MAJOR RESEARCH PAPER

FIRST OCCUPANTS: THE EROSION OF INDIGENOUS SOVEREIGNTY THROUGH LEGAL NARRATIVES

TAYLOR MACLEAN

Professor Joanne DiNova

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ABSTRACT

Land claim cases within Canada have yielded mostly small wins for Indigenous nations. While certain cases represent success in reinstating rights to cultural practices, granting certain levels of autonomy, and acknowledging rights to land use for culturally relevant activities, overriding sovereignty rests with Canada. Even land claim cases deemed successful are still adjudicated within the Canadian court system, and it is the nation-state of Canada that determines the validity of Indigenous claims to traditional territories. In this paper, I explore the discursive and narrative devices utilized within judicial rulings that uphold Crown sovereignty and deny Indigenous sovereignty. I argue that Indigenous sovereignty is undermined in legal discourse through the use of concealed narrative acts, which serve to sterilize racialized legal doctrines and distort the social and political history of relations between Indigenous nations and the Crown.

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DEDICATION

I dedicate this major research paper to my Mum and Dad, not just for their unwavering support and encouragement, but for showing me that while life may be hard, it is also sweet.

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INTRODUCTION

Since the arrival of Europeans to the North American continent, Indigenous[1] nations have fought to maintain their territorial jurisdiction and political autonomy. Indigenous peoples have engaged in multiple forms of resistance against the colonial state, which continues its attempt to assimilate Indigenous peoples within Canadian society and extinguish Indigenous sovereignty. In a modern context, the Canadian judicial system is a primary site for Indigenous resistance, and legal processes for resolving land claim disputes remain an important, yet imperfect process for regaining access to ancestral lands. Unfortunately, land claim cases within Canada have yielded mostly small wins for Indigenous nations. While certain cases represent success in reinstating rights to cultural practices, granting certain levels of autonomy, and acknowledging rights to land use for culturally relevant activities, overriding sovereignty rests with Canada. Even land claim cases deemed successful are still adjudicated within the Canadian court system, and it is the nation-state of Canada that determines the validity of Indigenous claims to traditional territories. Canada's legal jurisdiction over Indigenous nations denies Indigenous sovereignty: the right of Indigenous nations to the legal, political and economic autonomy that flows from their existence in North America prior to European arrival. The history of Indigenous-European relations has seen Indigenous sovereignty, once a respected political fact that governed diplomatic relationships, dissolve into paternalistic control on the part of the Government of Canada.

[1] I have opted to use the term Indigenous, as it is my understanding that is the preferred term when speaking of Indigenous populations a whole. I do not to use the term First Nations, as this term is not inclusive of Inuit and Metis peoples. I also do not use the term Aboriginal, as this is a state-imposed term, and as such does not respect the political autonomy of Indigenous nations. I do use the term Aboriginal, however, when referencing "Aboriginal rights" and "Aboriginal title" as these are legal concepts within the Canadian Constitution. In addition, the term Aboriginal is used throughout the *Tsilhqot'in Nation v. British Columbia* judicial ruling, and so this term appears in quoted sections of the ruling. Finally, the term "Indian" also appears in the quotations of Indigenous scholar N. Bruce Duthu; Duthu is a scholar studying in the United States where this term is more widely used.

When Europeans first arrived in North America, a nation-to-nation relationship between Indigenous peoples and the Crown was established. Treaties were entered into by the Crown and Indigenous nations to protect each nation's autonomy and to establish peaceful and just relationships. Treaties provide proof that the Crown acknowledged and respected Indigenous law, governance, territorial jurisdiction and, therefore, sovereignty (Macklem 1997 p. 127). In fact, respecting Indigenous sovereignty was a diplomatic necessity: the Crown was economically dependent on Indigenous nations and it was through the development of respectful and reciprocal relationships that peace and cooperation could be maintained (Macklem 1997 p. 127).

However, as the economic interdependence between Indigenous peoples and Europeans lessened, the respectful relations that had been established between the Crown and Indigenous nations eroded (Macklem 1997 p. 127-128). The necessity of establishing colonial control outweighed the Crown's responsibility to determine how the rights of Indigenous people would be expressed and protected within a new governmental order. The Crown began to deny Indigenous sovereignty and recast Indigenous-Crown relations in paternalistic terms. The denial of Indigenous sovereignty allowed the Canadian Government to enact policies designed to extinguish Indigenous territorial control and deny access to traditional territories, resulting in extreme social and economic devastation within Indigenous communities.

During the establishment of policies designed to remove them from their lands, Indigenous peoples actively fought to prevent the continued erosion of their territories. This fight saw a small win in 1982 when the *Constitution Act* "recognized and affirmed" Aboriginal rights. Despite the fact that the *Constitution Act* did not explicitly define what Aboriginal rights entailed (McNeil 2004 p. 127), the affirmation of Aboriginal rights created a legal opening. Subsequent Supreme Court rulings have further defined what is included within Aboriginal rights. In 1997

the *Delgamuukw v British Columbia* case established Aboriginal title as an Aboriginal right protected by the *Constitution Act* (Henderson 2004 p. 69). Essentially, the law of Aboriginal title is the legal right of Indigenous nations to occupy and control their traditional territories and stems from the existence of Indigenous legal and political systems that pre-date European contact (Borrows & Rotman 1998 p. 62). Lands held under Aboriginal title differ from reserve lands, which are held in trust for Indigenous people by the Crown and subject to government control of land use (The Indian Act 1985 Sect 18 (1)). In contrast, lands held under Aboriginal title can be used in whatever manner the title-holder decides, as long as the land is preserved for the enjoyment and benefit of future generations. Aboriginal title as a legal right has created potential for Indigenous nations to regain control over their traditional territories.

Despite the legal and political gains of Indigenous nations in the past four decades, there is still a long way to go in reinstating Indigenous autonomy. While the right to Aboriginal title has been established, Indigenous nations seeking a declaration of Aboriginal title have been widely unsuccessful. The Tsilhqot'in Nation is the only Indigenous nation in Canada to gain legal recognition of Aboriginal title to their territorial lands (Gunn 2014 p. 27). Furthermore, Aboriginal title as outlined within Canadian common law is not an acknowledgment of Indigenous sovereignty. Aboriginal title grants land ownership rights but does not necessarily grant the rights of political and legal jurisdiction afforded to sovereign nations. Aboriginal title and Indigenous sovereignty are, however, closely linked, and the ways in which Aboriginal title is outlined and described in judicial rulings has political impact on the realizations of Indigenous governance[2].

[2] Corntassel and Primeau (1995) explain that "'Indigenous sovereignty' can take on multiple meanings ranging from 'cultural integrity' to 'internal management'" (p. 361). Similarly, Macklem (1993) asserts that "'Sovereignty' means different things to different people. Its meaning is not entirely shared across particular groups, societies, or cultures, nor does sovereignty's meaning somehow inhere in the word. Instead, its meaning or value is a function of

Sovereignty is an essential concept when discussing Indigenous governance because it forms the foundation for the Indigenous right to self-determination[3]. In the areas of Canada covered by treaties, Indigenous sovereignty provides essential context for interpreting the true intent of those treaties and ensuring all parties interpret them as nation-to-nation agreements. In areas of Canada not governed by treaty agreements, sovereignty provides the foundation for reinstating Indigenous territorial control. Asserting Indigenous sovereignty is an act of Indigenous nationalism: "a movement in favour of political and cultural autonomy whose institutional expression encompasses collective forms of self-government and a relationship of equals between Aboriginal and non-Aboriginal nations" (Murphy 2009 p. 266). In fact, the "inherent right to self-government" for Indigenous nations is protected under section 35 of the *Constitution Act* (The Government of Canada 2014).

It is my understanding of the importance of the concept of Indigenous sovereignty within the context of Aboriginal rights that has defined the research focus of this paper. As a non-Indigenous woman of European ancestry, I feel it necessary to ensure my research does not encroach on scholarly projects more appropriately executed by Indigenous scholars. To this end, I will focus on the Canadian legal system—the jurisprudence of my cultural background—in order to come to a better understanding of the ways this system has supported the dispossession of Indigenous lands and territories. I rely primarily on Indigenous political and legal scholars to understand Western jurisprudence—their work illuminates elements of my culture's

interpretive acts by those who possess it and those who seek it. Sovereignty is a contested site of interpretation, and thus remains open to transformation and application to diverse forms of human association" (p. 1346). I use the term sovereignty in a general sense to capture the idea of autonomy and territorial jurisdiction of Indigenous nations. I do not attempt to define what this would look like or how it can be realized legally and politically within Canada.

[3] "Self-determination encompasses the right of First Nations to choose how and by whom they will be governed and to determine the nature and extent of their relationship with other self-determining peoples in the absence of external interference and domination" (Murphy 2009 p. 266)

philosophies, assumptions, and worldviews that often remain invisible within a Eurocentric framework. I contextualize the process of my research as a way to better understand my role in working towards rebuilding a nation-to-nation relationship between Indigenous and non-Indigenous peoples.

My method of inquiry is founded on the conception of law as narrative, a strand of legal scholarship that explores the discursive, linguistic and rhetorical elements within legal texts that serve a narrative function. I explore three discursive and narrative strategies utilized within judicial rulings that serve to uphold Crown sovereignty by casting Indigenous peoples in an historical, pre-modern light. First, the appeal to legal origin stories based on the legal fiction of the doctrine of discovery supports and enhances Crown authority by casting Crown sovereignty as an unbreakable legal doctrine. Second, the introduction of dominant societal narratives surrounding Indigenous identity plays an important role in legitimizing state objectives and influencing legal outcomes. Finally, retrospective narrative logic is a tool employed within the argumentation of judicial rulings that confines legal outcomes and ensures that a particular legal goal is made to seem inevitable and just. I argue that Indigenous sovereignty is undermined in legal discourse through the use of concealed narrative acts, which serve to sterilize racialized legal doctrines and distort the social and political history of relations between Indigenous nations and the Crown.

