INDIGENOUS SOVEREIGNTY AND IDENTITY IN THE FACE OF COLONIAL LEGAL REGIMES: *(DE)HUMAN(IZING) RIGHTS*

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"The most fundamental human right is the right to exist, both as an individual and in one's community."[1]

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It could be said that Christopher Columbus discovered America in 1492.[2] Of course, this statement fails on a number of levels. His fleet of ships landed on the shores of what is now commonly known as The Bahamas.[3] The Indigenous peoples called the land Guanahani.[4] The name America was not attached to any of the lands along the western edge of the Atlantic Ocean until August 1501, well after the arrival of Columbus.[5] In fact, Columbus was most likely not even the first European to spot land in the "New World," rather it was likely Rodrigo de Triana—who was a lookout on the *Pinta*.[6] The land and the Indigenous people existed well before Columbus or his crew took note of them, and well before outsiders attached the name America. *And what right did the outsiders have to name that land?*[7]

It could be said that Indigenous human rights were declared in 2007 by the United Nations.[8] Article One of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") states, "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human

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writes this paper, on the lands of the Kalapuya people, she grieves the trauma enacted by people who look like her, and those from her lineage, and hopes to contribute to healing. She struggles alongside generations of visionaries, radicals, and caregivers who have fought for a truly liberated world for all. In particular, she wants to acknowledge and thank Phoenix Johnson, her primary teacher. She also extends gratitude to Judge Ortega, who shared OLDER THAN THE CROWN and who continues to deepen Julia's understanding of legal systems. All mistakes remain her own.

[1] Joyce Green, *Introduction: Honoured in Their Absence: Indigenous Human Rights, in* INDIVISIBLE: INDIGENOUS HUMAN RIGHTS 1 (Joyce Green ed., Fernwood Publishing, 2014).

[2] The Kiboomers – Kids Music Channel, *Columbus Day Lyric Video – The Kiboomers Preschool Songs & Nursery Rhymes for Holidays*, YOUTUBE (Oct. 13, 2015), https://youtu.be/-yzzCYJDPrQ?si=s3gsEsNwVrPxh_JH; Little Patriots, *Star Spangled Adventures Episode 01: Christopher Columbus*, YOUTUBE (Sept. 13, 2022), https://youtu.be/wKaRsJlcPvU?si=rccvQhB9MY38A2nx; Lakshmi Gandi, *How Columbus Sailed into History Thanks to Italians*, NPR: CODE SWITCH (Oct. 14, 2013, 10:15 AM), https://www.npr.org/sections/codeswitch/2013/10/14/232120128/how-columbus-sailed-into-u-s-history-thanks-to-italians.

[3] National Geographic Society, *October 12, 1492 CE: Columbus Makes Landfall in the Caribbean*, NATIONAL GEOGRAPHIC SOCIETY: EDUCATION (Oct. 31, 2023), https://education.nationalgeographic.org/resource/columbus-makes-landfall-caribbean/.

[4] *Id.*

[5] Erin Allen, *How Did America Get Its Name?*, LIBRARY OF CONGRESS BLOG (July 4, 2016), https://blogs.loc.gov/loc/2016/07/how-did-america-get-its-name/.

[6] Christopher Columbus, *Journal of the First Voyage of Columbus*, *in* JOURNAL OF CHRISTOPHER COLUMBUS (DURING HIS FIRST VOYAGE, 1492-93), AND DOCUMENTS RELATING TO THE VOYAGES OF JOHN CABOT AND GASPAR CORTE REAL 15, 35 (Clements R. Markham, ed. and trans., London: Hakluyt Society 1893).

[7] CHARLES W. MILLS, THE RACIAL CONTRACT 45 (1997) (elucidating the European ethos of colonization around the world noting that "there are rituals of naming which serve to seize the terrain of these 'New' Worlds . . ." and that European conceptions of "'discovery' and 'exploration' . . . "basically imply that if no white person has been there before, then cognition cannot really have taken place.").

[8] G.A. Res. 61/295, United Nations Declaration in the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."[9] The land and Indigenous peoples existed well before the United Nations and its member-states took note of them, and well before the UNDRIP was adopted. *Did the rights of those Indigenous peoples exist before outsiders named them? What right did the outsiders have in naming the rights of the world's Indigenous peoples?*[10]

We are not seeking to dismantle the foundations of human and Indigenous rights law. UNDRIP and other international legal mechanisms have value. However, we must interrogate the existing paradigm that distinguishes those who are entitled rights and those who entitle others to exercise those rights. On a philosophical level, we may acknowledge that all human beings are inherently and fundamentally imbued with human rights—rights that exist beyond any legal paradigm. Yet, with regard to recognition of and exercising those rights, there is a patchwork of legal systems with overlapping jurisdictions. For most Indigenous peoples around the world, that means on a practical level, they are forced to seek recognition and enforcement of their fundamental rights through colonial legal systems[11] (often the same legal systems that advanced legal "justification" to colonize those Indigenous peoples and their homelands in the first place).[12]

This does not mean that Indigenous peoples do not have their own complex ideologies of human rights. Many Indigenous communities have practiced and continue to practice complex legal structures, including

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[9] *Id.* art. 1.

[10] Many Indigenous people and groups led decades of activism and diplomacy, beginning at least as early as the 1970s, to engage international human rights bodies in the work of recognizing and protecting Indigenous communities. However, as Duane Champagne (Turtle Mountain Band of Chippewa) argues, "Indigenous nations may realize some advantages within the UNDRIP frame, but most likely they will not see full indigenous claims to self-government, territory, and cultural autonomy." The effectiveness of UNDRIP is limited, in part because the nation-states who have adopted UNDRIP often have claims of sovereignty which are in direct conflict with Indigenous sovereignty and rights. Duane Champagne, *UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights,* 28 WICAZO SA REV. Spring 2013 at 9, 9-12.

[11] For example, U.S. common law courts (colonial in origin), court systems in commonwealths of the Crown, Norwegian courts that Indigenous Sámi are subjected to, and to some extent, international legal bodies heavily dominated or influenced by European colonial philosophy. *See generally id.*

[12] *See* Champagne, *supra* note 10 at 11-15 ("Collective human rights as outlined within UNDRIP suggests that all claims must be adjudicated before nation-state political, legislative, or judicial institutions. This plan of relying primarily on nation-state institutions negates the autonomy and powers of indigenous self-government."); *See also* TRUTH AND RECONCILIATION COMM'N OF CANADA, HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REP. OF THE TRUTH AND RECONCILIATION COMM'N OF CANADA, at 202-03 (2015) [hereinafter TRUTH & RECONCILIATION] ("[T]he view of many Aboriginal people is that the utilization of the Government of Canada's court is fraught with danger. Aboriginal leaders and communities turn to Canada's courts literally because there is no other legal mechanism.").

acknowledgment of human rights.[13] Due to historic and continual imposition of control by colonial legal forces (as well as material imbalance in power and access to resources), these Indigenous practices are often delegitimized by colonial forces.[14]

Colonialism, conquest, and genocide are evils too intense to be captured in writing. Imperial forces—aided by apathetic, indifferent, or inept witnesses—have ravaged and raped Indigenous peoples throughout this world and continue to do so. The Canadian government (which remains a commonwealth of the Crown), enacted the Gradual Civilization Act in 1857 and later the Indian Act of 1876, establishing federal policy which has "been highly invasive and paternalistic…regulat[ing] and administ[rating] in the affairs and day-to-day lives of registered Indians and reserve communities."[15] Similarly in the U.S., in 1823 the Supreme Court declared:

> According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators. All the proprietary rights of *civilized* nations on this continent are founded on this principle. The right derived from discovery and conquest.[16]

The *M'Intosh* court vindicated the "long and bloody war,"[17] which resulted in complete conquest over "the tribes of Indians inhabiting this

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[13] UVic, *Indigenous Law Today and Tomorrow with John Borrows and Val Napoleon*, YOUTUBE (Oct. 2, 2018), https://youtu.be/QhxVSYBDD98?si=OvGq0MD7mbWovYPb; Green, *supra* note 1; *Influence on Democracy*, HAUDENOSAUNEE CONFEDERACY, (last visited Jan. 30, 2024) https://www.haudenosauneeconfederacy.com/influence-on-democracy/ (Famously, legal practices, symbols and values practiced by the Haudenosaunee people for centuries were appropriated by drafters of the U.S. Constitution).

[14] "Sinixt sovereignty is inherent and does not rest on recognition from the state," as elucidated in a conversation between Sean Robertson (a Native studies faculty member at the University of Alberta-Edmonton) and Marilyn James (an official Sinixt spokesperson). Sean Robertson, *Extinction is the Dream of Modern Powers: Bearing Witness to the Return to Life of the Sinixt Peoples?*, 46 Antipode 773, 783 (2014). James shares, "the fact that we are limited in fulfilling our laws doesn't mean our laws aren't there: they are still there." *Id*.

[15] Erin Hanson, *The Indian Act*, Indigenous Foundations (last visited Jan. 31, 2024) https://indigenousfoundations.arts.ubc.ca/the_indian_act/ ("This authority has ranged from overarching political control, such as imposing governing structures on Aboriginal communities in the form of band councils, to control over the rights of Indians to practice their culture and traditions. The Indian Act has also enabled the government to determine the land base of these groups in the form of reserves, and even to define who qualifies as Indian in the form of Indian status.").

