

**WHERE IS THE INDIGENOUS LAW IN STATE SPONSORED TRANSITIONAL
JUSTICE PROCESSES?
WITNESSING AND TRUTH-TELLING IN THE TRUTH AND RECONCILIATION
COMMISSION OF CANADA**

by

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Abstract

This paper discusses the impact of state engagement with Indigenous legal orders through transitional justice mechanisms such as the Canadian Truth and Reconciliation Commission. My aim is to contribute to an understanding of the potential implications of the power imbalances caused by settler colonialism on interactions between state and Indigenous legal systems. This thesis builds on the Fanonian theorization of culture under settler colonialism by extending his analysis to Indigenous legal systems impacted by settler colonialism. In the case of the Canadian Truth and Reconciliation Commission, the inclusion of Indigenous legal traditions in the Commission's work has failed to create space for Indigenous law as a set of viable alternatives to state law. Instead, longstanding settler depictions of Indigenous law as static and primitive are reinforced and the dominant position of state law in relation to Indigenous law is reinscribed in the collective settler imagination. Rather than create space for an Indigenous legal resurgence that would strengthen the legal authority of Indigenous law, the Commission's engagement with Indigenous law ultimately served to affirm the supremacy of state law over Indigenous law and erase those aspects of Indigenous law that might prove threatening to the established settler colonial state.

Preface

This thesis is the original, unpublished work of the author, Karen Slakov.

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List of Abbreviations

Canada Council – Canada Council for the Arts

CAVR – Timor-Leste Commission for Reception, Truth and Reconciliation

CBC – Canadian Broadcasting Corporation

ICC – International Criminal Court

IRS – Indian Residential School

NCTR – National Centre for Truth and Reconciliation

SATRC – South African Truth and Reconciliation Commission

TRC – Truth and Reconciliation Commission

TRCC – Truth and Reconciliation Commission of Canada

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Introduction

Canada's attention was captivated by two Inuit throat singers who performed at the swearing in ceremony of Prime Minister Trudeau. A CBC video of their performance on Facebook has almost a million views and ten thousand likes, and an accompanying article declares that the singers "stole hearts" in their widely discussed performance.¹ While the inclusion of Indigenous cultural practices such as throat singing at the swearing in ceremony is certainly a sign of changing attitudes towards Indigenous peoples in Canada and something to be celebrated, cautious optimism is likely a more appropriate reaction than unbridled enthusiasm. While it is easy and appealing for settlers to celebrate Indigenous art and culture, it is more challenging for settlers to explore the roots of these cultural practices and the demands these practices would make on a settler colonial society which genuinely wished to move towards decolonization. Settlers' hesitation to consider these demands is apparent in discussion of the Truth and Reconciliation Commission of Canada (TRCC) which originated in response to a class action lawsuit against the federal government for the suffering caused by the Indian Residential School (IRS) system and sparked discussions among Canadians over what is owed to Indigenous peoples for the "cultural genocide" which they suffered as a result of the IRS program.² What the TRCC struggled to address is the broader context of dispossession and colonial exploitation that made the IRS program possible and the ongoing colonial context which continues to suffocate Indigenous cultures even in the absence of residential schools. "I don't expect much to happen...

¹ "Inuit Throatsingers Steal the Show at Justin Trudeau's Swearing-in Ceremony," *CBC News*, 4 November 2015, accessed November 2016, <http://www.cbc.ca/news/canada/north/inuit-throatsingers-steal-the-show-at-justin-trudeau-s-swearing-in-ceremony-1.3304148>.

² Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015a), 1.

we're just going to be placed aside," one survivor of the schools lamented following the publication of the final report of the TRCC.³ This attitude has been difficult to shake for many residential school survivors who are still waiting to see if the TRCC will help to disrupt colonial narratives and provide lasting material benefits to the lives of Indigenous peoples in Canada.