LITERATURE REVIEW

The following literature review examines two categories within law as narrative scholarship: critical race theory and law and literature research. I have divided this literature review into three sections, each of which defines the discursive and narrative strategies noted in the introduction and explains how these concepts conceal fallacies surrounding Canadian sovereignty by contributing to what Irlbacher-Fox (2009) terms the "historicization of indigeneity" (p. 34).

Legal Origin Stories

Legal origin stories are narratives that form the foundation of a legally accepted concept. They contain a certain telling of historical events as well as philosophical assumptions. Because legal origin stories form a legal foundation, they are reinforced every time a legal concept that relies on them is asserted. Therefore, legal origin stories contain great authority. I am concerned with legal origin stories that represent legal fictions—in particular, narratives that support Crown sovereignty over Indigenous peoples in Canada. I first discuss how I have arrived at the concept of a legal origin story through reference to the literature. I then argue that the doctrine of discovery is a legal origin story that forms the foundation of Crown sovereignty as a legally accepted concept.

The concept of legal origin stories is related to Brooks' (2003) discussion of the "discourse of origins" (100). Brooks applies literary analysis to judicial opinions in order to understand the narrative devices integral to legal argumentation, a practice that fits within law and literature scholarship. Brooks is concerned with how the explicit reference to judicial origins is used rhetorically in order to give greater weight and authority to judicial opinions. Brooks

(2003) gives the example of the use of the word "covenant" by a justice referencing the United States Constitution in a Supreme Court ruling (p. 98). He explains that the use of the word "covenant" frames the judicial ruling as an allegiance to a foundational legal text, making the legal decision appear impartial and unbiased (Brooks 2003 p. 98). The reference to and emphasis on legal origins creates a more convincing line of argumentation by making a judicial ruling seem inevitable. Brooks (1996) explains that judicial decisions are "…interwoven with the story of precedent and rule, reaching back to the constitutional origin, so that the desired result is made to seem an inevitable entailment" (p. 21). The discourse of origins is therefore a rhetorical tactic that conceals the judicial partiality involved in interpreting legal principles—the ruling is thus portrayed as an execution of "the rule of law" rather than exposing "…the terrifying arbitrariness that underlies much of the legal system" (Levinson 1996 p. 189).

Brooks' (2003) discussion of the discourse of origins shows the role of the explicit reference to origins in affording greater authority to legal decision-making. However, my exploration of the literature revealed that legal origin stories are often implied, rather than invoked or supplanted through origin discourse. In fact, the invisibility of a legal origin story affords that story greater power—it is taken for granted, assumed to be legitimate, and because of a lack of questioning, the story gains greater weight and authority through its repetition. In a Canadian context, the doctrine of discovery represents a legal origin story that, although it is not explicitly referenced as the source of Crown authority, is "rigorously advanced" (Borrows & Rotman 1998 p. 6) within the Canadian judicial system.

The doctrine of discovery allows for nations to claim territorial sovereignty to any unoccupied land—*terra nullius*—that they discover (Borrows & Rotman 1998 p. 6). In establishing colonial control within the "New World," European powers were required to appeal

to international law in order to legitimize their claims to sovereignty over other competing nations (Borrows & Rotman 1998 p. 10). The doctrine of discovery provided a measure of protection to Indigenous nations because it prevented the claiming of already occupied territory. In order to bypass the measure of protection that international legal doctrine provided Indigenous peoples and provide a legal foundation for British sovereignty, the Crown distorted the doctrine of discovery (Borrows & Rotman 1998 p. 10). The distortion was achieved by changing the concept of *terra nullius* to include lands not occupied by "civilized society" (Borrows & Rotman 1998 p. 6).

Through the distortion of *terra nullius*, the doctrine of discovery has become a legal origin story that contains philosophical assumptions of European superiority. Interpreting *terra nullius* as a lack of civility turned the doctrine of discovery into "…a racialized doctrine…that effectively deprived tribes of ownership interests in their lands because of their status as savage infidels, leaving them with a residual right of occupancy completely subject to the whim of the sovereign and terminable without compensation" (Duthu 2013 p.22). Duthu's (2013) use of inflammatory rhetoric showcases the violence of legal representations of Indigenous people hidden behind sanitized legal jargon, which allows the doctrine of discovery to remain invisible and undetected. Here again we see the power that invisibility gives to legal origin stories: the doctrine of discovery is never referenced or discussed in judicial rulings and so it cannot be interrogated or refuted.

Effectively, the origin story of the doctrine of discovery contributes to what Irlbacher-Fox (2009) terms the "historicization of indigeneity" (p.34) by incorporating civilizationist thinking into legal decision-making. Civilizationist thinking involves the ranking of "…societies on a scale of human development that measures their degree of material and moral intellectual

progress" (Murphy 2009 p. 253). The portrayal of Indigenous peoples as consistently behind Europeans in the processes of modernization, civilization and advancement allows Indigenous people to remain legally, politically and socially subordinate to Europeans. The denial of Indigenous sovereignty is, therefore, founded on a racialized assumption about human development.

Without the distortion of the doctrine of discovery, there is no legal foundation for the exertion of Canadian sovereignty in many parts of Canada. Yet, the process for resolving land disputes resides within the Canadian legal system and all Aboriginal rights must be "reconciled" with Canadian sovereignty—instead of Canada reconciling its claims against Indigenous sovereignty (Anderson 2011 p. 601, Borrows & Rotman 1998 p. 44-45). In British Columbia, for example, the Crown asserted sovereignty in 1846, despite a lack of engagement in treaty negotiations with Indigenous occupants. There are, therefore, no legal documents ceding Indigenous territory or granting European ownership within the province (Anderson 2011 p. 597-599). In many areas in Canada covered by treaties, European sovereignty is similarly unfounded. Primarily, treaties were diplomatic agreements meant to establish peaceful relations and most did not include the cession of land (Borrows & Rotman 1998 p.105)[4].

Because of the lack of legal foundation for Crown sovereignty in much of Canada, Anderson (2011) questions the appropriateness of solving land disputes between the Crown and

[4] Borrows (1997b) in "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government", discusses the Treaty of Niagara of 1764 as a foundational legal agreement in the creation of the Canadian nation-state" (p. 155). Borrows explains that the Treaty of Niagara was meant to clarify language used within the Royal Proclamation of 1763 in order to assert and reaffirm the nation-to-nation relationship between the British and the First Nations; it was a "…multination alliance in which no member gave up their sovereignty" (p. 161). The treaty agreement was documented according to *both* First Nation and British cultural protocols. The First Nations documented the treaty using the "two-row wampum belt," a beaded representation of the agreement of "mutual non-interference" (p. 163).

Indigenous people within Canadian courts (p. 592). Using the *Delgamuukw v. British Columbia* (1997) case as an example, he explains that "[t]he fact that the case was litigated in the Canadian court system…[shows that] it is the colonial power that makes up common law rules of Aboriginal title, and controls the interpretation of Aboriginal rights and title…" (Anderson 2011 p. 592). The use of the Canadian legal system to solve land disputes imbues the Canadian government with territorial sovereignty and legal jurisdiction. As a result, Indigenous peoples are continually blocked from legal decisions that would recognize their status as sovereign nations. The assumption of overriding Crown title within Canada implicitly appeals to the origin story of the doctrine of discovery and *terra nullius*: overriding territorial sovereignty resides with Canada because of a perceived lack of civility and advancement of Indigenous people at the time of contact.

Dominant Narratives

Narrative shapes the way we see and make sense of the world. King (2003) maintains that all societies and cultures are made up entirely of stories—it's "all we are" (p. 2). The stories and narratives of a culture contain beliefs, moral principles, ideologies and rituals (Sherwin 2000 p. 66). Dominant narratives are stories told by the dominant culture within a society that justify their superior position and uphold social, economic and racial hierarchies. Because dominant narratives are so integral to maintaining mainstream superiority, they are embedded within all forms of Western social and political exchange, including legal proceedings.

The importance of examining the role that dominant narratives play within judicial proceedings and decision-making was first identified by critical race theory. A central critical race theorist, Delgado (1989), explains legal meaning making as a "war between stories" (p.

2418), where normative narrative accounts of reality are heavily favoured (Delgado & Stefanic 2001 p. 41, Delgado 1990 p.110). Delgado maintains that narratives within legal proceedings often contain racial biases and assumptions that affect judicial decision-making. Because dominant narratives are commonplace, they often go undetected within the judicial process. To bring voice to marginalized experiences Delgado engages in counter-storytelling, a practice within legal scholarship that uses fiction to provide alternative accounts to jurisprudential issues. Counter-storytelling exposes which perspectives are heard and valued, and which are excluded within the courtroom. Not only does counter-storytelling bring voice to silenced minorities and provide new viewpoints from which to judge a dispute, it emphasizes how reliant the court is on stories: subjective, culturally-specific accounts about truth and reality.

