an opportunity to appear before the Federal Court of Canada.	B.C.S.C.	Mr. Justice MacDonald	Refused
Nov. 21st, 1990	Defense application for an Adjournment so that we may file an application to obtain leave from the B.C.C.A to join the Appeal from the original injunctive order of Chief Justice Esson	B.C.S.C.	Mr. Justice MacDonald	Granted

Nov. 21st, 1990	Defense application that the Lil'wat's Habeas Corpus application is heard now rather than at the close of the Crown's case	B.C.S.C.	Mr. Justice MacDonald	Refused
Nov. 26th, 1990	Application to join appeal of original injunction order.	B.C.C.A	Mr. Justice Josiah Wood	*Leave to join granted
Nov. 27th 28th and 29th, 1990	Crown Witnesses in Chief and Cross-examination	B.C.S.C.	Mr. Justice MacDonald	
Nov. 28th, 1990	Clark attempts to present the theory of the defense.	B.C.S.C.	Mr. Justice MacDonald	Denied the opportunity
Nov. 29th, 1990	Renewal of Application for Habeas Corpus	B.C.S.C.	Mr. Justice MacDonald	Refused as Judge rules the Habeas Corpus application is a collateral attack on the original injunctive order of the Chief Justice
Nov. 30th, 1990	Defense submissions	B.C.S.C.	Mr. Justice MacDonald	Allowed
Dec. 3rd, 1990	Crown application to review Mr. Justice Wood's granting of leave that allowed the Lil'wats charged with contempt to join the appeal of the original injunction by the Band Chief and Council.	B.C.C.A.	Three member panel	The division ordered that the ground of appeal upon which leave has been granted is declared to be "Do the plaintiffs have an arguable case that the Province may lawfully resume lands in Mount Currie Indian Reserve No. 3, the Nesuch Reserve, by its own Act, pursuant to Order-in-Council 1036/1938?" which limited the appeal to the legal position of the Band Chief and Council only.
Dec. 5th, 1990	Mr. Goldie, lead counsel for the B.C. government in *Delgamuukw* appears on behalf of the A.G. of B.C. to argue that the contempt hearing should be adjourned until the decision of Chief Justice McEachern is delivered	B.C.S.C.	Mr. Justice MacDonald	

Dec. 5th, 1990	Crown appeal of leave to join appeal	B.C.C.A.	3 Member Panel	Leave to Join Overturned
Dec. 7th, 1990	Defense response to Crown's adjournment application	B.C.S.C.	Mr. Justice MacDonald	
Dec. 10th, 1990	Lil'wat application for an injunction to prevent desecration of graves and pictographs	B.C.S.C.	Mr. Justice MacDonald	Refusal to hear application
Dec. 10th, 1990	Lil'Wat application to strike the A.G.'s writ as disclosing no cause of action capable of proof	B.C.S.C.	Mr. Justice MacDonald.	Judge rules that this application is simply another collateral attack on the Chief Justice's original order
Dec. 10th, 1990	Filed statement of claim seeking a declaration to force the Federal Government to act as fidicuary trustee of the Lil'wats	Federal Court of Canada		
Dec. 11th-14th, 1990	Lil'wat defense witnesses			
Dec. 11th, 1990	Defense application for the judge to take a view of the area and hold the hearing of the dispute in Mount Currie	B.C.S.C.	Mr. Justice MacDonald	Refusal of both applications
Dec. 12th, 1990	Lil'wat application for an adjournment so as to make an application for Injunctive relief before the Federal Court of Canada	B.C.S.C.	Mr. Justice MacDonald	Refused
Dec. 12th, 1990	Lil'wat application for an adjournment so as to appeal to the B.C.C.A., Mr. Justice MacDonald's ruling, that the Lil'wat application for an injunction was a collateral attack of the Chief Justice's original injunctive order.	B.C.S.C.	Mr. Justice MacDonald	Refused
Dec. 14th, 1990	A Crown application to strike Clark's statement of claim before the Federal Court of Canada		Madame Justice Reid	Adjourned Hearing

Dec. 14th, 1990	Lil'wat defense counsel advised by letter to seek a hearing before the Associate Chief Justice in Ottawa			
Jan., Feb. & March, 1991	Submissions and legal argument by Crown and defense counsel re: whether a preliminary challenge to the jurisdiction of the B.CS.C regarding unceded Indigenous territory was a collateral attack on the Chief Justice's original injunctive order	B.C.S.C.	Mr. Justice MacDonald	Reserved Judgment
Jan. 8th, 1991	Application by the Lil'wats for an injunctive order in relation to the Ure Creek site.	B.C.S.C.	Chief Justice Esson	Denied for Procedural Reasons
Jan. 18th, 1991	Lil'wat application to adjourn so that application for leave could be made before the B.C.S.C.	B.C.S.C.	Mr. Justice MacDonald	Granted
Jan. 30th, 1991	Lil'wat application to join and expand Band Council appeal of original injunctive order	B.C.S.C.	Mr. Justice MacFarlane	Refused
Feb. 1st, 1991	Injunctive application by Interfor Logging Corporation regarding Ure Creek	B.C.S.C.	Mr. Justice Wetmore	Granted
Feb 8th, 1991	Lil'wat defense counsel apply for leave to appeal Mr. Justice Wetmore's order	B.C.C.A.	Mr. Justice Wallace	Refused to hear Dr. Bruce Clark and asked the Crown to have the Law Society consider Clark's disbarment due to his inclusion of a reference in affidavid material to his client's fear of a judicial conspiracy to avoid hearing the applicable law