The Truth and Reconciliation Commission of Canada incorporated aspects of Indigenous legal traditions, most visibly truth-telling and witnessing, in its implementation of a state-based model of transitional justice based on previous truth and reconciliation commissions which have taken place across the world. However, the TRCC's limited mandate, the curation of Indigenous narratives, and the difficulties experienced by non-Indigenous audiences in fulfilling their responsibilities as witnesses call into question the success of the TRCC's use of Indigenous legal principles. Through a detailed analysis of the function of the Indigenous legal principles of truth-telling and witnessing in the Canadian TRC, this paper will demonstrate that state engagement with Indigenous legal orders in settler colonial contexts tends to reinforce the dominant state legal order rather than create space for alternative Indigenous legal orders.

This paper begins with a discussion of Fanon's theory of culture in the colonial context, which will serve as a foundation for the analysis of the role of Indigenous law in the Canadian settler colonial context. I will then provide a brief overview of current academic work being done in understanding and interpreting Indigenous law, and discuss how Indigenous legal orders interact with and are suppressed by dominant state legal orders. I will expand upon Fanon's work, showing that there is a strong relationship between culture and law, and that Fanon's understanding of the effects of colonization on culture can also inform our analysis of law in the

³ Connie Walker, "Truth and Reconciliation: Aboriginal People Conflicted as Commission Wraps up after 6 Years," *CBC News*, 1 June 2015, accessed December 2016, <http://www.cbc.ca/news/Indigenous/truth-and-reconciliation-aboriginal-people-conflicted-as-commission-wraps-up-after-6-years-1.3094753>.

colonial context. The paper will then apply this analysis to the case of the Canadian TRC through a discussion of the TRCC's engagement with the Indigenous legal principles of truth-telling and witnessing. In analyzing the case of the TRCC, this paper seeks to investigate the relationship between state and Indigenous legal orders in the settler colonial context and, following Fanon, imagine avenues for the decolonization of this relationship.

Culture in the Settler Colonial Context

According to Fanon, colonization degrades the colonized culture just as it degrades the colonized people. Meanwhile the culture of the colonizer assumes superiority, leading the colonized subject to idealize the colonizing culture at the expense of their own cultural practices. I will show that Fanon's theory provides insight into the Canadian context, in which the Canadian settler colonial state first attempted to eradicate the cultural practices of the colonized Indigenous peoples by prohibiting rituals, ceremonies, and self-governance practices, and by removing children from their families, thereby preventing the intergenerational transmission of cultural knowledge and language. Later post-colonial theorists such as Coulthard and Adams, building on Fanon's work, argue that when this more blatant form of colonialism is no longer palatable to settler society, the settler colonial state moves instead to celebrate performative aspects of the colonized culture, while stripping these practices of their original cultural meaning, permitting only a sanitized, hollow version of the formerly vibrant and dynamic culture to exist within the settler state.⁴ By permitting this particular form of culture, the settler state cultivates the appearance of tolerance while discouraging a genuine cultural resurgence that would include the flourishing of all aspects of Indigenous culture, not merely performative ones which are minimally threatening to state power. As this thesis will argue, Indigenous law has often been suppressed in these situations, even as ceremonies which traditionally act as sources of law are elevated by the settler state in their purely performative forms. Although the encouragement of certain Indigenous cultural practices by the state may even be well-intentioned, I will argue that the impact on Indigenous legal orders is too often negative.

⁴ Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 146-148; Howard Adams, *Prison of Grass: Canada from a Native Point of View* (Saskatoon: Fifth House Publishers, 1975), 34-37.