In North America, dominant narratives contain societal preconceptions about Indigenous people that help to justify the colonial project and validate settler occupation. For example, Duthu (1991) explains that in the early twentieth century, imagery that depicted stereotypes of Indigenous people as "frozen-in-time" contributed to the "dying race" thesis (p. 83). The "dying race" thesis allowed for the erosion of tribal territory by legitimizing claims that the land was empty (Duthu 1991 p. 83). In other words, the supposed decline of the Indigenous population justified colonial expansion (Duthu 2013 p. 25). Indigenous stereotypes were, therefore, essential to the creation of an "imagined political community" (Duthu 2013 p. 25). Similarly, Dean (2001) explains the role of Canadian literature in "forgetting" Indigenous people through the tropes of indigenization and inheritance (p. 24). The trope of indigenization involves literary characters embodying traits of Indigenous peoples—for example, "instinctive knowledge" about land and subsistence (Dean 2001 p. 30). The trope of inheritance involves the portrayal of the European as a "legitimate inheritor" of Indigenous land (Dean 2001 p. 31). Dean calls this a "literary land

claim": an attempt to resolve the uncertainty of Canada's sovereignty through popular literature (p. 26). Stereotypical imagery and literary tropes both represent popularized narratives surrounding Indigenous identity that have justified colonialism in the minds of the European settlers.

Once an "imagined political community" (Duthu 2013 p.25) was constructed, national narratives containing misconceptions about Indigenous peoples were invoked in legal contexts. Delgado and Stefanic (2001) assert that the dominant public perception of cultural difference is as influential on legal outcomes as the legal principles themselves (pp. 42-43). Our "…received wisdoms, stock stories and suppositions" (Delgado & Stefanic 2001 p. 42) inform the interpretation of our laws (Delgado & Stefanic 2001 p. 43). Duthu (1991) asserts that courts "…'construct' images of Indians that comport with popular conceptions or views of Indian people" (p. 84). Duthu goes on to say that "[t]he Supreme Court's early precedents are replete with constructed images of Indian people that… condemn them as incorrigible, inferior, war-loving savages..." (p. 84). Goldberg and Washburn (2011) point to the continued existence of Indigenous stereotypes within that law, stating that legal rulings have consistently portrayed Indigenous people as "savages," and such views remain in Supreme Court rulings in the United States, never having been renounced (p. 14).

Dominant narratives that contain Indigenous stereotypes make sense of Crown sovereignty in the face of continued Indigenous occupation by historicizing indigeneity. Irlbacher-Fox (2009) explains that the "Indian as past" (p. 24) stereotype facilitates assimilative policies and supports the exertion of Crown sovereignty through the portrayal of Indigenous peoples as out-of-date communities in need of paternalistic rule in order to advance (p. 31, 34).

Legal decisions also represent a constitutive force, legitimizing and legalizing the historicized view of Indigenous peoples and supporting the dominant colonial narrative. In conducting a critical feminist analysis, Freeman (1991) uses J.B. White's model of "constitutive rhetoric" to describe the ways in which legal arguments contribute to female subordination (p. 307). For Freeman, "Legal decisions endure. In addition to the precedential value of their holdings, their language is repeated in subsequent decisions. The imagery they create infects the culture" (Freeman 1991 p. 312). Freeman's discussion of constitutive rhetoric can be applied to Indigenous rights because it accounts for the ways in which the law contributes to the continued subordination of marginalized groups. For example, Aboriginal rights are legally defined as the right to engage in customs integral to physical and cultural survival of Indigenous people *prior* to European contact (Borrows 1997a p. 45). The protection of only pre-contact customs has frozen Aboriginal rights in time, and has introduced "disturbing stereotypes" about Indigenous people (Borrows 1997a p. 45, 49). Indigenous peoples framing their rights to land and customs must continually contribute to the "Indian-as-Past" stereotype. Similarly, the frozen nature of Aboriginal rights has hindered the continued growth and development essential for the survival of all societies (Borrows 1997a p. 49-50). In fact, the legal propagation of historicized indigeneity has served a productive function for colonial interests. Hunt (1990) states that the law "…lends authoritative legitimations to the norms and projects through which the state seeks to govern civil society" (p. 316). By both invoking and propagating dominant narratives that historicize indigeneity, documents produced by the legal systems in Canada and the United States have become tools for asserting colonial sovereignty and delegitimizing Indigenous claims to rights and territory.

Retrospective Narrative Logic

Judicial decisions are persuasive documents. Their purpose is to convince a judicial audience and the public at large that a particular ruling is logical and just, thereby upholding the authority of the courts. A key element in judicial persuasion is the use of narrative logic. Narrative logic is the primary way in which judicial opinions organize and make sense of events in legal question. To locate and unpack the use of narrative logic is to gain insight into the persuasive tactics used in judicial rhetoric and, perhaps, understand the motivations behind legal decisions.

Brooks (1996) explains that narrative logic can be located within judicial texts by examining how a sequence of events has been strung together to present a plausible and coherent chronology. On the surface, it would seem that the sequencing of the events in question within a legal case would be a straightforward reconstruction. However, Henderson (2006) asserts that legal cases are often "…awash in a sea of diametrically opposed stories, conflicting eyewitness accounts, contradictory evidence, incongruous precedents, unclear controlling laws, incompatible expert reports, ambiguous legal documents, and so forth" (p. 914-915). Narrative logic allows judges to create order out of chaos, telling a compelling and convincing story that leads to an inevitable conclusion.

A key component of narrative is retrospectivity logic. Retrospective logic is the use of a particular end or outcome in the attribution of meaning to events that have preceded that outcome. To explain further, fictional stories lead their audience through a narrative towards an ending. The audience knows that there will be an ending coming and they also know that the ending will provide some sort of clarity as to the meaning of the events within the story. Brooks (2003) tells us that a "…large part of the coherence of narrative derives from the knowledge that

an end lies in wait, to complete and elucidate whatever is put in motion at the start" (Brooks 2003 p.76). As tellers and listeners of stories, we have come to expect that an ending will explain whatever has preceded it—we have become accustomed to retrospective narrative logic.

Within a judicial context, retrospective logic is used to ensure that judgments support a particular legal outcome: the logic of the ruling works backward, starting from the end, "…to announce an effect that has the force of law and then [finding] the rhetoric that will persuade [the] audience that this effect has behind it an inexorable logic leading to an inevitable result" (Brooks 1996 20-21). However, the meaning and clarity that the ending attributes to the main body of the story does not necessarily represent the full truth or complexity of how and why those events happened. For Brooks (2003), the causal connection between events arranged chronologically is a phenomenon specific to narrative and does not necessarily reflect the way in which real events occur (p. 82). To illustrate the concept of retrospective narrative logic, Brooks uses the example of "inevitable discovery," a legal provision that allows for the inclusion of evidence that may have been obtained illegally on the basis that it would have *eventually* been found by legal means (p. 74). For example, the illegal questioning of a murder suspect without the presence of an attorney leads to the discovery of the victim's body. The evidence of the body's location and condition is allowed on the basis that *eventually* a search crew would have found the body (Brooks 2003 p. 74). The assumption that the victim's body would have been found eventually is the attribution of meaning to the events in question after the fact. It can never be known if the search crew would have found the body—it is merely an assumption. The assumption of the inevitable discovery of the body is an example of retrospective logic.

To hold that judicial opinions employ retrospective logic is not to say that the legal system is wholly corrupt, devising plot lines and inventing tales in order to persuade an audience.

Instead, retrospective logic is used within the argumentation of the ruling in order to present that ruling in a "…plausible and persuasive way, according to established principle, then find the connecting thread of narrative to take it back to its origins" (Brooks 1996 p. 21). In this way, judicial rulings appeal to the human desire for a "prophecy and fulfillment" structure, where a legal opinion is put into terms of origins and discovery (Brooks 2003 p. 100).

Within Indigenous land claim cases, retrospective narrative logic enables the Crown to control legal outcomes and limit realizations of Aboriginal rights and Aboriginal title. More specifically, retrospective logic has enabled the court to suppress Indigenous sovereignty by fixing Aboriginal rights in time. Aboriginal rights were placed within the *Constitutional Act* in 1982—instead of being contained within the Charter of Rights and Freedoms (Borrows 1997a p. 37). Section 35(1) of the *Constitution Act* states: "'existing [A]boriginal and treaty rights of [A]boriginal people of Canada are hereby recognized and affirmed'" (Borrows 1997a p. 38). Aboriginal rights are derived from the fact that Indigenous people existed within North America prior to European arrival (Borrows 1997a p. 42). Because the range and scope of Aboriginal rights were not defined within the *Constitution Act*, Supreme Court rulings throughout the 20th and 21st century have determined the expression and realization of these rights. Throughout the Supreme Court rulings on Aboriginal rights, the Court has had to overcome the paradox of Crown sovereignty: if Indigenous peoples' rights stem from their pre-contact occupation, "…how did the Crown gain their right to adjudicate here?" (Borrows 1997a p. 42).

In order to bypass this paradox and protect the legal jurisdiction and territorial sovereignty of the Crown, the Supreme Court utilized retrospective logic in their definition of Aboriginal rights. Aboriginal rights were eventually defined as rights to customs integral to Indigenous societies *prior* to European contact (Borrows 1997a p. 43). Defining Aboriginal

rights in pre-contact terms has, "…crystallized Aboriginal rights at an arbitrary date" (Borrows 1997a p. 49). The arbitrariness of choosing pre-contact as a measurement for rights integral to Indigenous nations reveals that the court is using the end result to define the beginning. Put another way, the logic of this ruling works from the ending: the sovereignty of the Crown must be maintained, so the coherence of the narrative rests on choosing contact as the point of origin.