[16] *Johnson v. M'Intosh*, 21 U.S. 543, 570 (1823); *See generally* CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS (2005) (noting that the *M'Intosh* court got the facts wrong—Native communities across what we now call North and South America engaged in highly specialized cultivation and care-taking practices of the land and other species).

[17] *Johnson v. M'Intosh*, 21 U.S. at 583.

country [who] were fierce sav[*]ges."[18] At so-called "residential schools" thousands of Native children, infants through teenagers, were tortured and killed, families and nations were torn apart.[19] Some say the last of these schools closed in 1996,[20] but Chemawa Indian School is still in operation by the Bureau of Indian Affairs on lands where hundreds of unmarked youth graves lay.[21] When colonizers arrived in Australia (another country that continues to be a commonwealth of the Crown), they declared *terra nulius*—that the people who had been stewarding the land since time immemorial—were *subhuman*, part of the flora and fauna.[22] This legal policy was not overturned until 1992.[23] Not only have colonizing forces declared legal policies specifically aimed at genocide of Indigenous peoples, colonial culture and legal practices have attempted to alter and eradicate Indigenous legal practices.[24] To this day, Indigenous people in colonized countries are disproportionately harmed by law enforcement[25] and incarceration;[26]

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[18] *Id.* at 590.

[19] Erin Hanson, Daniel P. Games & Alexa Manuel, *The Residential School System*, INDIGENOUS FOUNDATIONS, (2009, with updates in 2020), https://indigenousfoundations.arts.ubc.ca/the_residential_school_system/.

[20] *Id.*

[21] Rob Manning, *Federal Leaders Face Indigenous Schools' Tragic Past for First-of-Its-Kind Report*, OR. PUB. RADIO (Apr. 5, 2022), https://www.opb.org/article/2022/04/05/federal-leaders-face-indigenous-schools-tragic-past-for-first-of-its-kind-report/.

[22] *See generally* Rule of Law Education Centre, *European Settlement and Terra Nullius*, RULE OF LAW EDUCATION CENTRE (last visited Jan. 31, 2024), https://www.ruleoflaw.org.au/education/australian-colonies/terra-nullius/; National Library of Australia, *Challenging Terra Nullius*, NATIONAL LIBRARY OF AUSTRALIA: DIGITAL CLASSROOM (last visited Jan. 31, 2024), https://www.nla.gov.au/digital-classroom/senior-secondary/cook-and-pacific/cook-legend-and-legacy/challenging-terra.

[23] RULE OF LAW EDUCATION CENTRE, *supra* note 22.

[24] *See* K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 L. & Soc. Inquiry 1006 (2016) (describing the way early colonizers changed British mortgage common law in order to more easily dispossess Native people of their land); Sarah Deer (citizen of Muscogee Creek Nation), (*En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States*, 31 YALE J. L. & FEMINISM 1, 2, 9 (2019) (". . . some of the earliest formal legal relations between tribal nations and the federal government were marked with a significant absence and erasure of Native women's political power. One of the challenges faced by early Indian leaders was that European governments almost invariably declined to treat or even negotiate with Native women . . . As Native men were treated as more powerful in the eyes of Europeans, some internalized the Western concept of natural superiority of men and began to deny Native women their rightful role as equal participants in social and political spheres.").

[25] Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN (Nov. 13, 2017), https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html.

[26] Government of Canada, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses,* JUSTICE RESEARCH AND DATA (Jan. 20, 2023), https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/p3.html; Suzi Hutchings, *Aboriginal People in Australia: The Most Imprisoned People on Earth*, DEBATES INDIGENAS (Apr. 1, 2021),

disenfranchised from access to basic necessities like clean water,[27] electricity,[28] internet connectivity,[29] and affordable food;[30] endure

https://debatesindigenas.org/en/2021/04/01/aboriginal-people-in-australia-the-most-imprisoned-people-on-earth/; Off. of the Aboriginal and Torres Strait Islander Soc. Just. Comm'r for the Aboriginal and Torres Strait Islander Comm'n, *Indigenous Deaths in Custody 1989-1996*, 2 AUSTRALIAN INDIGENOUS LAW REPORTER 310 (July 1997); *Native Incarceration in the U.S.*, PRISON POLICY INITIATIVE (last visited Jan. 31, 2024), https://www.prisonpolicy.org/profiles/native.html.

[27] Lanikque Howard, *Addressing Water and Wastewater Challenges in Tribal Nations*, ADMIN. FOR CHILD. & FAMS. (Aug. 25, 2022), https://www.acf.hhs.gov/blog/2022/08/addressing-water-and-wastewater-challenges-tribal-nations ("Native American households are 19 times more likely than white households to lack indoor plumbing. It is worse in some communities, as Navajo residents are 67 times more likely than other Americans to live without access to running water. It is also estimated that approximately 75 percent of people living on Hopi land are drinking contaminated water, which pose serious public health risks to the community."); *Make It Safe*: *Canada's Obligation to End the First Nations Water Crisis*, HUMAN RIGHTS WATCH, (June 7, 2016), https://www.hrw.org/report/2016/06/07/make-it-safe/canadas-obligation-end-first-nations-water-crisis (According to studies between 2015 to 2016, "[c]ontaminants in drinking water on First Nations reserves visited by Human Rights Watch included coliform, *Escherichia coli* (*E. coli*), cancer-causing Trihalomethanes, and uranium.").

[28] *The Future of Tribal Energy Development: Implementation of the Inflation Reduction Act and the Bipartisan Infrastructure Law: Before S. Comm. on Indian Affs.*, 118th Cong. (Mar. 29, 2023) (statement of Bryan Newland, Asst. Sec. for Indian Affairs, U.S. Dept. of the Interior), https://www.doi.gov/ocl/tribal-energy-development (stating that in 2022, more than 16,000 Native homes in the U.S. were not connected to the electric grid); Isabeau van Halm, *How Indigenous Communities Became Major Players in Canada's Energy Transition*, Energy Monitor (Oct. 24, 2022), https://www.energymonitor.ai/just-transition/how-indigenous-communities-became-major-players-in-canadas-energy-transition/ (noting that Indigenous communities are often on the forefront of transitions to new renewable energies); Logan Turner, *This Remote First Nation Pays Lofty Power Costs. Forced to use U.S. Source, they Want to be on Ontario Grid,* CBC NEWS (Nov. 28, 2022), https://www.cbc.ca/news/canada/thunder-bay/windigo-island-electricity-costs-1.6664244 (describing unjustly high utility rates and unreliable electricity service for a remote First Nation community on Windigo Island, as well as noting failures by governmental actors and electric companies to address the injustice. Further noting that the Indigenous residents "live on waters that generate cheap power for Ontario and Manitoba, but have to import electricity from the United States," paying some of the highest electricity costs in Canada. In February 2021, one household paid nearly $1000 USD for a single month of electricity.).

[29] *Exploring the Lack of Internet Access on Native American Reservations*, COMMUNITY TECH NETWORK (July 28, 2023), https://communitytechnetwork.org/blog/exploring-the-lack-of-internet-access-on-native-american-reservations/.

[30] Alessandra, Univ. Puget Sound, *Food Price Index in Native American Reservations, Explained*, SOUND ECONOMICS (Oct. 28, 2021), https://blogs.pugetsound.edu/econ/2021/10/28/food-price-index-in-native-american-reservations-explained/; Cecily Hilleary, *Native American Tribes Fighting High Prices, Poor Food Quality*, VOA NEWS (Mar. 24, 2017), https://www.voanews.com/a/tribes-fighting-high-prices-poor-food-quality-in-indian-country/3780303.html; Andria Moore, *These Indigenous People Have Gone Viral for Exposing the High Costs of Groceries on Native Reservations*, BUZZFEED (Sept. 27, 2021), https://www.buzzfeed.com/andriamoore/indigenous-people-on-tiktok-are-exposing-the-outrageously; Jordyn Beazley, *'Through the Roof' Food Prices in Remote NT are Forcing Aboriginal Families to Make Impossible Choices*, THE GUARDIAN: NORTHERN TERRITORY (May 20, 2022), https://www.theguardian.com/australia-news/2022/may/21/through-the-roof-food-prices-in-remote-nt-are-forcing-aboriginal-families-to-make-impossible-choices.

environmental harms from foreign corporations,[31] and are more likely to be harmed by violent crime perpetrated by non-Native people.[32]

Despite these many grave harms, Indigenous communities around the world have developed a variety of effective methods to exercise their human rights.[33] Law professors Kristen A. Carpenter and Angela R. Riley (citizen of the Potawatomi Nation) describe what they view as a "jurisgenerative moment in human rights," noting the increasing degree to which Indigenous legal norms receive recognition in international courts.[34] For example, a 2001 ruling by the Inter-American Court on Human Rights validated the customary land tenure law of the Awas Tingni people in Nicaragua.[35]

In Australia, there are instances in which Indigenous elders and respected persons can participate in the sentencing process of Indigenous people who have violated Australian criminal laws.[36] In places like Aotearoa, Boliva, and Ecuador, Indigenous communities have fought to protect both the planet and their own rights through the legal instrument of rights of nature.[37] In the U.S., many Indigenous communities operate tribal courts.[38] Indigenous communities sometimes seek to enforce their rights through the formation of

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[31] *See* Hannah Grover, *Navajo Nation Officials, Activists Feel Cut Out as Company Advances Uranium Mining Plans*, N.M. POL. REP. (May 1, 2023), https://nmpoliticalreport.com/news/navajo-nation-officials-activists-feel-cut-out-as-company-advances-uranium-mining-plans/; *see* Spoorthy Raman, *Canada Mining Push Puts Major Carbon Sink and Indigenous Lands in the Crosshairs*, MONGABAY (June 2, 2022), https://news.mongabay.com/2022/06/canada-mining-push-puts-major-carbon-sink-and-indigenous-lands-in-the-crosshairs/; *see* Becky Bohrer, *Judge in Alaska Upholds Biden Administration Approval of the Massive Willow Drilling Project*, PBS NEWS HOUR (Nov. 9, 2023), https://www.pbs.org/newshour/politics/judge-in-alaska-upholds-biden-administrations-approval-of-the-massive-willow-oil-drilling-project.