Fanon explains that in the colonial context, “the colonized is elevated above his jungle status in proportion to his adoption of the mother country’s cultural standards.”⁵ In *The Wretched of the Earth*, he observes that “there is not one colonized subject who at least once a day does not dream of taking the place of the colonist.”⁶ Not only does the colonizer value the colonized based on the degree of their adoption of the cultural standards of the colonizer, but the internalization of the colonial culture leads the colonized to self-evaluate according to the standards of the colonizer. Adams, an influential Metis academic and activist, relates that “I came to hate myself for the image I could see in their [the colonizer’s] eyes.”⁷ The process of internalization becomes complete through this self-hatred which comes from seeing oneself reflected in the degraded image of the colonized created by the colonizer. To escape this self-hatred, the colonized subject attempts to shed this image by taking on the cultural practices of the colonizer. Thus, the colonized subject becomes ‘civilized’ as they increasingly adopt colonial cultural practices, and internalize those practices as the ideal. The colonized dreams of taking the place of the colonizer because to them, the colonizer comes to represent the cultural ideal that has been forced upon the colonized subject and finally internalized. However, this is not only an internal or psychological process. The degradation of the colonized culture and the valorization of the colonizing culture also manifests in the external or material aspects of culture.

The material effects of colonization on cultural norms are apparent in the adoption by the colonized of the political, social, and economic structures of the colonizer. In the beginning of the settler colonial process, these structures are forced upon the Indigenous population, but as the cultural norms of the colonizer are internalized, they come to replicate these structures even in

⁵ Frantz Fanon, *Black Skin, White Masks*, 1952, trans. Richard Philcox (New York: Grove Press, 2008), 9.

⁶ Fanon, *The Wretched of the Earth*, 1961, trans. Richard Philcox (New York: Grove Press, 2004), 5.

⁷ Adams, 16.

the absence of overt violent coercion. Fanon's claim that the colonized subject dreams of taking the place of the colonizer is the result of this internalization. The colonized subject sees the colonizer both as the embodiment of internalized cultural ideals, but also as the material embodiment of the structures of colonialism that benefit the settler at the expense of Indigenous peoples. Fanon argues that the colonized does not want the status of the colonizer, but their farm.⁸ They desire the material benefits which the settler has amassed through the colonial structure: his land, belongings, servants, employment, and education. Of course, these material benefits are closely linked to the idealization of the colonial culture through its internalization by Indigenous peoples who are subject to settler colonialism. The colonizer's farm would not be desirable if a farm did not have value according to the dominant cultural practices of the colonizer. Thus, it becomes apparent that it is impossible to separate the psychological and material effects of colonialism. The colonized subject internalizes the culture of the colonizer in both its psychological and material aspects, and these aspects are inextricably linked. This understanding of colonization as both material and psychological will be essential to the analysis of the Canadian TRC. In attempting to address the impacts of a particular colonial institution, the residential school system, the TRC had to grapple with both the material and psychological impacts of colonization, and often struggled to do so in a manner that was effective and attentive to Indigenous legal principles.

Fanon recognized the potential of culture to be a site of resistance to colonialism as well as a tool of colonial domination. In a discussion of the Algerian war, he states that "the veil was worn because tradition demanded a rigid separation of the sexes, but also because the occupier was bent on unveiling Algeria."⁹ As the colonized subject begins to do the difficult work of

⁸ Fanon [1961] 2004, 23.

⁹ Fanon, *A Dying Colonialism*, 1959, trans. Haakon Chevalier (New York: Grove Press, 1965), 65.

decolonizing him or herself, they turn away from the culture of the colonizer, rejecting any symbol or idea that might derive from the colonial culture.¹⁰ In disgust, they turn to a rediscovery of the colonized which was erased and outlawed by the colonizer. Everything that was wrong, sinful, or illegal under colonialism is rediscovered. The danger of this cultural resurgence is that it will fail to recognize the dynamic, fluid nature of a healthy culture. Because colonialism “ossifies” the culture of the colonized, brands it as primitive and relegates it definitively to the past, rediscovering this culture can mean a discovery of the culture of the colonized as it was imagined by the colonizer.¹¹ That is, the cultural resurgence may occur according to the colonizer’s definition of the colonized culture. Moreover, the colonizer will even encourage such a resurgence because it is a false resurgence that serves the ends of the colonizer by preventing a true resurgence that encompasses both the psychological and material aspects of culture. A false resurgence distracts the colonized subject with performances of ‘culture’ and enables the perpetuation of colonial culture as the dominant cultural form. This is the later form of colonization that was discussed earlier, in which the state allows certain cultural practices that were previously forbidden, while continuing to suppress the legal orders and ideas that underpin those practices.