Similarly, the use of retrospective logic in defining Aboriginal rights serves to enhance the view of Indigenous people as out-of-date and historical. Borrows (1997a) explains that "Aboriginal is retrospective. It is about what was, 'once upon a time,' central to the survival of a community, not necessarily about what is central, significant and distinctive to the survival of these communities today" (Borrows 1997a p. 43). Borrows aptly asks,

> Why is it that European laws, practices and traditions, some of which developed solely through contact with Aboriginal peoples, are allowed to grow and develop from the moment of contact, while Aboriginal laws and practices, which also developed from the same moment of contact, are stifled in their progression? (p. 58)

Within land claim cases, the use of retrospective narrative logic extends beyond the definition of Aboriginal rights. Suzack (2011) asserts that the Courts' reasoning in the *Delgamuukw v. British Columbia* case represents a form of "means-ends analysis": a judicial goal is defined and narrative devices are used to support that judicial goal (p. 449). Suzack explains that in *Delgamuukw*, the Court describes the right to engage in cultural customs as "parasitic" to Aboriginal title (p. 455). The ruling states:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves [A]boriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and

> traditions which are integral to the distinctive cultures of [A]boriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title (*Delgamuukw v. British Columbia* 1997 para. 111)

Suzack asserts that the use of the term "parasitic" rather than "subsidiary" represents the use of metaphor as a linguistic tool for recasting the relationship between Indigenous people and the Crown: "[r]econciliation of competing relations thus shows itself to be a process that depends on linguistic invention and the 'retrospective prophecy' enabled by metaphor" (p. 455). Here we see how the relationship between Indigenous nations and the Crown is subtly presented in a way that supports Crown sovereignty. The representation of Crown/Indigenous relations is an invented narrative, an historical account adjusted slightly, yet powerfully, to confine Aboriginal title so that it does not take away from Crown sovereignty. Retrospective narrative logic is thus a powerful tool for ensuring that all legal decisions with regard to Aboriginal rights do not weaken Crown authority.

The literature I have reviewed shows how overriding Crown sovereignty is upheld through discursive means, despite the existence of Indigenous people in Canada prior to European arrival. The literature represents a blend of law and literature scholarship and critical race theory and showcases discursive and narrative strategies within legal decisions that uphold Crown sovereignty and negate Indigenous sovereignty. Through an appeal to legal origin stories, the Crown provides a foundation for the assertion of territorial sovereignty by appealing to a distorted version of *terra nullius*. The incorporation of dominant narratives that portray Indigenous peoples only in pre-contact terms influences judicial rulings, and judicial rulings legitimize and further propagate these narratives. Finally, retrospective narrative logic is

employed in judicial rulings to attribute causality within a sequence of events that will uphold Crown sovereignty. Interrogating legal texts that control the outcomes of competing sovereign interests is an important task if we are to move beyond colonialism and realize legal pluralism within Canada. For, as Borrows (1997a) asserts "…if Aboriginal rights emerged through the meeting of two legal cultures, then Aboriginal rights must be litigated by reference to both societies' laws" (p. 60)[5]. In the remainder of this paper, I apply the narrative concepts outlined in this literature review to the judicial ruling in the *Tsilhqot'in Nation V. British Columbia* case. I have chosen this case because it is the first time that Aboriginal title has been granted within Canada and, therefore, provides an unprecedented opportunity for examining the paradoxes of acknowledging Aboriginal title without acknowledging Indigenous sovereignty. In my analysis of the judicial ruling, I locate areas where the narrative and discursive tactics of legal origin stories, dominant narratives and retrospective logic impact the realization of Indigenous sovereignty.

[5] Duthu (2013), in *Shadow Nations: Tribal Sovereignty and the Limits of Legal Pluralism*, challenges legal centralism, defined by John Griffiths as "'the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions'" (p. 9). According to Griffiths and Hookers, and quoted by Duthu, most societies incorporate some measure of legal pluralism with "'multiple systems of legal obligation" existing together (p. 9).

BACKGROUND: TSILHQOT'IN NATION V. BRITISH COLUMBIA

In 1983, the Tsilhqot'in Nation was one of many Indigenous nations in British Columbia occupying lands with unresolved land claims. At this time, the province of British Columbia granted a logging permit to Carrier Lumber Ltd. to land occupied by the Tsilhqot'in Nation (*Tsilhqot'in Nation v. British Columbia* 2014 Para. 5). The Tsilhqot'in Nation did not approve of the logging and enacted measures to get Carrier Lumber Ltd. to cease their logging operations on Tsilhqot'in land. The dispute eventually culminated in a blockade in front of a bridge used by the logging company (Para. 5). At this point, the British Columbia Premier stepped in, promising to engage in negotiations with the Tsilhqot'in Nation in order to ensure that all logging operations would cease until consent had been obtained. Unfortunately, negotiations between the Tsilhqot'in Nation and the Ministry of Forests were unsuccessful and the parties could not reach a resolution (Para. 5). In 1998, the Tsilhqot'in Nation filed a claim for Aboriginal title to their ancestral territory, which included the area where the logging took place (Para. 5), and the trial process for determining the validity of this claim commenced.

The trial process was lengthy, passing through the British Columbia Supreme Court to the British Columbia Court of Appeal, and finally, to the Supreme Court of Canada. In the British Columbia Supreme Court, Justice Vickers found that the Tsilhqot'in people were entitled to a declaration of Aboriginal title. However, he did not make this declaration for procedural reasons (Para. 7). Next, the case went to the British Columbia Court of Appeal, where the judge ruled that title to the entire territory had not been established, but left open the possibility that the Tsilhqot'in people could seek declarations of Aboriginal title within specific sites of settlement (Para. 8). Finally, the case went to the Supreme Court of Canada, where Chief Justice McLachlin granted the Tsilhqot'in people the first declaration of Aboriginal title in Canada.

Because this judicial ruling is the first and only declaration of Aboriginal title in Canada, it is an ideal legal text for analyzing the relationship between Indigenous sovereignty and Aboriginal title. As stated above, Aboriginal title-holders are granted ownership and a level of control over their lands. The level of control afforded Aboriginal title-holders far exceeds what is afforded to those occupying reserve lands, which are held in trust by the Crown for Indigenous nations and subject to governmental control. However, Aboriginal title-holders are not granted political, legal and economic autonomy—in other words, sovereignty. Yet, both Indigenous sovereignty and Aboriginal title stem from the same legal fact: Indigenous nations occupied North America prior to European arrival. Because Indigenous sovereignty and Aboriginal title stem from the same legal origin, it would be logical to assume that granting Aboriginal title would involve an acknowledgement of Indigenous sovereignty. The fact that the judicial ruling grants Aboriginal title without acknowledging Indigenous sovereignty provides an opportunity for analyzing the tactics utilized within legal discourse for circumventing Indigenous sovereignty.

METHODS

I conducted a qualitative content analysis of the *Tsilhqot'in Nation v. British Columbia* (2014) judicial ruling using the theoretical framework outlined in my literature review. The judicial ruling was accessed on the Supreme Court of Canada's website at: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do. The ruling contains 9 sections, 152 paragraphs, and is approximately 16, 500 words in length. My research was guided by a central research question: how do discursive and narrative strategies uphold Crown authority and deny Indigenous sovereignty within the *Tsilhqot'in Nation v. British Columbia* judicial ruling?

I created three coding categories for the content analysis: legal origin stories, dominant narratives and retrospective narrative logic. My coding technique does not represent an exhaustive attempt to capture all instances of the narrative and discursive devices defined by my literature review. The coding process was meant to facilitate the identification of the most relevant and profound instances of legal origin stories, dominant narratives and retrospective logic

To identify areas where the judicial ruling invoked, relied upon or supported the legal origin story of the doctrine of discovery, I coded for both implicit and explicit references to the doctrine. This involved an analysis at the word, sentence, and paragraph levels. For example, a micro-analysis of words and phrases revealed the term "pre-sovereignty," which represents an implicit reference to the doctrine of discovery and showcases the distortion of such doctrine by suggesting the prior occupation of Indigenous people before European arrival while simultaneously asserting European sovereignty over Indigenous people upon contact. Such an assertion necessarily involves the expansion of *terra nullius* to include lands occupied by "uncivilized" societies. At the sentence and paragraph level, I searched for lines of argumentation that relied on the doctrine of discovery as a foundation for Crown sovereignty.

In locating the presence of dominant narratives within the judicial ruling, I coded for descriptions of and references to Indigenous cultural identity. I then analyzed whether the depictions of Indigenous people within the judicial ruling serve to historicize indigeneity, determining if descriptions of Indigenous identity contributed to the "Indian-as-past" stereotype, as described by Irlbacher-Fox (2009). For example, identification of the cultural attributes of the Tsilhqot'in people revealed that those attributes were being used to place land-use restrictions on the declaration of Aboriginal title.

In searching for retrospective logic, I coded for references to actions conducted by the Tsilhqot'in Nation, the Crown and the Canadian government, descriptions of events, and references to precedent established by earlier court cases. I then analyzed the connection between each, looking at how causality is established and how the sequence of events and actions is woven together with cases of precedential importance into a coherent narrative. My task here was to decipher if the sequence of events described in the judicial ruling is arranged in a way that makes Crown sovereignty inevitable. For example, the sequence of events that lead to Aboriginal title and Crown sovereignty omits the fact of Indigenous sovereignty in order to make the assertion of Crown sovereignty appear a logical conclusion. The erasure of Indigenous sovereignty represents a retrospective act, a narrative omission.