[32] National Institute of Justice, *Five Things About Violence Against American Indian and Alaska Native Women and Men*, U.S. DEPT. OF JUSTICE (May 2023), https://www.ojp.gov/pdffiles1/nij/249815.pdf.

[33] Kristen A. Carpenter & Angela R. Riley (citizen of the Potawatomi Nation), *Indigenous Peoples and the Jurisgenerative Movement in Human Rights*, 102 CALIF. L. REV. 173 (2014), https://scholar.law.colorado.edu/faculty-articles/65.

[34] *Id.* at 176.

[35] *Id.*

[36] Elena M. Marchetti & Kathleen Daly, *Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model*, 29 (3) SYDNEY L. REV. 415 (2007), https://ro.uow.edu.au/lawpapers/708/.

[37] Gwendolyn Gordon, *Environmental Personhood*, 43 COLUM. J. ENVTL. L. 49, 53-59 (2018); Tiffany Challe, *The Rights of Nature—Can an Ecosystem Bear Legal Rights?*, COLUM. CLIMATE SCH. STATE OF THE PLANET (Apr. 22, 2021), https://news.climate.columbia.edu/2021/04/22/rights-of-nature-lawsuits/#%3A%7E%3Atext%3DWhat%20are%20the%20%E2%80%9CRights%20of%2Cor%20even%20by%20climate%20change (This begs the question, what form of dehumanization is at play if Indigenous people must seek protection of their own rights through declaration of legal personhood for nature?).

[38] Indian Affairs, *Tribal Court Systems*, U.S. DEPT. OF INTERIOR, https://www.bia.gov/CFRCourts/tribal-justice-support-directorate.

nonprofits or other organizational structures.[39] Often, Indigenous people or communities appeal directly to colonial courts to assert their rights. In addition to legal victories for Indigenous communities, Carpenter and Riley also note that "indigenous peoples are influencing law around and outside of their communities, *all the way up* into state and international practice."[40] These scholars argue that "indigenous peoples are deeply and consciously involved in architecting a human rights system that bridges—or at least aspires to bridge—Western and indigenous ideals, mechanisms, and outcomes at every level."[41] Each method serves as an important tool to help Indigenous communities vindicate rights, however, in all of these instances, colonial powers still run the show.[42] And in the process, the colonial legal structure is bolstered or validated.

The sophisticated and nuanced engagements many Indigenous peoples have led within international human and Indigenous rights law deserve greater attention and acknowledgment. However, we remain skeptical as to whether a healthy "bridge" can ever be formed between colonial and non-colonial or anti-colonial communities. When Indigenous communities are required to assert their rights in legal systems where The Queen or King (of a country which has engaged in perhaps the most far-reaching colonialism) is an opposing party, or where the U.S. federal government maintains "plenary power" over tribal nations and is not required to follow treaty obligations, there is an inherent dehumanization at play.[43] Justice cannot be

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[39] *E.g. Native American Organizations Serving the Community*, NATIONAL INSTITUTES OF HEALTH, https://www.edi.nih.gov/people/sep/na/campaigns/native-american-heritage-month-2018/native-american-organizations.

[40] Kristen A. Carpenter & Angela R. Riley (citizen of the Potawatomi Nation), *Indigenous Peoples and the Jurisgenerative Movement in Human Rights*, 102 CALIF. L. REV. 173, 177 (2014), https://scholar.law.colorado.edu/faculty-articles/65.

[41] *Id.* at 197.

[42] Even when Indigenous communities engage international or regional human rights courts, colonial forces may have outsized power in that process. For example, "[t]he five permanent members of the UN Security Council wield great power in the [International Court of Justice] just as they do in the UN Security Council," and three out of five of the permanent Security Council members are France, the United Kingdom, and the United States. S. Gozie Ogbodo, *An Overview of the Challenges Facing the International Court of Justice in the 21st Century*, 18:1 ANN. SURV. OF INT'L & COMPAR. L. 93, 106 (2012); *see also* Paul Joffe, *Undermining Indigenous Peoples' Security and Human Rights*, in INDIVISIBLE: INDIGENOUS HUMAN RIGHTS 217, 223 (Joyce Green ed., 2014) ("[t]he Government of Canada repeatedly uses international processes and forums to undermine Indigenous peoples' rights and the UNDRIP, based on narrow self-interest.").

[43] *E.g.* American Constitution Society, *Founding Failures: Indian Country's Sovereignty and Subordination*, YOUTUBE (Sept. 17, 2021), https://www.acslaw.org/video/founding-failures-indian-countrys-sovereignty-and-subordination/ (statement of Ambassador Keith Harper) ("One of

achieved through fora that continue to subjugate Indigenous peoples, while the invasive party trying to assert dominance gets to dictate the legal and cultural procedures and policies that are used to adjudicate the claim.[44]

As Joyce Green (English, Ktunaxa and Cree-Scottish Métis), professor emerita of political science at the University of Regina, writes, "Indigenous peoples find that the settler states, the colonizers and their political, economic and legal apparatuses set the possibilities and parameters for Indigenous liberation so as to minimize the effect on the states."[45] Of course, from a colonial viewpoint, nation-states have a strong incentive to constrain recognition of Indigenous rights—"Indigenous human rights include a claim to land and against the sovereignty of settler states…none are willing to confront and remedy Indigenous rights violations as a consequence of state occupation and oppression."[46]

This truth is echoed in the Summary of the Final Report of the Truth and Reconciliation Commission of Canada: "[m]any Aboriginal people have a deep and abiding distrust of Canada's political and legal systems because of the damage they have caused. They often see Canada's legal system as being an arm of a Canadian governing structure that has been diametrically opposed to their interests."[47]

Regardless of whether the ruling of a colonial court produces a tangible remedy or meaningful benefit for an Indigenous person or community, we must grapple with what standing does a colonial court have to judge, impose penalties, or deliver remedies with regard to the fundamental rights of Indigenous peoples, in the first place? Either explicitly or *de facto* requiring Indigenous people to engage in the adversarial and idiosyncratic processes of colonial legal systems, in order for their personhood to be acknowledged, can cause Indigenous people psychological, financial, and other harms.[48]

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the things about the plenary power doctrine…on the one hand it gives Congress the power to break treaties, it gives Congress the power to terminate tribes…"); TRUTH & RECONCILIATION, *supra* note 12, at 202-03 ("Until Canadian law becomes an instrument supporting Aboriginal peoples' empowerment, many Aboriginal people will continue to regard it as a morally and politically malignant force."); Oral Argument at 3:03:50, Her Majesty the Queen v. Richard DeSautel, 2021 SCC 17 (2021), https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=38734&id=2020/2020-10-08--38734&date=2020-10-08, (statement from an attorney representing the Bar of Canada) ("Indigenous people across the country are regularly forced into court to defend their rights. Too often the Crown responds to their claim with arguments that would, if accepted, narrow and defeat [reconciliation].").

[44] Champagne, *supra* note 10, at 9-12 (discussing the non-consensual relationship between Indigenous people and nation-state forums).

[45] Green, *supra* note 1, at 5.

[46] *Id.* at 6.

[47] TRUTH & RECONCILIATION, *supra* note 12, at 202.

[48] *Id.*; Kate Gunn & Bruce McIvor, *Footing the Bill: The Supreme Court Weighs in on the Costs of Indigenous Rights Litigation*, FIRST PEOPLES L. (Apr. 15, 2021), https://www.firstpeopleslaw.com/public-education/blog/footing-the-bill.

Utilizing colonial legal mechanisms to rule on the very *humanity* of Indigenous people is dehumanizing and may perpetuate a false belief that rights are bestowed on sav*ge Natives by "civilized" outsiders.

In order for the rightful liberation of Indigenous peoples and to truly engage in reconciliation, the dominance of colonial legal structures needs to be lessened. The inherent sovereignty of Indigenous communities and their own legal practices need to be elevated to a level of understanding, power, respect, and authority, not lesser than colonial legal powers. To put it succinctly, decolonization can never be achieved through colonial legal structures.

I. COLONIAL LEGAL STRUCTURES INVADE THE SINIXT

The form, norms, procedure, jurisprudence, and structure of colonial courts continue to reinforce some of the original underpinnings of colonization (even if the effects have been softened to some degree in recent years). First and foremost, the authority of a colonial legal system arises from conquest over Indigenous peoples and the declaration—by the invasive force—of their sovereignty over the Indigenous peoples and their homelands.[49] This creates a paradigm in which the colonial legal regime is recognized as the "legitimate" one, while any existing Indigenous legal system is either entirely disregarded or subordinate to the colonial legal force. The experiences of the Sinixt people give us insight into the ways in which colonial legal frameworks can perpetuate longstanding, destructive colonial attitudes and power imbalances, even when rulings are made in favor of Indigenous peoples.