Feb 14th and 15th, 1991	Appeal of the original the Chief Justice's injunctive limited to the Band Council's appeal of the Provincial power of resumption.	B.C.C.A.	Five member bench:	Appeal dismissed.
March 18th, 1991	Submissions by counsel for the A.G. of B.C. and counsel for the A.G. of Canada, regarding whether the Provincial Family Court of B.C. or the Supreme Court of B.C., had jurisdiction for a contempt of court committed by a juvenile.	B.C.S.C.	Mr. Justice MacDonald	Held: The B.C.S.C. had the requisite jurisdiction to try to juvenile accused. The jurisdictional challenge brought by the government was heard and decided by the judge, without any reference to the collateral attack principle.
April 5th, 1991	Lil'wat application seeking leave to appeal the Ure Creek injunction order	B.C.C.A.	Mr. Justice Braidwood	Refused.
April 15th, 1991	Criminal Contempt of Court Conviction and Lil'wat statements at sentencing.	B.C.S.C.	Mr. Justice MacDonald	Conviction
April 15th and 16th, 1991	Further Lil'wat statements made at the continuation of their sentencing hearing	B.C.S.C.	Mr. Justice MacDonald	Sentence suspended and One Year Probation Order to Keep the Peace and to agree to not block the Lillooet Lake Road.

Appendix II

Lil'wat Declaration of 1911

Declaration of the Lillooet Tribe:

To Whom It May Concern:

We the underwritten chiefs of the Lillooet tribe (being all the chiefs of said tribe) declare as follows:

We speak the truth, and we speak for our whole tribe, numbering about 1400 people at the present time.

We claim that we are the rightful owners of our tribal territory, and everything pertaining thereto. We have always lived in our country; at no time have we ever deserted it or left it to others. We have retained it from the invasion of other tribes at the cost of our blood. Our ancestors were in possession of our country centuries before the whites came. It is the same as yesterday when the latter came, and like the day before when the first fur traders came. We are aware the B.C. Government claims our country, like all other Indian territories in B.C.; but we deny their right to it. We never gave it nor sold it to them. They certainly never got the title to the country from us, neither by agreement nor conquest, and none other than we could have any right to give them title. In early days we considered white chiefs like a superior race that never lied nor stole, and always acted wisely, and honorable, We expected they would lay claim to what belonged to themselves only. In these considerations we have been mistaken, and gradually have learned how cunning, cruel, untruthful, and thieving some of them can be. We have felt keenly the stealing of our lands by the B.C. government, but we could never learn how to get redress. We felt helpless and dejected; but lately we begin to hope. We think that perhaps after all we may get redress from the greater white chiefs away in the King's country, or in Ottawa. It seemed to us all white chiefs and governments were against us, but now we commence to think we may yet get a measure of justice.

We have been informed of the stand taken by the Thompson River, Shuswap, and Okanagan tribes, as per their declaration of July 16th, 1910. We have learned of the Indian Rights Association of B.C., and have also heard the glad news that the Ottawa government will help us to obtain our rights. As we are in the same position in regard to our lands, etc., and labor under the same disadvantages as the other tribes of B.C., we resolved to join with them in the movement for our mutual rights. With this object, several of our chiefs attended the Indian meeting at Lytton on Feb. 13th, 1910, and again the meeting at Kamloops on the 6th Feb. last. Thereafter we held a meeting ourselves at Lillooet on 24th Feb. last when the chiefs of all the Lillooet bands resolved as follows:

First – That we join the other interior tribes affiliated with the Indian Rights Association of the Coast.

Second – That we stand with them in the demand for their rights, and the settlement of the Indian land question.

Third – That we agree unanimously with them in all the eight articles of their Declaration, as made at Spences Bridge, July,1910.

In conclusion, we wish to protest against the recent seizing of certain of our lands at "The Short Portage," by white settlers on authority of the B.C. Government. These lands have been continually occupied by us from time out of mind, and have been cultivated by us unmolested for over thirty years. We also wish to protest against the building of railway depots and sidings on any of our reservations, as we hear is projected. We agree that a copy of this Declaration be sent each to the Hon. Mr. Oliver, the Superintendent of Indian Affairs, the Secretary of the Indian Rights Association, Mr. Clark, K.C. and Mr. McDonald, Inspector of Indian Agencies.

(Signed)
James Nraiteskel, Chief Lillooet Band
James Stage, Chief Pemberton Band
Peter Chalal, Chief Mission Band
James James, Chief Seaton Lake Band
John Koiustghen, Chief Pasulko Band
David Eksiepalus, Chief No. 2 Lillooet Band
Charles Nekaula, Chief Nkempts Band
James Smith, Chief Tanas Lake Band
Harry Nkasusa, Chief Samakwa Band
Paul Koitelamugh, Chief Skookum Chuck Band
August Akstonkail, Chief Port Douglas Band
Jean Babtiste, Chief No. 1 Cayuse Creek Band
David Skwinstwaugh, Chief Bridge River Band
Thonas Bull, Chief Slahoos Band
Thomas Jack, Chief Anderson Lake Band
Chief Fransois Thomas Adolph, for Fountain Indians