FINDINGS & DISCUSSION

Through my analysis of the judicial ruling in the *Tsilhqot'in Nation v. British Columbia* case, I identified several instances where the narrative and discursive tactics described within my literature review were employed, effectively upholding Crown sovereignty and negating Indigenous sovereignty. In this section, I describe my findings with regard to the narrative and discursive analysis of the text and discuss the relevance and importance of those findings. My discussion of the judicial ruling does not represent an analysis of the legal implications associated with the ruling, nor do I attempt to outline the benefits and achievements of the case. Instead, I look at the ways in which the ruling discursively supports State governance over Indigenous people. I have organized the discussion of my analysis into the three categories identified within my literature review: legal origin stories, dominant narratives, and retrospective narrative logic. The title of each section also includes a relevant quotation from the judicial ruling meant to highlight key examples of the narrative and discursive devices at work.

Legal Origin Stories: "Acts of Occupation"

The doctrine of discovery remains an unvoiced legal foundation that fortifies Crown sovereignty, allowing it to go unquestioned. While there is no explicit reference to the doctrine of discovery as the source of Crown sovereignty, it is invoked implicitly through the assumed legitimacy of underlying Crown title, and the lack of acknowledgement of Indigenous nations as sovereign entities. For example, phrases such as "acts of occupation" and "Aboriginal occupation pre-sovereignty" are juxtaposed with phrases where Crown authority is taken for granted, such as "pre-sovereignty" and the "assertion of Crown sovereignty." Additionally, it is clear that the MacLachlin C.J. decision is based on the Tsilhqot'in Nation adequately proving sufficient occupation. The reliance on occupation as the foundation for Aboriginal title reduces Indigenous

peoples to "occupants" and denies their status as sovereign nations. The denial of Indigenous sovereignty and the assumption of Crown sovereignty both rely on the distortion of the definition of *terra nullius*.

Within this judicial ruling the origin story for Crown sovereignty is confined to a single, neatly packaged paragraph:

> At the time of the assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation of 1763. The Aboriginal interest in the land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown. (Para 69)

While this passage shows that MacLachlin C.J. explicitly rejects the doctrine of discovery and *terra nullius*, there is no attempt made to outline the legal foundation for Crown sovereignty. If the land was owned and occupied prior to European arrival, how did the Crown gain underlying title to all lands in British Columbia and sovereignty over the territory? The legal foundation for the establishment of Crown sovereignty and underlying title is never discussed or defined within the judicial ruling—the distortion of *terra nullius* provides the only explanation for Crown sovereignty. The lack of a clear legal description of Crown sovereignty is consistent with past Supreme Court cases regarding Aboriginal title: the Court continues to avoid making declarations about the origins of Crown sovereignty, allowing the Crown's jurisdiction over Indigenous lands to go unquestioned (Borrows and Rotman 1998 p. 68, 104).

Indeed, the unquestioned assertion of Crown sovereignty is a political and economic necessity for Canada. Corntassel et al. (2009) explain that federal and provincial governments seek "certainty and legitimation" of the Crown's title to lands throughout Canada in order to "…secure a stable land base to facilitate corporate investment" (p. 145). It is in this context that the phrase, "…reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown" (Para 81), takes on new meaning. The process of "reconciling" Aboriginal pre-occupation with underlying Crown sovereignty represents an attempt to define and legitimate a legal foundation. The legal origin point is the assertion of Crown sovereignty—the extinguishment of Indigenous sovereignty is never addressed. In this instance, the term "reconcile" enhances origins, by asserting that all expressions of Aboriginal rights and title must not take away from Crown sovereignty. Crown sovereignty becomes the legal foundation that must never be questioned.

Next, through an emphasis on Indigenous "acts of occupation" (Para 38), MacLachlin C.J. evades the issue of Indigenous sovereignty and nationhood while continuing to affirm Crown sovereignty. The lack of recognition for Indigenous sovereignty is an example of how entrenched the doctrine of discovery has become within Canadian Indigenous law.

While MacLachlin C.J. states that *terra nullius* did not apply to Indigenous nations in Canada, the case revolves around disproving the doctrine of discovery. As discussed earlier, the doctrine of discovery was used by the Crown to gain international recognition of their territorial control over lands in North America (Borrows & Rotman 1998 p. 5-6). The Crown relied on a distorted view of the concept of *terra nullius* that included lands not occupied by groups with the requisite levels of civility and political organization (Borrows & Rotman 1998 p. 5-6). This "civilizationist" thinking stemmed from political philosophers such as John Locke, who viewed

the European colonization of North America as justified because "North American Indians merely roamed over their territories and thus were derelict in their natural duty to make productive use of the land via European modes of cultivation" (Murphy 2009 p. 257).

The concept of *terra nullius* within the doctrine of discovery, therefore, contains two elements: the occupation of people on the land, and the level of governance and social organization that those people exhibit. Disproving the doctrine of discovery requires proving two essential elements: we were here and we were governing. The treatment within the judicial ruling of the separate elements of occupation and governance is where the doctrine of discovery is reaffirmed. First, while prior occupation is acknowledged, the case hinges on the Tsilhqot'in Nation proving that occupation. Second, by focusing on the requirements of occupation on the land, the case ignores markers of Indigenous sovereignty and nationhood that would provide compelling legal reasoning for the acknowledgement of Indigenous sovereignty.

Throughout the judicial ruling, the occupation of the Tsilhqot'in people prior to European arrival is acknowledged, yet the burden of proving that occupation is placed on the Tsilhqot'in Nation. In the judicial ruling, the judge applies the test for Aboriginal title established in *Delgamuukw*, which involves ensuring that occupation meets three characteristics: "[i]t must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive"* (Para 25). Despite the fact that "…underlying Crown title is subject to Aboriginal land interests" (Para 18), "[t]he claimant group bears the onus of establishing Aboriginal title" (Para 50). This begs the question, if the doctrine of discovery did *not* apply, why do Indigenous groups bear the onus of proving occupation? Given the fact that Indigenous peoples occupied and governed territories prior to European arrival, it seems highly unfair that they must go through the process of proving what has already been acknowledged and affirmed in the

Constitution Act, and previous Supreme Court cases. By placing Indigenous nations in the position of proving their occupation, we are continually feeding into the narrative of the doctrine of discovery.

In addition, the proof of occupation is viewed through the lens of British common law and there must be "intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law" (Para 42). There is recognition of the need to look "to Aboriginal culture and practices, and [compare] them in a culturally-sensitive way with what was required at common law to establish title on the basis of occupation" (Para 50). However, it is clear that Western standards are paramount: "…regular use of territories for hunting, fishing, trapping and foraging is 'sufficient' use to ground Aboriginal title, provided that such use, on the facts of particular cases, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law" (Para 38). The Supreme Court makes some accommodations for the cultural differences of the respective parties; however, this accommodation does not go very far in shifting the power structures between Indigenous people and the Crown. Standards of land use under British common law are sometimes inconsistent with Indigenous ways of occupying the land and different conceptions of land use make Indigenous land highly susceptible to *terra nullius*. Measuring Indigenous "acts of occupation" using Western common law standards invokes the civilizationist thinking that established British colonial rule through the doctrine of discovery.

Most importantly, the emphasis on land use and "acts of occupation" ignores the political, legal and societal structures that denote a nation-state and provide compelling proof of territorial ownership. By not establishing Indigenous groups as sovereign nations the distortion

of the definition of *terra nullius* is invoked. A clear example of the lack of recognition of Indigenous sovereignty exists in paragraph 75 of the judicial ruling: "Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group" (Para 75). The phrase "pre-sovereignty occupation" (Para. 26, 30, 45) is repeated several times in the judicial ruling. This phrase speaks volumes about how the Court views the relationship between Indigenous peoples and the government of Canada: there is no delineation between European or Indigenous sovereignty—sovereignty is only meant to apply to Canada as a nation-state.

Macklem (1993) asserts that the prior sovereignty of Indigenous nations is a deeper legal claim than occupancy and essential for the furthering of Indigenous governance (p. 1315). Macklem explains that "[a] claim of prior sovereignty in defense of Indian government is indeed a stronger claim than one based solely on the fact of prior occupancy because it intimates that something more than the use and enjoyment of land was lost and ought to be restored" (p. 1334). In defining occupation as "use and enjoyment" of land, without acknowledging the Indigenous jurisdiction over territory indicative of sovereignty, the judicial ruling implicitly portrays Indigenous nations as uncivilized—not possessing the requisite complexity of political, social and economic structures necessary to legally ground sovereignty. Here we see the doctrine of discovery being "rigourously advanced" (Borrows & Rotman 1998 p. 6) through implicit means.

Furthermore, Aboriginal rights stem from pre-existing Indigenous legal systems that "…do not require a sovereign, the will of a political state, or the affirmation of outsiders to be legitimate…These legal systems have always operated out of their own force on Aboriginal peoples" (Henderson 2004 p. 71). Yet in the judicial ruling only hollow references to Aboriginal

law are made: Indigenous laws are listed among other Indigenous "perspectives" that must be considered when evaluating proof of occupation (Para 36, 41). The content of Indigenous laws are never discussed or incorporated into the ruling. McNeil (1997) explains that "[i]f Aboriginal title has its source in the land and laws of the Indigenous peoples prior to European colonization, one would expect that in Canadian courts existence of that title would depend on proof of those laws" (p. 136-137). In other words, a demonstration of laws and governance, rather than proof of occupancy, is a more appropriate way to gain legal recognition of territory, and an acknowledgment of Indigenous jurisprudence would represent a powerful recognition of Indigenous sovereignty. The lack of recognition of Indigenous jurisprudence is typical of Supreme Court rulings. Henderson (2004) explains that the Supreme Court does not go further in defining and incorporating Indigenous law than merely asserting the importance of being sensitive to Indigenous perspectives (p. 73).