The Sinixt peoples "are the sovereign indigenous caretakers of Sinixt *tum-ula7xw* (mother-earth)," of the lands colonially known as the interior plateau of British Columbia, Canada and extending to Kettle Falls, Washington, and including the headwaters of the *shwan-etk-qwa* (Columbia

[49] *E.g.*, Article III of the U.S. constitution declares that, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." In Canada, "[c]ourts of law flourished in the eighteenth-century in present-day Quebec and Ontario, as well as in what are now the Maritime provinces. . . . The *Quebec Act, 1774*, section 17, defined powers for creating British-style criminal, civil, and ecclesiastical courts in Quebec alongside that province's much more ancient courts dating back to the French [colonizing] regime." Supreme Court of Canada, *Creation and Beginnings of the Court*, (June 26, 2023), https://www.scc-csc.ca/court-cour/creation-eng.aspx. Eventually, the *Constitution Act, 1867*, was passed, enabling the new federal Parliament to create a federal court of appeal for Canada. *Id*.

River).[50] The name Sinixt roughly translates to spotted fish people, referencing a fish commonly found throughout the Arrow Lakes region.[51] The Canadian government did not recognize Sinixt peoples as their own nation and rather only provided legal recognition through the Arrow Lakes Band.[52] Until the mid-1800s, the Sinixt traditionally spent their summer in the southern part of their lands and wintered in the north near the Arrow Lakes.[53] The Sinixt often traverse their territory, including along the *shwan-etk-qwa* in their sturgeon-nose canoes made of white pine.[54]

In 1846 the ancestral land of the Sinixt people was divided, along the 49th parallel, by the U.S.-Canada border.[55] Euphemistically stated by the Supreme Court of Canada, "a constellation of factors made the Sinixt people move to the United States."[56] As one scholar writes, the imposed border "forced the reconfiguration of both [Sinixt] identities and the environments through which they moved…[and] allow[ed] each nation to impose its own criteria…[and] utilize the international boundary as a tool to terminate its obligations to [the Sinixt]."[57] Many Sinixt people continue to live all across their ancestral lands, but the Court was referring to the fact that officially the peoples were moved to the Colville reservation in Washington.[58]

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[50] SINIXT NATION, *About Us*, https://sinixtnation.org/content/about-us (last visited Jan. 31, 2024).

[51] R. v. DeSautel, 2017 BCPC 84, ¶ 22 (CanLII), [2018] 1 CNLR 97 (Can.); Oral Argument at 1:55:55, R. v. Richard DeSautel, 2021 SCC 17 (2021), https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=38734&id=2020/2020-10-08--38734&date=2020-10-08. *The authors would like to note that "R." in abbreviated case names from Canadian courts is short for* rex *or* regina*, the Latin terms for king and queen, respectively. In this particular case, the full party name appears on documents as* Her Majesty The Queen.

[52] Robertson, *supra* note 14, at 773.

[53] *Id.* at 777.

[54] R. v. DeSautel, 2017 BCPC 84, ¶ 24 (CanLII), [2018] 1 CNLR 97 (Can.); Sinixt Nation, *Sinixt Culture*, https://sinixtnation.org/content/sinixt-culture (last visited Jan. 31, 2024).

[55] Andrea Geiger, *"Crossed by the Border": The U.S.-Canada Border and Canada's "Extinction" of the Arrow Lakes Band, 1890-1956*, 23:2 WESTERN LEGAL HISTORY 121, 123 (2010), https://www.njchs.org/wp-content/uploads/23.2.pdf.

[56] Her Majesty the Queen v. Richard DeSautel, 2021 SCC 17 (2021), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18836/index.do?q=sinixt.

[57] Geiger, *supra* note 55, at 121-22.

[58] The Colville Reservation was established by executive order in 1872 and originally extended both north and south of the international (U.S.-Canada) border. *Id.* at 124-27. However, settlers demanded access to the rich agricultural area and U.S. Congress acted almost immediately to shrink the reservation "limiting it to the far rockier and inhospitable terrain west of the Columbia River." *Id.* Then again in 1892, Congress severed the northern portion of the reservation in order to open up mining prospects for settlers. *Id.* Canada also engaged in a process of sequestering Native people on tiny and disconnected reserves. *Id.* Still, settlers believed Indigenous people sought too much access and mobility—across the land they stewarded since time immemorial. *Id.* One letter from settlers to representatives of the Canadian government written in 1915 states, "[t]he Indians appear to be laboring under the impression that all the land is theirs and we think it is high time they were disillusioned." *Id.*

II. IN 1956, CANADA DECLARED THE SINIXT PEOPLE EXTINCT

As Sean Robertson, faculty of the Native Studies at the University of Alberta-Edmonton, writes, this was an act of "conjuring extinction," using law and cartography to erase the Sinixt.[59] Robertson goes on to write, "[t]he formation of the *settler* state relies not only upon imaginative geographies of the precarious presence of the other, but also upon the discourse of emptying space of the inscriptions of daily life."[60] In 1936, an agent of the Canadian government "reported that Annie Joseph, an Arrow Lakes Indian residing in Vernon, 'has no knowledge of any survivor of the Reserve except herself.'"[61] Joseph passed away in the 1950s.[62] When she died, the Canadian government called her "an old Indian lady," and declared extinction of the Arrow Lakes Band (and therefore the Sinixt).[63] The title to Sinixt land—filled with lush timberlands—was transferred to British Columbia.[64] As Robertson asserts, "[w]ith this event, the cultural legitimation of colonialism, in the form of the imaginative geography of biological extinction materialized."[65]

Author Johnson (Tlingít and Haida) invites non-Native readers to engage in a visualization of erasure.

> *Erasure is something that isn't just a defined word we can understand…It is an existential chilling dread.*
>
> *Sit where you are and clear your mind. Look at your hands and stare at them for a moment, now imagine they're becoming see-through, and you can no longer see your fingers, and you can no longer see your hands, and this feeling creeps up inside of you.*
>
> *The erasure enacted against Native people is like being buried alive and watching the dirt heaped over you and the diggers and onlookers see right through you.*

One administrative function (carried out by a non-Native person) can lead to centuries of trauma playing through our mind at lightning speed. It is important for non-Native people to understand how colonizers enact erasure both through overt slaughter and through administrative and rhetorical acts; all forms of erasure compound the lived experience of generational trauma.

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[59] Robertson, *supra* note 14, at 778.
[60] *Id.* at 779.
[61] *Id.* at 778.
[62] *Id.*
[63] *Id.*
[64] Geiger, *supra* note 55, at 121.
[65] Robertson, *supra* note 14, at 778.

Marilyn James, an appointed spokesperson for the Sinixt Nation and director of the Sinixt Nation Society, reflects on the impact of being declared extinct:

> Someone would say to me… 'They say you are extinct, but you are not! You are still existing!' Yes, but I am also compromised; my actual ability to exist as who I am, what I am, be entitled to what everybody can be entitled to who hasn't been declared extinct: I am limited… Sure we can practice, I can still breathe and my heart still beating and I am not going to fall over by a declaration of extinction.[66]

III. THE SINIXT PEOPLE WERE NOT EXTINCT[67]

While none lived at the Oatscott Reserve, some still lived in Burton and Edgewood.[68] Research conducted by Dr. Andrea Laforet, retired director of ethnology and cultural studies at the Canadian Museum of Civilization, shows that Sinixt individuals continue to live throughout their ancestral lands in places now called British Columbia and Washington State, and that such individuals are direct descendants of Sinixt families who lived in British Columbia prior to 1930.[69]

The decision to declare the Arrow Lakes people extinct advanced geopolitical goals of the Canadian government.[70] The government was on the verge of negotiations with the U.S. "for the Columbia River Treaty that would dam the Columbia and create a…200 kilometre" reservoir, cutting through traditional Sinixt lands and washing away "nearly all archaeological traces of a culture that had endured for over five thousand years."[71]

Beginning in the 1930s, President Roosevelt—motivated to fulfill a campaign promise to put unemployed people to work—led the charge to build a dam in Washington at the Grand Coulee canyon.[72] The federal government followed no formal procedure for engaging Native people in

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[66] *Id.* at 782.

[67] Black Press Media, *The Sinixt: A People Without Recognition in Their Own Home,* ARROW LAKES NEWS (Oct. 23, 2013), https://www.arrowlakesnews.com/opinion/the-sinixt-a-people-without-recognition-in-their-own-home-4574931.

[68] *Id.*

[69] Factum of Resp't, R v. DeSautel, 2020 SCC 17 (2020), 1 S.C.R. 533, https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM020_Respondent_Richard-Lee-Desautel.pdf.

[70] Black Media Press, *supra* note 67.