The encouragement of superficial forms of cultural resurgence is an important source of legitimacy for the colonial state. Fanon claims that “the government’s agent uses a language of pure violence. The agent does not alleviate oppression or mask domination.”¹² While pure violence remains an important tool of colonization in Canada, as seen, for example, in the cases of the missing and murdered Indigenous women across the country, the state is now also

¹⁰ Fanon [1952] 2008, 100.

¹¹ Adams, 35.

¹² Fanon [1961] 2004, 4.

concerned with masking domination and oppression in order to avoid disturbing settlers who wish to see themselves not as violent oppressors, but as peaceful cohabitants.¹³ To this end, the state allows, even encourages, certain cultural displays, including powwows, potlatches, and other previously banned practices. Adams explains that in Canada:

Powwows or other rituals were allowed or discouraged according to the functions they originally performed in the native society. If they served the original political or religious purposes, they were discouraged because they tended to strengthen the native culture; if they were rewarded by the whites as simply colorful, primitive performances, they were permitted and even encouraged.¹⁴

He goes on to describe the “pitiful” dances and other performances by Indigenous peoples at the Calgary Stampede, which are “humiliating” for Indigenous peoples because of the removal of these cultural practices from their original context.¹⁵ Although Adams is perhaps overly harsh in his indictment of these performances given the coercive context of settler colonialism in which they took place, he provides an important insight into the superficiality of ceremonies from which the ceremonial – the political, the legal, the religious – has been removed, leaving only the empty performance. These ceremonies become mere performances of culture, devoid of any actual cultural meaning, meant primarily for the entertainment of the colonizer. They also serve to perpetuate national myths which erase the violence of colonization and depict Canadian settlers as peaceful and respectful of Indigenous ways of life.

The colonial state is a constantly evolving oppressor. When the overt use of violence described by Fanon begins to generate disquiet among settlers, who question the legitimacy of a

¹³ Eva Mackey, *House of Difference: Cultural Politics and National Identity in Canada* (New York: Routledge, 1999), 99-100.

¹⁴ Adams, 35.

¹⁵ *Ibid.*, 36.

state which openly brutally oppresses a certain segment of society, the colonial state changes tactics. The colonizing people do not wish to see themselves as colonizers. When former Prime Minister Harper declared that Canada has “no history of colonialism,” he was merely repeating the myth that Canadians have been telling themselves since before confederation.¹⁶ Mackey argues that through the use of Indigenous peoples as “supporting actors” in the development of Canadian nationalist creation myths, Canadians seek to differentiate themselves from the United States, imagining themselves as “gentle, tolerant, just, and impartial.”¹⁷ Because of this desire, the Canadian state has sought to disguise its colonialism. Although the Canadian state has used overt violence as a tool of colonial domination, and continues to do so in certain cases, it has attempted to mask that violence. One of the most powerful tools used by the Canadian state to further this end is the appropriation of Indigenous culture, particularly rituals, ceremonies, and those principles of Indigenous law that are easily compatible with existing state power structures.

Cultural appropriation is difficult to pin down conceptually. It has been defined as the act of “taking – from a culture that is not one’s own – of intellectual property, cultural expressions or artifacts, history and ways of knowledge.”¹⁸ It seems to be accepted that there are both positive and negative forms of cultural appropriation, although generally it is a phrase with negative connotations. Terms such as cultural learning or sharing, on the other hand, have more positive associations.¹⁹ Lee Maracle perhaps said it best when she asked that colonizers simply allow

¹⁶ Aaron Wherry, “What Was He Talking about When He Talked about Colonialism,” *Macleans*, 1 October 2009, accessed December 2016, <http://www.macleans.ca/politics/ottawa/what-he-was-talking-about-when-he-talked-about-colonialism/>.

¹⁷ Mackey, 39.