In summary, the legal origin story of the doctrine of discovery is the legal foundation upon which Crown sovereignty rests. Without the doctrine of discovery, the Crown has no legal claim to the underlying title it has usurped. Within the judicial ruling, the doctrine of discovery is maintained as a legal origin point through both the assumption of Crown sovereignty and the denial of Indigenous sovereignty. The assumption of Crown sovereignty can be seen in the constant reference to Crown authority and underlying title without any discussion of how the Crown gained sovereign jurisdiction over lands in North America. Similarly, the focus within the judicial ruling on "acts of occupation" represents a denial of Indigenous sovereignty. Focusing on proof of occupancy as opposed to recognition of governance and jurisprudence prevents a line of argumentation that would provide a strong legal case for the acknowledgment of Indigenous

sovereignty. While the doctrine of discovery remains invisible within this judicial ruling, it is nevertheless a power legal origin story that continues to support the Crown's superior position.

Dominant Narratives: "Attachment to Land"

Through my analysis of the *Tsilhqot'in* Nation *v British Columbia* ruling, I identified the presence of dominant narratives that serve to portray Indigenous people in an historical light, as well as lines of argumentation that further supplant those dominant narratives. The use and propagation of dominant narratives within the *Tsilhqot'in* decision effectively maintains the status quo of Crown control over Indigenous lands. First, the *Tsilhqot'in* decision restricts land-use rights on the basis of cultural identity, freezing Aboriginal identity in time and furthering dominant conceptions of Indigenous identity as antiquated. For example, the phrase "attachment to land" is used as one reason for restricting land-use activities and suggests the inclusion of cultural attributes in determining the definition of Aboriginal title. While "attachment to land" may not be indicative of a dominant narrative in itself, the tying of rights to cultural attributes exposes Indigenous peoples to dominant narratives surrounding Indigenous identity that are already embedded within the law. Second, the judicial ruling utilizes "reconciliation discourse" (Corntassel & Holder 2008 p. 486), which contributes to dominant narratives that portray the injustices committed by the Crown as historical rather than ongoing. Packaged as the judicial goal of encouraging cooperative and peaceful relations between Indigenous and non-Indigenous peoples, reconciliation discourse represents a dominant narrative because it contributes to the myth that colonial injustices exist solely in the past. Representing the injustices committed against Indigenous peoples as historical acts makes Indigenous peoples themselves appear out-

of-date; current systemic suffering is blamed on the inability of Indigenous people to live in a modern context.

Dominant narratives surrounding Indigenous identity serve to uphold colonial control by portraying Indigenous people as outdated: the lack of advancement becomes the reason for paternalistic and assimilative governmental policies. The construction of dominant narratives has been aided by the legal system, which has described and defined Indigenous identity in pre-contact terms. Because Aboriginal rights are tied to cultural identity, Indigenous people must prove their distinct Indigenous identity and show continuity in their cultural practices from pre-contact times to present-day in order to be granted those rights. In an attempt to gain rights, Indigenous people must continually feed stereotypical definitions of Indigenous identity that have become embedded within the law.

The *Tsilhqot'in* decision limits the rights afforded by Aboriginal title on the basis of cultural identity, thereby subjecting Indigenous people to legally entrenched dominant narratives surrounding Indigenous identity. To begin, MacLachlin C.J. utilizes descriptions of Indigenous cultural identity as the foundation for restrictions placed on lands held under Aboriginal title. The ruling stipulated that the lands are not to be used in any way that would deprive future generations from using and benefiting from the land. Paragraph 67 states that non-traditional uses of land under Aboriginal title are permitted, "…provided these uses can be reconciled with the communal and ongoing nature of the group's attachment to the land" (Para 67). The phrases "attachment to the land" and "communal" impose a legal definition of Indigenous identity and use that identity to restrict the expression of rights.

Whether the above examples of legal definitions of Indigenous identity are accurate or not, the restriction of Aboriginal rights on the basis of these cultural attributes allows for the propagation of dominant narratives that make Indigeneity seem unmodern. If "attachment to land" and "communal" are not accurate descriptors used by the Tsilhqot'in Nation, it means that these definitions of identity have been externally imposed within the judicial process. The external imposition of identity descriptors means that those descriptions are likely to contain dominant conceptions of pre-contact Indigenous identity. Within judicial rulings, language is recycled. Unless there is a deliberate and rigorous attempt to repeal dominant narratives of Indigenous identity, the continual appeal to precedent within judicial reasoning means that Aboriginal rights rulings will contain the residue of historicized cultural identities.

Even if the cultural descriptions of the Tsilhqot'in people are accurate, they will be legally preserved and fixed. Capturing identity within the law time-stamps cultural attributes that are constantly evolving. Identities that are accurate today may not be accurate in the years to come and future cases that rely on proving Indigenous identity through Indigenous practices may have to rely on legally-defined attributes that are no longer relevant. Whether accurate or inaccurate, limiting Indigenous identity to Court definitions further supplants dominant narratives that justify colonial rule through the portrayal of Indigenous people as out-of-date and resistant to change.

In addition, attaching restrictions to Aboriginal title limits the advancement of Aboriginal nations, further feeding the dominant narrative that Indigenous nations are static. While preserving the land for the enjoyment of future generations is an admirable goal, the restriction places a level of oversight over Indigenous lands that owners of lands held under *fee simple* are not subject to. Because this is the first instance of Aboriginal title, there are no models for how to

proceed with major development projects that may significantly alter lands held under Aboriginal title. The judicial ruling does not outline the land use approval process, it simply states that, "Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises" (Para 74). One can surmise that the land use restrictions will only add to the many bureaucratic hoops Indigenous nations must jump through in order to enact change within their communities. Bureaucratic hoops add to the multiple ways in which Indigenous identity in this ruling serves to limit the range of land uses available to title holders, thereby contributing to the portrayal of indigeneity as static by preventing First Nations from developing their land, growing their economies, and governing their territories.

Dominant narratives that present Indigenous peoples as out-of-date serve a productive function: restricting rights to Court-defined attributes of cultural identity means that the further Indigenous peoples move away from these attributes, the harder it becomes for them to secure rights. To define the affordances and restrictions of Indigenous rights with reference to cultural attributes that may shift and change means that moving forward rights will be increasingly harder to obtain. Embedded within the *Tsilhqot'in* ruling is a clause that seems designed to limit future Tsilhqot'in appeals to Aboriginal rights. Quoting *Delgamuukw*, the ruling states that "…group title and cannot be alienated in a way that deprives future generations of control and benefit of the land" (Para 15). Later in the ruling it is further defined that Aboriginal title lands "…cannot be alienated except to the Crown" (Para 74). Whether lands are alienated to the Crown or a private party, the act would still deprive future generations of the land and title. The stipulation of alienating land only to the Crown provides the Crown with a residual right to Indigenous lands while maintaining the illusion of protection of Indigenous interests. The illusion of protection

allows the Crown to deny future claims on the basis that they performed their due diligence in granting and protecting Aboriginal rights. The future generations clause seems more about limiting future generations from making further land claims than about protecting future generations from the actions of their ancestors. It is in this way that dominant narratives surrounding Indigenous identity limit the extent to which Indigenous sovereignty can be realized.

Next, the judicial ruling presents a dominant conception of reconciliation that places the existence of colonial injustice in the past. When conceived of as the process of healing historical wounds and moving on from past wrongdoings, reconciliation portrays Indigenous peoples as living in the past. Reconciliation discourse shifts the responsibility for social suffering onto Indigenous peoples by using what Irlbacher-Fox (2009) calls an "injustice-as-history conflation" (p. 64). Government induced suffering is made an historical occurrence, and current suffering is an example of the inherent dysfunctional nature of Indigenous communities (p. 64). The injustice-as-history conflation, therefore, contributes to dominant narratives that make Indigeneity appear unmodern.

Within the judicial ruling there are two separate conceptions of reconciliation at work. Reconciliation is first introduced as the legal activity of determining how Aboriginal rights, which stem from prior occupation, will be expressed within the modern nation state of Canada; this project is termed the "…reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown" (Para 81, quotation from the Court of Appeal proceedings). However, the conception of reconciliation as the legal project of determining a just expression of Indigenous rights gives way to the mainstream conception of reconciliation as a political goal of restoring conciliatory relations between citizens. After describing reconciliation as a legal

project, MacLachlin C.J. outlines reconciliation as a project of reuniting Indigenous peoples and the settler community:

> What is at stake is nothing less that justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues are resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved. (Para 23)

The above passage represents a shift from talking about the migration of institutional powers to talking about how citizens within one nation can better "get along."

The social and political concept of reconciliation is further asserted when MacLachlin C.J. expresses her desire that the province and the group holding Aboriginal title will work together: "And it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both" (Para 105). This passage is an example of the superficiality of State imposed reconciliation. There is no discussion of how exactly the province and Indigenous peoples will move forward in a cooperative relationship. In the light of the fact that the judicial proceedings represent a decade-long legal conflict between the two parties, a comprehensive plan outlining how jurisdictional disputes will be handled is an important consideration. The casual attitude with regard to jurisdiction over environmental management shows a disregard for the systemic injustices that have prevented cooperation between the Tsilhqot'in Nation and the province of British Columbia. The ruling grossly underestimates the detrimental impact of current colonial policies,

contributing to the notion that current suffering experienced by Indigenous peoples is a result of their inability to thrive in a modern context.