[71] *Id.*

[72] LEONARD ORTOLANO ET AL., GRAND COULEE DAM AND THE COLUMBIA BASIN PROJECT USA i, v (2000), http://large.stanford.edu/courses/2010/ph240/harting2/docs/csusmain.pdf.

decisions concerning the taking or destruction of their reservation or ancestral lands.[73] The government forced thousands of Indigenous people in the region to relocate due to the construction of the dam.[74] After 1940, the federal government denied Native landowners even an opportunity to negotiate—they were notified of the forced removal via mail.[75] The dam blocked all runs of salmon to the Spokane, Coeur d'Alene, Kalispel, and Kootenai reservations as well as their traditional off-reservation fishing territories, and significantly diminished salmon runs to the Colville reservation.[76] In fact, the dam project completely swallowed Kettle Falls—a remarkably important fishing and gathering spot for the Sinixt and many other tribes for centuries.[77] Thousands of Indigenous people from across the Northwest, including the Sinixt, gathered for a three-day mourning Ceremony of Tears.[78] In the words of Marilyn James, "[t]he end of salmon runs had an enormous impact on the social, economic, spiritual and cultural lives of our people."[79] It has become more widely known that these destructive practices have a direct psychological, social, and spiritual impact. Further compounding this kind of trauma drives some to seek solace in self-medication using substances. It is believed that the harmful stereotype of the drunken Indian led to the further support of tribal status termination in the 1950s and 60s.[80]

> *Erasure is something that isn't just a defined word we can understand…It is an existential chilling dread.*

IV. RIGHTFUL CONNECTION WITH THE LAND

Many Sinixt members engage in a spiritual belief and practice that when there is a death in a family, that family does not hunt for a year, while another member of the tribe hunts to supply them with food and ceremonial meat.[81] Moreover, it is recognized that hunting and meat are central to the Sinixt way

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[73] *Id.* at xii.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 74.

[77] Tara Justine, *The Ceremony of Tears: The Rising Waters of Lake Roosevelt Ended a 10,000-year Native Tradition*, SPOKANEHISTORICAL.ORG (last visited Mar. 4, 2024), https://spokanehistorical.org/items/show/668.

[78] ORTOLANO, *supra* note 72, at 74.

[79] Marilyn James Aff. (Pet'r), Campbell v. British Columbia (Forest and Range), [2010] BCSC (2010), https://sinixtnation.org/files/Affidavit_James.pdf.

[80] Ortolano, *supra* note 72, at 74.

[81] OLDER THAN THE CROWN (War Pony Pictures 2022).

of life.[82] Richard Lee DeSautel, a direct descendant of the Ntsoxtiken family, is a ceremonial hunter of the Sinixt Nation and has worked as a game agent for tribal fish and wildlife.[83] He often hunts to supply meat for families who are observing the death of a loved one.[84] Due to the Canadian government's declaration that the Sinixt tribe had become extinct, Richard is regarded by U.S. and Canadian governments solely as a member of the Lakes Tribe of the Colville Confederated Tribes based in Washington state.[85]

In 2010, with the support of his community, Richard traveled to the northern area of his ancestral lands and hunted a cow-elk.[86] With a goal of affirming his nation's rights across their entire territory (including the lands now called British Columbia), he reported this hunt to authorities and was charged for hunting without a license and not being a resident of British Columbia.[87] This was not the Sinixt's first attempt to vindicate their rights in the eyes of Canada's legal system, but it has turned out to be the most successful thus far.[88]

Richard sought relief from the charges on a defense that he was exercising his Aboriginal hunting rights.[89] The adversarial nature of the colonial court in Canada placed a number of burdens on Richard (and his tribe, and by extension all Indigenous people who seek rights in Canada)—he "bears the onus of proving the existence of an aboriginal right to hunt in British Columbia," he must also illustrate a prima facie infringement of that right, and he must defend his position *against* an adversarial opponent—the Crown.[90]

It may seem like we are pointing out a banal and obvious point—that Richard must face and overcome opposing legal arguments to have his Indigenous rights (and by extension, his own personhood) vindicated by the courts in Canada. But it is important to acknowledge that not all dispute resolution or legal systems are predicated on an adversarial hostility—in fact,

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[82] R. v. DeSautel, 2017 CanLII 84, ¶ 28 (Can. BCPC).

[83] OLDER THAN THE CROWN, *supra* note 81; Factum of Resp't, R v. DeSautel, 2020 SCC 17 (2020), 1 S.C.R. 533, ¶ 16 https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM020_Respondent_Richard-Lee-Desautel.pdf.

[84] OLDER THAN THE CROWN, *supra* note 81.

[85] R. v. Richard DeSautel, 2021 SCC 17, ¶ 4 (Can.) https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18836/index.do?q=sinixt.

[86] *Id.* at ¶ 3.

[87] *Id.*

[88] *See* Sunshine Logging (2004) Ltd. V. Prior, 2011 BCSC 1044 (2011) (an example of representatives of the Sinixt tribe unsuccessfully attempting to prevent logging of Slhu7kin/Perry Ridge); *see* Robert Allen Watt v. R., T-1831-06, (Fed Ct. Can. filed Oct. 16, 2006) (a case regarding an attempt to seek free travel across the international border).

[89] R. v. Richard DeSautel, 2021 SCC 17, ¶ 3 (Can.) https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18836/index.do?q=sinixt.

[90] R. v. DeSautel, 2017 CanLII 84, ¶ 52 (Can. BCPC).

that is a *Western* or *English* tradition.[91] Many Indigenous dispute resolution systems are focused on horizontal power-sharing and collaborative peacemaking.[92] In contrast, the adversary system is based on "the sharp clash of proofs presented by adversaries,"[93] which reinforces a zero-sum ethos and encourages legal practitioners or representatives of the Crown to develop anti-Indigenous legal arguments, even when doing so offends our moral sensibilities or shared collective knowledge about Indigenous history.

More broadly, he must adhere to the court battle as defined by the colonial invader and follow the legal rules as well as unspoken norms of the colonial court. Even courtroom attire is tied to English practices from the 1300s; judges and lawyers continue to wear robes as a symbol of "privilege" and, to "remind people of the important role our courts play in a democratic society."[94] The so-called privilege denoted by robes functions entirely within the Euro-colonial tradition—certainly not recognizing any Indigenous customs of respect or privilege. Not only is Richard expected to conform to the Canadian legal customs and laws to defend his rights—doing so is his only option under the existing paradigm. Yet, there is no such expectation that officials of the colonial court system or representatives of the Crown—while adjudicating the very nature of Indigenous rights—conform with, or even attempt to validate, Indigenous legal norms or customs.

Richard's case was first heard in the Provincial Court of British Columbia before Judge Mrozinski in late 2016.[95] Several attorneys, representing the Crown, argued he "was not and could not have been exercising an aboriginal right to hunt…because no Sinixt aboriginal rights ever came into existence in Canada."[96] This argument requires an unspoken, yet underlying belief that the rights of Sinixt peoples did not exist before the "civilized" white people arrived. Or, that even if their rights existed before colonization, those rights were fully extinguished by the Crown's assertion of sovereignty. Alternatively, the Crown argues that the Sinixt people

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[91] *Compare* Stephan Landsman, *A Brief Survey on the Development of the Adversary System*, 44 OHIO STATE. L. J. 713, 717 (1983) (citing the adversary process as "a product of the slow evolution of English and American judicial procedure," dating back as early as the eleventh century), *with* JOHN HOSTETTLER, FIGHTING FOR JUSTICE: THE HISTORY AND ORIGINS OF ADVERSARY TRIAL 9 (2006) ("Roman-canon inquisitorial system . . . imposed on the judge a duty to inquire into the circumstances of the case with a view to uncovering the truth"), *and* Jessica Metoui*, Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities,* 2007 J. DISP. RESOL. 517, 528-38 (2007) (describing a number of Indigenous dispute practices from nations throughout North America).

[92] *See* Metoui, *supra* note 91, at 528-38.

[93] Landsman, *supra* note 91, at 714.

[94] Provincial Court of British Columbia, *Why do Canadian Judges Wear Robes?*, ENEWS (Sept. 18, 2018), https://www.provincialcourt.bc.ca/enews/enews-11-09-2018.

[95] R. v. DeSautel, 2017 CanLII 84 (Can. BCPC).

[96] *Id.* ¶ 5.

voluntarily left what is now called British Columbia, and thus their contemporary practices and territory lack any continuity upon which to base Aboriginal rights claims.[97] In other words, the Crown "assert[s] that no aboriginal collective capable of exercising such a right exists in British Columbia."[98]

"A Lumbee Indian legal scholar, Robert Williams, has traced the evolution of the Western legal position on the rights of native peoples…showing how it is consistently based on the assumption of 'the rightness and necessity of subjugating and assimilating other peoples to the European worldview.'"[99] The arguments put forward by the Crown, presented seriously and without hesitation by several attorneys, are essentially a repackaging of the arguments made to justify colonization in the first place.