¹⁸ Bruce Ziff & Pratima Rao, “Introduction to Cultural Appropriation: A Framework for Analysis,” in *Borrowed Power: Essays on Cultural Appropriation*, ed. Bruce Ziff & Pratima Rao (New Brunswick: Rutgers University Press, 1997), 1.

¹⁹ James Young & Susan Haley, “Nothing Comes from Nowhere: Reflections on Cultural Appropriation as the Representation of Other Cultures,” in *The Ethics of Cultural Appropriation*, ed. James Young &

Indigenous writers the space to write their own stories: “Move over and let us sit at the same table,” she demanded following a report by the Canada Council for the Arts on cultural appropriation that generated significant controversy in the early 1990s.²⁰ Keeshig-Tobias, similarly, demanded that non-Indigenous peoples wishing to write about Indigenous experiences spend the time to live with and learn from Indigenous peoples.²¹ Thus, when colonized peoples complain of cultural appropriation, it is not a blanket demand that colonizers refrain from engaging with other cultures, but that they be respectful while doing so. Because, as Fanon argues, the culture of the colonizer is taken as superior to the culture of the colonized as part of the process of colonization, there will naturally be unequal power dynamics at play when settlers choose to engage with the Indigenous cultures they once attempted to erase. Rather than simply taking from Indigenous cultures, Maracle asks that settlers engage with Indigenous cultures as students, allowing Indigenous peoples to act as guides and teachers in the process of cultural learning.²² While there has been much discussion about cultural appropriation by individual

Conrad Brunk (Oxford: Wiley-Blackwell, 2009), 268; Rosemary Coombe, “The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy,” *Canadian Journal of Law and Jurisprudence* 6 no. 2 (1993): 251-252.

²⁰ Jennifer Kelly & Lee Maracle, “Coming out of the House: A Conversation with Lee Maracle,” *ARIEL: A Review of English Literature* 25, no. 1 (1994): 83; for an example of the coverage of the Canada Council report, see Stephen Godfrey, “Canada Council Asks Whose Voice is it Anyway?” *Globe and Mail*, 21 March 1992, and a number of letters to editor in the same paper in the following weeks.

²¹ Lenore Keeshig-Tobias, “Stop Stealing Native Stories,” in *Borrowed Power: Essays on Cultural Appropriation*, ed. Bruce Ziff & Pratima Rao (New Brunswick: Rutgers University Press, 1997), 73. The Canada Council report on cultural appropriation called for “collaboration with minority groups” as a strategy to avoid perpetuating stereotypes when writing about those groups. Following an editorial in the *Globe and Mail* discussing the report, controversy erupted in a series of letters to the editor and, later, academic articles, debating whether or not this articulation of cultural appropriation amounted to censorship. The debate quickly devolved into accusations of totalitarianism on one side and cultural theft on the other. See Coombe, as cited above, for further background and an insightful discussion of the controversy.

²² Kelly & Maracle, 82-83.

artists, writers, and anthropologists, cultural appropriation by the state has been less discussed, even as it has increasingly become an important agent of continued colonization in Canada.

The Canadian state has never been afraid to instrumentalize Indigenous culture in the service of nation-building, Mackey has argued convincingly. Even as the Canadian government sought to erase Indigenous culture and forbid Indigenous cultural practices, settlers “increasingly romanticised and appropriated Aboriginal practices by dressing up as ‘Indians’, by collecting their cultural ‘artefacts’, and even pretending to be ‘Indians.’”²³ The state itself profited from these activities by encouraging tourism centred on these stereotyped understanding of indigeneity. Furthermore, as I have shown earlier in this paper and as Mackey herself demonstrates, the appropriation of Indigenous ‘culture’ in this way served to create a narrative in which Indigenous peoples were an integral part of a tolerant, multicultural Canada.²⁴ More recently, as overt state violence in the service of colonial aims has become less palatable to Canadian settlers, government use of appropriation in this way has become an increasingly important part of government policy. As colonialism loses the veneer of legitimacy that it cultivated through the discourse of the ‘white man’s burden’ and similar paternalist conceptions of Indigenous peoples as ‘uncivilized’ or ‘savage’, the Canadian state must find new ways to legitimize its ongoing colonial practices.²⁵ The performance of Indigenous cultural practices has increasingly been used to regain the legitimacy that settler colonialism seeks.