Furthermore, the Tsilhqot'in Nation, in seeking legal recognition of Aboriginal title, was attempting the protection and environmental stewardship of their lands by stopping detrimental logging practices. To treat both parties equally in a call for cooperation is a dismissal of the lengths that Indigenous nations have gone to and continue to go to "to sustain the natural environment." The judicial ruling seems only to pay lip service to the development of cooperative relations, utilizing the dominant reconciliation discourse "…which seeks to legitimize the status quo rather than to rectify injustice for Indigenous communities" (Corntassel et al. 2009 p. 139). Corntassel and Holder (2008) assert that Crown calls for cooperation and relationship building represent the "…'politics of distraction' strategies practiced by policy elites in framing the discourse of reconciliation" (p. 486). In actuality, reconciliation policies as devised by the State "…favor solutions that minimize settler-colonial territorial and material sacrifice while maximizing political/legal expediency" (Corntassel & Holder 2008 p. 471).

The dominant narrative surrounding reconciliation places the injustices committed by the Crown primarily in the past, with no acknowledgement of current governmental policies that lead to the subjugation of Indigenous peoples. Corntassel (2009) explains that "…state applications of reconciliation tend to relegate all committed injustices to the past…" (p. 145). The *Tsilhqot'in* judicial ruling historicizes injustice by portraying reconciliation as a process of letting go of the past and moving forward: "Aboriginals and non-Aboriginals are 'all here to stay' and must of necessity move forward in a process of reconciliation" (Para 82). The phrase "all here to stay" is a quotation from the *Delgamuukw* judicial decision (Rotman 2004 p. 202); it implies that there is a necessity for reconciliation, but also an ease of moving forward. This

assertion assumes that simply letting go of historical injustices and atrocities can solve current disputes. If injustices are ongoing, a simplistic and dismissive statement like this one will not be a convincing reason for two parties to reconcile.

In effect, reconciliation discourse places an unfair burden on Indigenous people to make concessions and maintains an order of needs where Indigenous rights fall below those of "broader society." By stating that Europeans and Indigenous people are "all here to stay," instead of saying "European settlers are here to stay," the ruling erases the superior claim of Indigenous pre-occupation and treats each party as though they have equal claim to territory within Canada. Similarly, MacLachlin C.J. asserts several times that "…distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community" (Para 83, from Delgamuukw para 165) and therefore there is a need for the "…reconciliation of Aboriginal interests with those of the broader public" (Para 118). To serve the goal of ensuring that the needs of broader society are met, the ruling preserves the province's right to infringe upon Aboriginal title if there is "compelling and substantial public interest" (Para. 88). While MacLachlin C.J. states that the "..the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest" (Para 87), the needs of broader society coupled with public apathy towards Indigenous issues can very easily lead to infringement of Aboriginal title. Dominant reconciliation discourse places greater pressure on Indigenous peoples to make concessions in order to serve the goal of developing conciliatory relations. Too often Indigenous peoples are pushed towards cooperation, compromise and forgiveness without meaningful action on the part of Crown to make restitutions for past and current injustice.

In summary, the judicial ruling employs, through restrictions on land use and reconciliation discourse, dominant narratives that recast Indigenous issues with historical causes,

and contribute to the view that Indigenous identities are static and unchanging. While not explicitly furthering historicized notions of Indigenous identity, the ruling restricts land-use on the basis of cultural identity. As cultures shift and change, fixed notions of Indigenous identity may prevent future generations from gaining access to Aboriginal rights. Similarly, the dominant reconciliation discourse confines solutions to Indigenous/non-Indigenous relations to healing past wounds. A focus on historical wrongs ignores ongoing abuses. A call for reconciliation on the part of the Courts must be coupled with meaningful engagement in negotiation to determine the structure of ongoing relationships.

Retrospective narrative logic: "Pre-Sovereignty"

My analysis revealed retrospective narrative logic at work within the argumentation surrounding the discussion of Crown authority and the order of legal interests. Working from the unfounded premise of Crown sovereignty, the logic of this ruling moves backwards to present the history of relations between Indigenous people and Europeans in a way that asserts and affirms Crown sovereignty and underlying title—Crown sovereignty is the legal goal, towards which all argumentation must lead. First, the ruling rephrases and rewrites the historical fact of Indigenous sovereignty and nationhood in order to support Crown sovereignty. Crown authority is presented as superseding Indigenous authority, a legal argument that can only be achieved by working backward from the assumption of Crown authority towards the limiting of Indigenous sovereignty. Terms such as "pre-sovereignty" present a new sequence of historical events where Crown sovereignty is cast as inevitable. Second, the assertion of Crown sovereignty in British Columbia becomes the point of reference for measuring Indigenous occupation of territorial lands—this arbitrary date is chosen retrospectively to support Crown goals.

To begin, the argumentation within the ruling uses a retrospectively constructed causality to reinforce Crown sovereignty. To make sense of both Crown sovereignty and Indigenous occupation, the judicial ruling states that Crown sovereignty "…was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival" (Para. 69). The use of the term "burden" suggests that there is a problem of logic that must be solved because a desired outcome must be achieved. In other words, the prior-occupation of Indigenous peoples undermines the assertion of Crown sovereignty. The ruling moves on to define the source and scope of Aboriginal title in a way that does not undermine Crown authority:

> The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group" (Para 75).

This passage is an example of retrospective narrative logic: a causal sequence of events are strung together not as an accurate account of the historical relations between Europeans and Indigenous nations, but in a way that supports the legal goal of Crown sovereignty. To discuss the autonomy and independence of Indigenous nations would render the usurpation of Crown sovereignty and underlying title an illogical position; therefore, the ruling must avoid acknowledging pre-existing Indigenous autonomy.

Similarly, the judicial ruling utilizes retrospective narrative logic in the order of interests it presents. Rather than measuring Crown claims against underlying Indigenous title, the concept of "underlying Crown title" suggests a hierarchy of land jurisdiction where Crown authority supersedes Indigenous authority. In defining the residual Crown interest in lands held under Aboriginal title, the judicial ruling states that "[t]he content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it" (Para 70). More specifically:

> What remains, then, of the Crown's radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements —a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest…(Para 71)

The order of the subtraction of claims speaks volumes about the order of jurisdiction considered; and it is an order of jurisdiction defined retrospectively to solidify a claim that is not legally sound.

Finally, Aboriginal title is only granted if there is sufficient proof of occupation *prior* to the assertion of European sovereignty. Choosing pre-sovereignty as the window of time for assessing acts of occupation is arbitrary; pre-sovereignty is merely a point in time chosen retrospectively in order to confine realizations of Indigenous sovereignty. Aboriginal title is based on pre-sovereignty acts of occupation because section 35(1) of the *Constitution Act* defines Aboriginal rights as flowing from the existence of Indigenous peoples in North American prior to Europeans. In other words, Indigenous peoples are legally entitled to continued protection of specific rights because of their status as sovereign nations before European contact. The acknowledgment of the pre-existence of Indigenous peoples within the *Constitution Act* was a

powerful declaration, creating a wide opening for the realization of Indigenous rights. To maintain state authority and Crown jurisdiction, Aboriginal rights needed to be confined in some way so as not to "flood" Indigenous nations with power and control (Borrows 1997a p. 42). To this end, Supreme Court decisions following the *Constitution Act* defined Aboriginal rights and title in pre-contact terms, effectively limiting the scope of rights afforded to Indigenous peoples.

Underneath this limiting of Aboriginal rights and title is an assumption that the assertion of Crown sovereignty extinguished all Aboriginal rights. However, the reaffirmation of Aboriginal rights in the *Constitution Act* is testimony to the fact that Aboriginal rights survived and continued on following European. If Aboriginal rights were not extinguished with the assertion of Crown sovereignty, they must be allowed to evolve in order to attend to the ever-changing needs and realities of Indigenous people. Borrows (1997a) explains that the rights of non-Indigenous people have been allowed to change and evolve over time (p. 43). To choose an arbitrary point in the history of Indigenous-European relations and state that the rights exercised at this time represent the maximum level of rights achievable is a retrospective act intended to limit realizations of Indigenous nationhood and uphold Crown sovereignty.

An example of the arbitrariness of using pre-sovereignty to determine the modern realization of Indigenous rights can be seen in the definition of territorial boundaries. The Court determines the size of landmass that the Tsilhqot'in Nation is entitled to on the basis of their pre-sovereignty population, rather than the size of landmass required for their current population. In determining the validity of the claim to the territorial in question, the pre-sovereignty population of the Tsilhqot'in Nation was compared against the perceived carrying capacity of the territory claimed. The trial judge deemed the territory too large for a pre-sovereignty population of 400 members to occupy (Para 59). However, the Supreme Court determined that the land was only

able to support a small population: "…the land, while extensive, was harsh and was capable of supporting only 100-1000 people. The fact that the Aboriginal group was only about 400 people must be considered in the context of the carrying capacity of the land…" (Para 37). The current needs of the Tsilhqot'in Nation—now a population of 3000— are restricted to what was needed to sustain a pre-sovereignty population. If conceiving of Indigenous/Crown relations as nation-to nation, it would it be more appropriate to consider modern day populations and negotiate Aboriginal title based on a territory that would support such a population.

In summary, the logic of the judicial ruling weaves a narrative about Crown/Indigenous relations, the logic of which works retrospectively to deny Indigenous jurisprudence and limit the realization of Aboriginal rights to pre-contact occupation. The ruling erases Indigenous sovereignty in order to remove it as an obstacle in the path of Crown sovereignty. Similarly, Indigenous jurisprudence, which forms the foundation of Aboriginal rights, is treated as though it expired with the assertion of European sovereignty. All rights that stem from prior-occupation are thus confined to pre-sovereignty Indigenous practices, customs and attributes.