The objective truth is that thousands of societies of Indigenous people existed across what we now call North America, since time immemorial, before the arrival of European colonizers.[100] And that these societies had, and continue to have, complex cultures, legal systems, economies, and recognition of rights.[101] These societies continue, despite the gruesome attempts to erase them over the past several centuries.[102] Yet, Mills describes that within the paradigm of European colonialism and dominance, "one has an agreement to misinterpret the world. One has to learn to see the world wrongly."[103] There must be a foundational belief that Europeans "were 'civilized,' … and [n]on-Europeans were 'sav[*]ges,'…the man whose being wildness, wilderness, has so deeply penetrated that the door to civilization, to the political, is barred."[104] Mills goes on to underscore that colonizers engaged in a process of declaring Indigenous people subhuman, nonexistent, part of the wilderness, and nonetheless killing them to reduce or eradicate their populations; "[s]o the basic sequence ran something like this: there are no people there in the first place, in the second place, they're not improving the land, and in the third place—oops!—they're already all dead anyway (and, honestly, there really weren't that many to begin with, so there are no people there, as we said in the first place.)"[105] Similarly, the legal position of the Crown and other provincial governments across Canada, in the 2010s, is that the Sinixt people never really had rights in Canada, and if they did, those

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[97] *Id.*
[98] *Id.*
[99] CHARLES W. MILLS, THE RACIAL CONTRACT 21 (1997).
[100] Roxanne Dunbar-Ortiz, An Indigenous Peoples' History of the United States, 1 (2014).
[101] *Id.* at 6.
[102] *Id.*
[103] Mills, *supra* note 99, at 28; *see also* Robertson, *supra* note 14, at 790.
[104] Mills, *supra* note 99, at 37.
[105] *Id.* at 40.

people died. And if those people didn't die, they left willingly. And either way, the sovereignty of the Crown supersedes.

The discord between the reality (that Indigenous peoples have always created robust civilization), and the European intentional misinterpretation (that Indigenous people either did not exist, or where they did they were wild and subhuman), sometimes surfaces in legal disputes and must be resolved by the colonial legal regime in a way that does not disturb the manufactured colonial superiority.[106] In 2001, in *Mitchell v. M.N.R.*, the Supreme Court of Canada wrote:

> Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation…At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown:...With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin v. The Queen*…
>
> Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them… Barring one of these exceptions, the practices, customs and traditions that defined the various

[106] Green, *supra* note 1, at 7 ("[S]ettler states deny Indigenous claims to land and sovereignty and have fought those claims in courts and in their political arenas…[w]here states have acknowledged the violence and consequences of historical policies of colonialism by past governments…[it] has been in such a compartmentalized fashion that it permits contemporary governments to conceive of colonial events as merely historical and to insulate their present practices that violate Indigenous rights").

> aboriginal societies as distinctive cultures continued as part of the law of Canada...[107]

The language and construction of these sentences shows the court grappling with having to admit the personhood and the existence of fundamental rights within Indigenous peoples and their societies pre-colonization, while continuing to reassert the validity of "the French and the British," and "the Crown's assertion of sovereignty."[108] The Court is telling Indigenous people that, even when the Crown recognizes your rights, *you must remember that the* legitimate (aka the European, civilized, victorious) *"government [can] extinguish[] them.*"[109]

Richard must assert his rights within the context of a colonial court system (rather than a sovereign Indigenous legal system),[110] and thus, he based his claim to aboriginal rights on common law and a Canadian constitutional amendment. Richard's argument before the Supreme Court of Canada notes, "[a]t common law, legislatures were able to extinguish or regulate aboriginal rights without justification."[111] Aboriginal rights received greater recognition and force of law with section 35 in the Constitution Act, 1982.[112] Section 35 declares that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[113] Section 35 recognizes existing and treaty rights, though it does not clarify what those rights encompass, and while section "35 jurisprudence has led to positive development for some Indigenous communities, the test for proving the Aboriginal rights has been criticized as being unduly narrow and freezing Indigenous rights" in relation to pre-contact culture—or what can be proved in a colonial court of law as "'integral and distinctive'" Indigenous practices pre-colonialism.[114] Naiomi Metallic and the Truth and Reconciliation Commission both underscore the inherent limitation of using a colonial legal system to affirm Indigenous rights—"s. 35 has not furthered meaningful

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[107] Mitchell v. M.N.R, [2001] 1 SCR 911 (Can.), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1869/index.do.

[108] *Id.*

[109] *Id.*

[110] TRUTH & RECONCILIATION, *supra* note 12, at 203 ("When [Indigenous people turn to Canada's courts] they do so, []with the knowledge that the courts still are reluctant to recognize their own traditional means of dispute resolution and law.").

[111] Factum of Resp't, R. v. Richard DeSautel, 2021 SCC 17, ¶ 28 (CanLII), [2021] 1 SCR 533 (Can.), https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM020_Respondent_Richard-Lee-Desautel.pdf.

[112] Naiomi Metallic, *The Relationship Between Canada and Indigenous Peoples: Where Are We?, in* SPECIAL LECTURES 2017: CANADA AT 150: THE CHARTER AND THE CONSTITUTION 423 (The Law Society of Upper Canada, ed., Toronto: Irwin Law, 2018).

[113] The Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 (U.K.), 1982, c 11, s 35, (Can.).

[114] Metallic, *supra* note 112, at 423.

reconciliation because the case law is still anchored in the doctrine of discovery."[115]

Because of the wording of section 35 and related jurisprudence, the courts of Canada consider Sinixt behavior both before and after what they describe as "pre-contact," in order to decide the fate of Richard's criminal charges, as well as the rights of all Sinixt people. [116] For the purpose of resolving Richard's case, the parties agreed to use 1811 as the time of first contact, when a man who is believed to be the first European to enter Sinixt territory was on his way to the Pacific Ocean.[117] However, it should not be forgotten that at least indirect "contact" between colonizers and the Sinixt occurred "in the 1780s when smallpox pandemics swept through the area reducing the population though to what extent cannot be known."[118]

At the trial level, Judge Mrozinski notes that under Canadian law, "[a]boriginal rights are communal rights…and they may only be exercised by virtue of an individual's ancestrally based membership in [a historic and present community.]"[119] Canadian courts have developed common law tests for determining whether a present day community is a "rights-bearing" community—in other words, the colonial courts in Canada engage in a legal process of determining whether an individual or group of individuals are Indigenous to the land now called Canada.[120] Judge Mrozinski further notes that when evaluating a claim for an aboriginal right "a court must take into account the perspective of the aboriginal people claiming the right yet at the same time 'do so in terms that are cognizable to the non-aboriginal legal system.'"[121]

After reviewing extensive trial evidence, Judge Mrozinski ultimately concluded that Richard was a member of a modern-day community descended from the Sinixt, that "hunting in what is now British Columbia was a central and significant part of the Sinixt's distinctive culture in pre-contact times," and held that the Wildlife Act unjustifiably infringed Richard's rights.[122] The ability of Richard and the Sinixt people to enjoy

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[115] *Id.*

[116] R. v. DeSautel, 2017 BCPC 84, ¶ 14 (CanLII), [2018] 1 CNLR 97 (Can.). Even the language used to describe invasion by European colonizers is sanitized in the legal system. The phrase "pre-contact" defines the existence of Indigenous people solely in relation to invading forces, and further reduces the violent acts of colonization to "contact."

[117] *Id.* at ¶ 15.

[118] *Id.* at ¶ 16.

[119] *Id.* at ¶ 55.

[120] *Id.* at ¶ 56.

[121] *Id.* at ¶ 79.

[122] *Id.* at ¶ 84.

certain rights on their ancestral land was eventually affirmed by the Supreme Court of Canada, but not without further hardship and disrespect.[123]

The Truth and Reconciliation Commission suggests that the Canadian government should not "subjugate Aboriginal peoples to an absolutely sovereign Crown,"[124] yet, the Crown chose to appeal Judge Mrozinski's ruling.[125] Richard's case wound through an arduous appeals process[126] in the colonial legal system, including an appeal trial on September 6-8, 2017; a hearing about a request for leave to file appeal on March 27, 2018; a hearing before the Court of Appeal for British Columbia on September 12, 2018; an appeal heard by the Supreme Court of Canada on October 8, 2020; and a final judgment rendered on April 23, 2021, more than ten years after Richard's ceremonial act of hunting on his ancestral lands.[127]

By the time the case reached the Supreme Court of Canada, the Attorney General of Canada, and Attorneys General of six provincial or territory governments joined as intervenors.[128] Thirteen First Nation and tribal governments or associations also joined the case.[129]

Before the Supreme Court of Canada, attorneys for the Crown reiterated that aboriginal rights outlined in section 35 cannot apply to "US Indigenous groups," implying that the imposition of a colonial international border through Sinixt territory somehow invalidates who they are and where they come from.[130] The Crown further argues that "[c]onstitutionalizing the rights of US Indigenous groups has deleterious consequences," including that Canada may have to invite representatives of Indigenous groups living within the US to constitutional conferences under some circumstances, may have to recognize title rights of some Indigenous groups living in the US, and may be required to consult and accommodate Indigenous groups at times.[131]

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[123] OLDER THAN THE CROWN, *supra*, note 81.

[124] TRUTH & RECONCILIATION, *supra*, note 12, at 203.

[125] R. v. DeSautel, 2017 BCSC 2389, ¶ 7 (CanLII), [2018] 1 C.N.L.R. 135 (Can.), https://www.bccourts.ca/jdb-txt/sc/17/23/2017BCSC2389.htm.

[126] On appeal, the Okanagan Nation Alliance, a "First Nations government in the Okanagan which represents the 8 member communities including: Okanagan Indian Band, Upper Nicola Band, Westbank First Nation, Penticton Indian Band, Osoyoos Indian Band and Lower and Upper Similkameen Indian Bands and the Colville Confederated Tribes," joined as an intervenor. The Okanagan Nation Alliance reiterates that "[t]hrough colonization we were divided from one another and from our way of life. At the same time we were dispossessed from the resources we relied upon, and our self-sufficient economy collapsed." Okanagan Nation Alliance, *About Us*, SYILX OKANAGAN NATION ALLIANCE, https://www.syilx.org/about-us/ (last visited Jan. 31, 2024).