²³ Mackey, 36.

²⁴ Ibid., 49-51.

²⁵ The ongoing colonial practices of the Canadian state are numerous. Some examples include the underfunding of hospitals and schools in Indigenous communities, the continued refusal to honour treaties, and the failure to obtain permission when exploiting Indigenous land. See Coulthard, 6-7; Adam Lewis, “Living on Stolen Land: Colonialism and Indigenous Peoples’ Lands in Canada,” *Alternatives Journal* 41, no. 5 (2015): 31; Joyce Green, “Decolonization and Recolonization in Canada,” In *Changing Canada: Political Economy as Transformation*, ed. Wallace Clement & Leah Vosko (Montreal: McGill-

In prior attempts to legitimize colonialism, the colonizer would claim that the colonized peoples were incapable of self-governance, child-like, and uncivilized. However, as these justifications for colonialism become increasingly insufficient to assuage settler guilt over the treatment of colonized peoples, a new discourse of reconciliation has emerged, which seeks a shift in colonial relations through the inclusion and recognition of colonized peoples.²⁶ However, this discourse of reconciliation fails to seriously consider the material changes that would have to occur in order to genuinely transform colonial relations. As Leanne Simpson argues, the version of reconciliation being promoted by the state resembles an abusive relationship in which the abuser is determined to ‘reconcile’, regardless of the wishes of the victim and without making any efforts to change or acknowledge their wrongdoing.²⁷ Instead of genuinely seeking reconciliation, the Canadian state seems more interested in appearing to seek reconciliation to the average disinterested, non-Indigenous citizen observer, while continuing its existing colonial practices. In order to mask the reality of persistent colonization and oppression in Canada, the state has engaged with some of the more performative aspects of the cultures of Indigenous peoples living in Canada, celebrating these sanitized cultural performances as evidence of the inclusion of colonized peoples in a just, tolerant Canadian state. This theoretical understanding of state engagement with Indigenous cultural practices provides the foundation for this paper’s elaboration of the relationship between Indigenous legal orders and the settler colonial state. Like Indigenous culture, Indigenous law is subject to the degradation of colonialism, which attempts to eliminate, and, when elimination proves impossible, ignore and suppress Indigenous law.

Queen’s University Press, 2003), 61-68; Peter Kulchyski, “Trail to Tears: Concerning Modern Treaties in Northern Canada,” *Canadian Journal of Native Studies* 35, no. 1 (2015): 70-73, 80.

²⁶ Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver, UBC Press, 2010), 86; Coulthard, 22.

²⁷ Leanne Simpson, *Dancing on our Turtle’s Back: Stories of Nishnaabeg Re-Creation, Resurgence, and a New Emergence* (Winnipeg: Arbeiter Ring Publishing, 2011), 15.

Indigenous law, like Indigenous culture, also has the potential to serve as a space for resistance to colonization, however, by providing alternatives to the colonial state legal system that are grounded in Indigenous ways of knowing. The remainder of this thesis will consider the evidence that through the TRCC, state law was positioned as the primary source of legal authority, while Indigenous law, despite its substantial contributions to the operation of the TRCC, was positioned as subordinate to state law. I will argue that although the TRCC's engagement with Indigenous law served partly as an avenue for ongoing colonial appropriation and violence, Indigenous law also has the potential to serve as a site for resistance to colonial violence when engagement with Indigenous law is respectful of the inherent legal authority of Indigenous legal orders.