To summarize my findings and discussion, the judicial ruling utilizes the three narrative and discursive tactics identified in my literature review. These devices maintain the coherence of an argument that must uphold Crown sovereignty and authority. First, I determined that the judicial ruling relies on the doctrine of discovery to maintain the legal foundation for Crown authority. If all arguments that relied on the distortion of the doctrine of discovery were identified and removed, Crown authority would dissolve and Indigenous sovereignty would become the logical conclusion. Second, I identified the inclusion of dominant narratives as well and legal argumentation that served to further entrench these narratives throughout the judicial

ruling. The restricting of rights on the basis of cultural identity and the use of reconciliation discourse both contribute to dominant narratives surrounding Indigenous identities, which portrays them as unwilling to adapt and change to modern ways of life. Finally, retrospective narrative logic is employed in order to ensure that a particular judicial goal is realized. The argumentation avoids making assertions about Indigenous sovereignty by re-casting historical occurrences in ways that support the assertion of Crown sovereignty, presenting an illogical order of legal needs, and using an arbitrary point in time with which to judge acts of occupation. The subtle and often invisible nature of the discursive and narrative tactics that deny Indigenous sovereignty only serve to enhance their power. The biases, assumptions, and political goals embedded within judicial decision-making are obscured through legal discourse that projects impartiality and objectivity. Peeling away the layers of seemingly banal and benign legal jargon reveals the legal necessity of maintaining Crown sovereignty at the expense of furthering Indigenous rights.

CONCLUSION

Throughout this paper I have argued that legal discourse obscures racialized and prejudicial legal doctrine, and serves to uphold Crown authority over Indigenous people. Legal discourse can be obscure, inaccessible, exclusionary and, in the case of Indigenous rights in Canada, a misrepresentation of the motivations and worldviews behind legal decisions that consistently favour Crown authority. Narrative analysis allows for layers of judicial jargon to be peeled away, revealing stories that represent clear and accessible truths about how a society functions: who advances and thrives, who has power and control, and whose worldviews and cultural protocols are valued and upheld. By making legal decisions more accessible through narrative, we bring legal issues into everyday discussions. MacNeil (2007) asserts that incorporating narrative analysis within legal scholarship "helps restore topics of jurisprudential import—justice, rights, ethics—to where they belong: not with the economists, not with the sociologists, not even with the philosophers, but rather with the community at large" (p. 2). It is only through community and citizen involvement in the legal system that we can correct prejudicial practices, and ensure that the legal system works for Indigenous peoples in the way it works for non-Indigenous peoples in Canada.

Interrogating legal texts is an important project for moving forward Indigenous rights and the application of narrative and literary analysis to judicial decision-making has great importance for the legal and political future of Canada. By uncovering stories surrounding Indigenous identities and histories entrenched within legal decisions, we can begin to break down the systemic racism and cultural subordination of Indigenous nations in Canada. Because the legal definition and content of Aboriginal rights and title is further defined with every Supreme Court ruling, the continued research into the legal, political and social implications of legal discourse is

a project with human rights implications. As legal, literary and Indigenous studies scholars, we must remain attentive and vigilant to the discursive and narrative devices utilized within legal texts. Legal discourse directly affects governance: language within legal texts quite often forms the foundation of legislation that continues to erode Indigenous sovereignty. By unpacking the depiction of Indigenous-European relations within legal texts, we can create a legal framework that not only acknowledges Aboriginal rights, but works towards the affirmation and protection of Indigenous sovereignty.

REFERENCES

Anderson, R.T. (2011). Aboriginal title in the Canadian legal system: The story of Delgamuukw v. British Columbia. In C. Goldberg, K. Washburn, & P. Frickey (Eds.), *Indian law stories* (591-619). New York: Foundation Press.

Borrows, J. (1997a). Frozen rights in Canada: Constitutional interpretation and the trickster. *American Indian Law Review 22*(1), 37-64.

Borrows, J. (1997b). Wampum at Niagara: The Royal Proclamation, Canadian legal history, and self-government. M. Asch (ed.), *Aboriginal and treaty rights in Canada: Essays on law, equality, and respect for difference*, (155-172). Vancouver: University of British Columbia Press.

Borrows, J. & Rotman L. (1998). *Aboriginal legal issues*. Toronto: Butterworths.

Brooks, P. (1996). The Law as Narrative and Rhetoric. P. Brooks and P. Gewirtz (eds.), *Law's Stories: Narrative and rhetoric in the law* (2-13). New Haven: Yale University Press.

Brooks, P. (2003). 'Inevitable Discovery'—Law, narrative, retrospectivity. *Yale Journal of Law & the Humanities 15*(71), 71-101.

Corntassel, J., and Primeau, T. (1995). Indigenous "sovereignty" and international law: Revised strategies for pursuing "self-determination". *Human Rights Quarterly 17*, 343-365.

Corntassel, J., and Holder, C. (2008). Who's sorry now? Government apologies, truth commissions, and Indigenous self-determination in Australia, Canada, Guatemala, and Peru. *Human Rights Review 9*, 465-489.

Corntassel, J., Chaw-win-is, & T'lakwadzi. (2009). Indigenous storytelling, truth-telling, and community approaches to reconciliation. *English Studies in Canada 35*(1), 137-159.

Dean, M. (2001). Making Canada's "literary land claim": Marjorie Pickthall's "the third generation". *Journal of Canadian Studies 36*(3), 24-34.

Delgado, R. (1989). Storytelling for oppositionists and others: A plea for narrative. *Michigan Law Review 87*, pp. 2411-2441.

Delgado, R. (1990). When a story is just a story: Does voice really matter. *Virginia Law Review, 76*(1), pp. 95-111.

Delgado, R. & Stefanic, J. (2001). *Critical race theory: An introduction*. New York: New York University press.

Delgamuukw v. British Columbia, Supreme Court of Canada. (1997). Retrieved from The Supreme Court of Canada: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do

Duthu, N.B. (1991). *American Indians and the law*. London: Penguin.

Duthu, N.B. (2013). *Shadow nations: Tribal sovereignty and the limits of legal pluralism*. New York: Oxford University Press.

Freeman, J. (1991). Constitutive rhetoric: Law as a literary activity. *Harvard Women's Law Journal 14*, 305-325.

Goldberg, C., & Washburn, K. (2011). The Indian law canon as narrative: Stories of legal strategy and Native persistence. In C. Goldberg, K. Washburn, & P. Frickey (Eds.), *Indian Law Stories* (1-26). New York: Foundation Press.

The Government of Canada. (2014). The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government. Retrieved from Aboriginal Affairs and Northern Development Website: http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844.

Gunn, B. (2014). Case Note: Tsilhqot'in Nation v. British Columbia 2014 SCC 44. *Indigenous Law Bulletin 8*(14), 27-29.

Henderson, G. (2006). The cost of persuasion: Figure, story, and eloquence in the rhetoric of judicial discourse. *University of Toronto Quarterly 75(*4), 905-924.

Henderson, J.Y. (2004). Aboriginal jurisprudence and rights. K. Wilkins (ed.), *Advancing Aboriginal claims: Visions/strategies/directions* (67-69). Saskatoon: Purich Publishing.

Hunt, A. (1990). Rights and Social Movements: Counter-Hegemonic Strategies. *Journal of Law and Society 17*(3), 309–328.

The Indian Act. (1985, c. I-5). Retrieved from Justice Laws Website: http://laws-lois.justice.gc.ca/eng/acts/I-5/page-10.html#docCont

Irlbacher-Fox, S. (2009). *Finding dahshaa: Self-government, social suffering, and Aboriginal policy in Canada*. Vancouver: University of British Columbia Press.

King, T. (2003). *The truth about stories: A Native narrative*. Toronto : House of Anansi Press.

Levinson, S. (1996). The rhetoric of judicial opinion. P. Brooks and P. Gewirtz (eds.), *Law's Stories: Narrative and rhetoric in the law* (2-13). New Haven: Yale University Press.

Macklem, P. (1997). What's law got to do with it? The protection of Aboriginal title in Canada. *Osgoode Law Journal 35*(1), 126-137.

Macklem, P. (1993). Distributing sovereignty: Indian nations and equality of peoples. *Stanford Law Review 45*, 1311-1367.

MacNeil, W. (2007) *Lex Populi: The Jurisprudence of Popular Culture*. Stanford: Stanford University Press.

McNeil, K. (1997). The Meaning of Aboriginal Title. M. Asch (ed.). *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (135-153). Vancouver, BC: UBC Press.

McNeil, K. (2004). Continuity of Aboriginal rights. K. Wilkins (ed.), *Advancing Aboriginal claims: Visions/strategies/directions* (127-150) Saskatoon: Purich Publishing.

Murphy, M. (2009). Civilization, self-determination and reconciliation. A. Tompson (ed.), *First thoughts: The impact of Indigenous thought in Canada* (251-278). Vancouver: UBC Press.

Rotman, L. (2004). "Let us face it, we are all here to stay". K. Wilkins (ed.), *Advancing Aboriginal claims: Visions/strategies/directions* (202-240). Saskatoon: Purich Publishing.

Sherwin, R.K. (2000) When the Law Goes Pop: The Vanishing Line Between Law and Popular Culture. Chicago: University of Chicago Press.

Suzack, C. (2011). The transposition of law and literature in *Delgamuukw* and *Monkey Beach*. *The South Atlantic Quarterly, 110*(2), 447-463.

Tsilhqot'in Nation v. British Columbia, Supreme Court of Canada. (2014). Retrieved from The Supreme Court of Canada: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do