[127] DeSautel, *supra*, note 116; DeSautel, *supra*, note 125; R. v. DeSautel, 2018 BCCA 131 (CanLII); R. v. DeSautel, 2019 BCCA 151 (CanLII); R. v. Desautel, 2021 SCC 17 (CanLII), [2021] 1 SCR 533 (Can.).

[128] R. v. Desautel, 2021 SCC 17 (CanLII), [2021] 1 SCR 533 (Can.).

[129] *Id*.

[130] App. Factum at 17, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[131] *Id.* at 29.

Astonishingly, the Crown advanced a scarcity-mindset argument providing that "US Indigenous groups" access to limited resources such as hunting "decreases the availability of these resources to Canadian Indigenous groups."[132]

The Attorney General of Alberta argued that recognizing Richard as having an Aboriginal right, while he is not a Canadian resident or citizen, "is incompatible with Crown Sovereignty," and further that "[c]ontrol of a country's borders, and who may enter and remain in that country, is a fundamental attribute of sovereignty."[133] Alberta further argued that descendants of the Sinixt people do not have an on-going presence in what is now British Columbia, and therefore hunting in that region cannot be considered integral to their culture.[134]

The Attorney General of New Brunswick presented several arguments that require a certain degree of mental gymnastics. First, New Brunswick argued that a distinctive feature of pre-contact Sinixt ceremonial hunting "requires a community with whom the hunt, game, and pre and post hunt rituals are shared," and that because the modern-day community with whom Richard engages in these rituals is located in the U.S. rather than British Columbia, "there can be no meaningful expression of his asserted right in Canada."[135] Second, New Brunswick then explains that the absence (in their eyes) of a modern-day Sinixt community in British Columbia means that international travel is necessary for the right to be expressed, and that this "international mobility aspect of the Aboriginal right" is incompatible with Crown sovereignty.[136]

The Attorney General of Canada argued that "a mobility right may not necessarily be incompatible with Canada's sovereignty," rather "the manner in which the right interacts with Canadian sovereignty should be determined on the specific facts of each case."[137] Additionally, the Attorney General of Canada suggested that the lower courts improperly applied an approach that "leads to an overly broad interpretation of the term 'aboriginal peoples of Canada,'" and proposed that the Supreme Court rely on a different line of case law and adopt a more narrow legal framework.[138]

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[132] *Id.* at 30.

[133] Factum for the Intervenor (Alta.) at 5, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.). Perhaps the claim made by Alberta's Attorney General, that control of own's borders is a fundamental sovereignty attribute, is a powerful argument *in favor of* recognizing the Sinixt's existence and rights—after all it was colonizing forces from Europe, and eventually the colonial U.S./Canada border that encroached upon Sinixt territory in the first place.

[134] *Id.* at 16.

[135] Factum for the Intervenor (N.B.) at 9, 12 (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[136] Factum for the Intervenor, *supra* note 135, at 14.

[137] Factum for the Intervenor (Can.) at 2 (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[138] Factum for the Intervenor, *supra* note 135, at 10.

The Attorney General of Saskatchewan argued that Richard's "claim is not supported by s. 35's linguistic, philosophic and historic context, and should have been rejected in the courts below."[139] The Attorney General of Quebec echoed arguments presented by the Crown and other Attorneys General, that Indigenous groups "outside" of Canada cannot be afforded aboriginal rights under section 35.[140]

The Attorneys General of Ontario and the Yukon did not take positions on the outcome of the appeal but raise other legal questions and ideas.[141] Ontario cautioned that the lower court did not properly address two separate legal questions, and suggests that the Supreme Court adopt a procedure that involves first resolving "who may hold a right recognized and affirmed by s. 35," before turning to "whether the right is established on the facts."[142] Ontario presented a number of factors that the court could use to determine whether a community located outside of Canada could be entitled to rights under section 35.[143] The Yukon Attorney General submitted a factum to express how the Yukon territory has navigated prior land claims and international border agreements with Yukon First Nations, and further cautioned the Supreme Court against making a ruling that may inadvertently impact treaty rights.[144]

> *Erasure is something that isn't just a defined word we can understand…It is an existential chilling dread.*

The legal posturing and arguments that were put forward by the Crown and Attorneys General are in stark contrast to those that were presented by Indigenous nations and organizations. The Assembly of First Nations (AFN), which represents more than 634 First Nations, drew on UNDRIP and stated "that First Nations people have the right to self-determination and to freely determine their political status and the right to autonomy or self-government in matters relating to their international and local affairs."[145] AFN underscored the importance of recognizing the extensive "diversity among First Nation beliefs, laws and relationships," which existed before the arrival of colonizers and continues today. Moreover, AFN argued that the Canadian government's attempts to develop and utilize a one-size-fits-all test for evaluating Indigenous rights, perpetuates the "cultural homogenization of

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[139] Factum for the Intervenor (Sask.) at 16 (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[140] Factum for the Intervenor (Que.), (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[141] Factum for the Intervenor (Ont.) at 2, (2021); Factum for the Intervenor (Yukon) at 1, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[142] Factum for the Intervenor (Ont.) at 3-4, (2021).

[143] *Id.* at 7-9.

[144] Factum for the Intervenor (Yukon) at 1, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

[145] Factum for the Intervenor, (AFN) at 8, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).

Indigenous people, and the denial of their history [which] is a legacy of colonization."[146] Further, AFN asserted that "[t]he rights of a nation which existed since time immemorial and prior to contact with a settlor state cannot be subsequently defined or unilaterally infringed upon by another nation."[147] AFN emphatically asserted:

> First Nations laws have always been the foundation of our relationships with one and other and with other nations. These rights were practiced throughout history and are still practiced to the present day, regardless of the many ways the Crown has sought to minimize or restrict First Nations rights. First Nations rights are not subject to the discretion of the Crown, they are not granted or permitted by the Crown, they pre-existed the creation of the Canadian state and will not be defined, narrowed, or unilaterally infringed upon to suit the policy objectives of the Crown. The First Nations perspective is [the] only perspective, which is relevant to the determination of who holds First Nations rights.[148]

Further, AFN raises concerns regarding the prevailing jurisprudence which seeks "to limit as much as possible the interpretation of First Nations and treaty rights…[i]nstead of striving for genuine reconciliation."[149]

The Mohawk Council of Kahnawà:ke (MCK) asserted that many of the legal foundations advanced by the Crown "were based on the presumed inferiority of Indigenous peoples and their continued application perpetuates historical injustices."[150] Applying perspectives from constitutional, legal, and First Nations experts, MCK asserted that sovereign incompatibility arguments are connected to the Crown's act of "unilaterally claim[ing] authority to legislate over Indigenous peoples and Indigenous lands, in an era where Indigenous peoples were not even considered persons" by settlers, and that validation of sovereign incompatibility would be ahistorical as well as morally and legally wrong.[151] Separately, MCK refuted the Crown's natural resource scarcity argument, by citing studies that prove biodiversity and land management outcomes are improved on lands managed or co-managed by Indigenous communities.[152]

The Congress of Aboriginal Peoples (CAP) plainly asked the court to decide the case "in a manner that does not perpetuate or incorporate the

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[146] *Id.* at 7.
[147] *Id.* at 4.
[148] *Id.* at 5.
[149] *Id.* at 8.
[150] Factum for the Intervenor, (MCK) at 2, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).
[151] *Id.* at 1.
[152] *Id.* at 9-10.

legacy of colonialism."[153] CAP underscored that "[b]orders are a colonial construct. Indigenous identity is not formed by national or provincial boundaries," and the U.S.-Canada border, which "bisects Indigenous groups, [cannot be taken] as a defining characteristic of Indigenous group identity."[154] The filing by CAP also traced a number of historical events and judicial decisions that either perpetuate colonialism or vindicate Indigenous rights.[155]

The Peskotomuhkati Nation provided clarity to the phrase "Aboriginal peoples of Canada," by noting that the proper interpretation of "of Canada" is "not possessive: Canada, the political entity, does not own people." Rather, the phrase "refers to the connection between the peoples and the land."[156] Further, the Peskotomuhkati Nation factum also pointed out that arguments advanced by the Attorney General of Quebec "echo[] a policy of assimilation that Canada has explicitly abandoned."[157]

The Métis Nation British Columbia wrote to express concern about the possibility of the Supreme Court drafting a ruling that inadvertently infringes Métis rights under section 35.[158]

Ultimately, the Supreme Court of Canada ruled in favor of Richard and the rights of Sinixt people—holding that section 35 protects the rights of "modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact," which may include groups that are now outside Canada.[159] The Court recognizes that Aboriginal rights existed before section 35 was created, and declared its broad interpretation aligns with the purpose of reconciliation.[160] However, two justices wrote dissenting opinions. Justice Côté wrote that Richard should be found guilty on both counts and that he should be denied section 35 protections, stating that "[t]he framers' intent was to protect the rights of Aboriginal groups that are members of, and participants in, Canadian society."[161] Justice Côté's opinion implies a belief that Canadian society is somehow superior to or encompassing over Indigenous societies and that such societies should not

[153] Factum for the Intervenor, (CAP) at 1, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).
[154] *Id.* at 3.
[155] *Id.*
[156] Factum for the Intervenor, (Peskotomuhkati Nation) at 5, (2021); R. v. DeSautel, [2021] S.C.R. 533 (Can.).
[157] *Id.* at 5.
[158] R. v. DeSautel, [2021] 1 SCR 533 (Can.).
[159] *Id.* at 535.
[160] *Id.* at 536.
[161] *Id.* at 538.

be entitled to full rights unless they assimilate to Canadian society.[162] Justice Côté advances many of the legal theories put forward by Attorneys General in the case, about how ruling in favor of Sinixt rights would cause deleterious impacts to Canadian democracy.[163] Another justice, Justice Moldaver, dissented by saying that Richard did not prove continuity between his hunt and an Indigenous practice that existed prior to European contact.[164] Moldaver's dissent is quite brief, but implies that when the Sinixt "left" Canada in the 1930s (which, of course, never happened),[165] their traditional practices on the land were severed.