Indigenous Law in the Settler Colonial Context

Just as Indigenous cultures have endured attempted assimilation and erasure in the Canadian settler colonial context, Indigenous legal orders have similarly suffered under colonialism. Perhaps the most tragic consequence of the attempted erasure of Indigenous law is the failure of Canadians to recognize Indigenous law as law. Instead, Canadians often see Indigenous legal orders as primitive cultural practices, or, more recently, alternative ways of ‘doing justice.’ This section will first provide a brief overview of the field of Indigenous legal theory, showing that Indigenous legal orders are complete and independent legal systems that provide viable alternatives to Canadian state law. I will point out the flaws with the common misconceptions of Indigenous law as either a set of cultural practices or as a set of justice processes. Importantly, I argue that because law is rooted in culture in substantial ways, Fanon’s observations about culture can be interpreted as having relevance to legal orders under colonialism, opening the path for the main argument of this thesis, that state engagement with Indigenous legal orders in the settler colonial context tends to strengthen the position of state law and diminish that of Indigenous law. Because this argument is derived from Fanon’s analysis of the effects of settler colonialism on culture, it is essential to understand that culture and law are inextricably linked, and similarly impacted by colonization. Thus, while Indigenous law is not merely a set of cultural practices, but a number of separate, although often related, complete, alternative legal orders, all law, including state law, is rooted in culture and is part of a broader cultural structure.

As the name implies, Indigenous legal theories are complete alternative legal theories which employ different methods of doing justice, including restorative, retributive, and rehabilitative methods. Indigenous legal theory is a diverse field which is engaged in examining

Indigenous law as a complex, fluid body of knowledge that contains important information that helps Indigenous communities to create meaningful, adaptable rules that structure society and manage conflict.²⁸ While Indigenous legal theorists recognize similarities and connections among different Indigenous legal traditions, a major concern in Indigenous law is the exploration of Indigenous legal traditions as they exist in different Indigenous communities and cultures.²⁹ Thus, while Indigenous legal theory may be seen as a semi-consolidated, emerging academic field, it is important to note that theorists of Indigenous law do not generally promote a pan-Indigenous conception of Indigenous law, but instead are engaged in researching and articulating the many, varied legal traditions of each Indigenous nation. Given the scope of this paper, I have not been able to engage in similar work, and I hope that in acknowledging this shortcoming I will be able to avoid depicting Indigenous legal orders as universal among all Indigenous nations, but rather interconnected yet unique. That is, different nations may share some of the same legal principles or even derive their legal orders from similar legal traditions. Cultural and legal sharing, too, has led to similarities between legal orders in proximate Indigenous nations. For example, Friedland argues that the concept of the *weitiko*, or *wendigo*, is important to a variety of Indigenous legal traditions.³⁰ However, different nations take up the concept of the *weitiko* slightly different, although the stories which inform the *weitiko* as a legal principle are similar

²⁸ Emily Snyder, "Indigenous Feminist Legal Theory," *Canadian Journal of Women and the Law* 26, no. 2 (2014): 383.

²⁹ For example, Napoleon and Friedland both engage in the careful research and analysis of a particular legal practice in a particular Indigenous nation; this narrow, highly focused approach is common among Indigenous legal scholars. See Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent," in *Between Consenting Peoples: Political Community and the Meaning of Consent*, ed. Jeremy Webber & Colin Macleod (Vancouver: University of British Columbia Press, 2010), 50-57 and Hadley Louise Friedland, "The *Wetiko* Legal Principles: Responding to Harmful People in Cree, Anishinabek and Sauteaux Societies" (master's thesis, University of Alberta, 2009).

³⁰ Friedland 2009, 22.

across all three nations that Friedland studies.³¹ This interconnectedness allows for some broader analysis of Indigenous legal orders, even as the differentiation of Indigenous legal orders remains an essential project of Indigenous legal theory.