V. INDIGENOUS SOVEREIGNTY NOW

While Richard and the Sinixt people won a victory at the Supreme Court, the very nature of its legal mechanisms infringes their dignity. It is perverse—for living beings who have existed with and stewarded the land since time immemorial—to have to endure years of legal contestation in order to have justices who serve at the leisure of the Crown to declare them into existence. Linda Desautel, Richard's wife, expresses grief and frustration about the process: "[u]ntil that Supreme Court tells you yay or nay, your voice means nothing."[166] Shelly Boyd, a member of the Sinixt nation who was intimately connected with Richard's legal case, remarked that over and over Canadian officials would say to her "well, once you win at the Supreme Court, that'll make a difference."[167] She said "I don't get that, I never got that…the truth is the truth."[168] The emotional toll that the protracted legal process takes on members of the Sinixt tribe can be seen and felt in the documentary *Older than the Crown*.[169]

One scene of the film that starkly contrasts the customs of the colonial legal system against Indigenous customs shows Shelly and Richard sitting on the exterior steps of the Supreme Court of Canada.[170] The height of the covid pandemic made it challenging for Richard and Shelly to even travel to the hearing, but still, they were not allowed into the court on the basis of covid

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[162] JOYCE GREEN, INDIVISIBLE: INDIGENOUS HUMAN RIGHTS 7 (2014) ("[T]he politico-economic and legislative history of the Canadian state indicates that Indigenous people are welcome only when they effectively assimilate—when they adopt the assumptions and practices of the state and turn away from any criticism of the state's legitimacy.").

[163] R. v. DeSautel, [2021] 1 SCR 533, 535 (Can.).

[164] *Id.* at 596.

[165] *See* § III of this paper.

[166] OLDER THAN THE CROWN, *supra* note 81.

[167] *Id.*, at 30:28.

[168] OLDER THAN THE CROWN, *supra* note 81

[169] *Id.*

[170] *Id.*

precautions.[171] At times, Shelly and Richard sit close to one another, sharing a woven blanket for warmth and watching the court proceedings on a phone.[172] At other times they engage in prayer and rituals.[173] Shelly is wearing a beautiful woven hat and traditional fur accessories.[174] Meanwhile, Richard's attorney and dozens of other lawyers are before the chief justice and judges inside the court house, wearing black robes and white tabs representative of the English tradition.[175] Proceedings are carried out in English and French, not Indigenous languages.[176] Attorneys for the Crown and provincial governments don't seem to flinch one bit as they make arguments in opposition to the rights of the Sinixt peoples. [177]

When Richard's attorney begins his remarks, he acknowledges that many Sinixt people wanted to be in attendance but could not travel due to the pandemic.[178] Richard's attorney continued by noting that Richard wanted to express his gratitude for a welcome he received from the Algonquin people when he arrived in what is now called Ottawa.[179] Paul Williams, lead counsel for the Peskotomuhkati Nation, began his remarks in his Native language.[180] Not only are the legal and ethical contrasts palpable, but so are the behavioral and emotional differences between the Indigenous representatives and those speaking on behalf of the Crown or colonial provinces.[181]

Dozens of Sinixt peoples gathered on a beach with Richard to engage in ceremony and await the decision of the Supreme Court of Canada.[182] Richard's attorney calls, and while holding back tears, he says, "On behalf of Canada, welcome home, we won."[183] Richard, his wife, and others gathered show visible joy and relief.[184] A few moments later, Richard says "I don't have to go back to the museum and stand by the dinosaur display no more?"[185] It is a moment of triumph for Indigenous peoples, and also a moment for the rest of us to reflect on the ways in which we perpetuate colonial harm. Amongst the hollering and cheers of celebration, Shelly Boyd shares that, in her view, the next step is reconciliation—and not just reconciliation with the Canadian government, with all relatives, she says,

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[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* at 50:50.
[184] OLDER THAN THE CROWN, *supra* note 81.
[185] *Id.* at 51:10.

"I'm talking about reconciliation with the land. I think the land has missed us. And this water remembers us."[186]

Champagne calls our attention to the fact that "Indigenous nations often have tightly interrelated institutional relations between culture, government, economy and community," whereas "nation-states strive to separate culture and religion from politics, community, and economy, which is almost an inverse set of institutional imperatives than found in indigenous nations."[187] He continues, "Indigenous peoples have loyalties to their own forms of government, community, and territoriality, which do not conform to the views and positions of nation-states, whose policies usually explicitly deny such indigenous claims in favor of the nation-states' interests."[188] When colonial courts serve as the only forum to adjudicate Indigenous human and legal rights, progress towards true reconciliation is undermined.

Similarly, UNDRIP also fails to reconcile western notions of individual citizenship with cultural understandings held by many Indigenous communities (such as collective economic ownership and stewardship).[189] UNDRIP does not recognize political self-government from Indigenous nations, often incorporating Indigenous people as citizens of the nation-state without Indigenous consent, and UNDRIP explicitly "denies indigenous nations the right to secede from their surrounding nation-states."[190] Thus, even as UNDRIP may aspire to enshrine rights of Indigenous people and communities, it incorporates colonial frameworks.

Such legal endeavors, which are presented as fair and just, actually treat colonialism "as only historical rather than as a continuing process."[191]As Joyce Green writes "[t]he relationship [between Indigenous peoples and settler states] is adversarial and every right won is through struggle on *the hostile terrain of settler state courts and legislatures.*"[192] These types of legal judgments quietly reinforce the power, validity, and assumed stature of colonial legal systems—creating a false narrative that contemporary nation-state "governments and settler populations" are "temporally and legally separate" from perpetrators of colonialism.[193]

Attorneys continue to advance legal theories predicated on subjugation of Indigenous peoples—and those theories are taken seriously (legitimated),

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[186] *Id.* at 52:25.
[187] Champagne, *supra* note 10, at 13-14.
[188] *Id.* at 12.
[189] *Id.*
[190] *Id.* at 13.
[191] JOYCE GREEN, INDIVISIBLE: INDIGENOUS HUMAN RIGHTS 7 (2014).
[192] *Id.* at 4 (emphasis added).
[193] *Id.* at 7.

even when a court ruling does not adopt them in full.[194] When judges and justices announce rulings that are favorable to Indigenous people, they are able to portray themselves as saviors and bestowers of rights—the implication is that Indigenous peoples should be *grateful* for the recognition *granted to them* by the "civilized" society. In fact, many rulings are not favorable with regard to Indigenous rights, but it is the rare ruling in favor of Indigenous rights that sustains a perception that colonial court systems are "fair" and "just."[195] When a judge writes to constrain or deny an Indigenous right, whether in dissent or a majority opinion, that judge is not viewed as a pariah or a contemporary colonizer—their actions are interpreted as perfectly appropriate legal analyses and positions within the colonial legal paradigm.

To achieve reconciliation and liberation, Indigenous legal sovereignty must be recognized and elevated. The inherent authority of Indigenous people to name and exercise their own rights needs to be acknowledged, particularly by governments who have colonized those peoples. Until Indigenous governments can be fully freed from the constraints of colonial forces, every attempt should be made to eradicate legal doctrines and practices that are predicated on the imagined inferiority of Indigenous peoples. Court officials should work towards welcoming Indigenous customs and norms into courthouses, legal procedures, and proceedings. Courts who have the opportunity to review Indigenous rights claims should not rely on and continue to shape common law that is rooted in the doctrine of discovery/conquest—instead courts should explicitly reject and overturn such legal rulings. Judges within colonial legal structures should draft opinions that evince humility, and vindicate Indigenous wisdom, knowledge, and legal argument.

Creativity, compassion, and resources should be directed towards the development of legal processes that enable Indigenous peoples to assert their rights within colonial legal structures—without having to endure the dehumanizing and counterfactual adversarial dynamic. For example, could a new legal process be developed in partnership between the Canadian judiciary and Indigenous peoples to create a pathway for Aboriginal rights claims to be advanced to and vindicated by the Supreme Court of Canada—without requiring adversarial parties and appeals? The grave horrors of colonialism have worn scars across our planet for centuries—it will not be easy to dismantle the stronghold that colonialism has on our legal systems—

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[194] *See generally* R. v. DeSautel, [2021] 1 SCR 533 (Can.).

[195] *Cf.* interest-convergence theory: "[t]he interest of [B]lack [people] in achieving racial equality will be accommodated only when it converges with the interests of whites," Derrick Bell Brown v. Board of Education *and the Interest-Convergence Dilemma* 93.3 H. L. Rev. 518, 523 (1980).

but as we collaborate to do so, freedom will become more alive and palpable for all.