In this thesis I use the terms ‘legal order’ and ‘legal system’ interchangeably to refer to a system of laws in the legal positivist sense; that is, a social order which organizes laws, provides a distinctive form of legal reasoning through which to interpret those laws, and determines appropriate consequences for infractions of those laws. A legal system or order must also have a set of constitutional laws which are fundamental to the organization of all other laws in the system.³² I use the term ‘legal tradition’ to refer more specifically to a set of laws that are generated by the religious teachings, natural observations, proclamations, customs, and deliberations of a particular culture.³³ A legal tradition shapes the way people think about the role of law in society, as well as how people expect legal systems to operate.³⁴ A legal system may incorporate a variety of legal traditions; for example, the Canadian state legal system draws on both civil and common legal traditions. Finally, the terms ‘legal concept’ or ‘legal principle’ I use to refer to any particular concept, which is part of a legal system or legal tradition. A concept may be expressed as a single law, or it may be an idea which contributes to several laws. For example, the legal principle of political equality is fundamental to the Canadian legal system, and underlies a number of Canadian laws, such as the law that all Canadians of a certain age have the right to vote, or run for political office. As the remainder of this thesis will illustrate, in the case of the Canadian TRC, certain Indigenous legal principles were centred in the creation

³¹ Friedland, “Reflective Frameworks: Methods for Accessing, Understanding, and Applying Indigenous Laws,” *Indigenous Law Journal* 11, no. 1 (2012): 32-33

³² Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System*, 1970 (Reprint, Oxford: Oxford University Press, 2003), 205.

³³ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 24.

³⁴ *Ibid.*, 7.

and operation of the commission, yet the broader context of these principles which would have been provided by an engagement with Indigenous legal traditions or systems was sometimes lacking.

As independent legal orders, Borrows argues that Indigenous law must not be understood as static; like any legal order, Indigenous law “must be continually reinterpreted and reapplied in order to remain relevant amid changing conditions.”³⁵ Canadian state law is commonly understood in this manner, often through the metaphor of the ‘living tree’ constitution, which conceives of judicial review as “necessarily creative and ‘living,’ relying as it does on evaluative considerations of various sorts. Regardless of whether judges decide to conserve or innovate constitutional law, they are always faced with the possibility of innovations.”³⁶ Despite the popularity of the living tree interpretation of law in Canada, Indigenous legal traditions are still interpreted as static by Canadian courts, fixed in some precolonial period forever – Borrows offers as evidence of this strange application of originalism to Indigenous law alone, but not state law, that “Aboriginal rights can only be claimed if they flow from Aboriginal practices that were ‘integral to their distinctive culture’ prior to European contact.”³⁷ By eschewing this originalist interpretation of Indigenous legal traditions and understanding Indigenous law as dynamic and inherent to Indigenous political and legal orders, Indigenous legal theorists are creating space for the continued growth of Indigenous legal traditions and setting up Indigenous legal orders as legitimate alternatives to state legal orders.

³⁵ *Ibid.*, 60.

³⁶ Aileen Kavanagh, “The Idea of a Living Constitution,” *Canadian Journal of Law and Jurisprudence* 16, no. 1 (2003): 89.

³⁷ John Borrows, “(Ab)Originalism and Canada’s Constitution,” *Supreme Court Law Review* 58, no. 1 (2012): 360.

Because Indigenous law is inherent to Indigenous communities, it does not rely on state recognition for its legal authority. Indigenous legal theories reject the assumption that law must derive its authority from the state; Webber, for example, posits that “law, and the associated governmental rights, originate from within the particular people’s own traditions... they are not the result of a grant of authority from any other entity.”³⁸ Indigenous law is derived from a variety of different sources and comes in different forms, including sacred law, deliberative law, and natural law.³⁹ Borrows acknowledges these different sources in order to show the complexity of Indigenous law, which is not merely customary, but the result of careful legal reasoning similar to that expected of legal professionals in the state legal system. Napoleon uses the example of a dispute among the Gitksan peoples over the use of a particular crest to show that those involved in the dispute, their relations, and elders and other knowledge keepers, engaged in legal reasoning in order to determine who had the right to display the crest based on established laws regarding the use of crests.⁴⁰ The inherency of Indigenous legal authority, the existence of complex, dynamic sources of law and deliberative, formal legal reasoning demonstrates that Indigenous legal orders constitute fully independent legal systems, which coexist with but do not depend on state legal systems.

As the field of Indigenous legal theory grows, restorative justice scholars have increasingly drawn from Indigenous legal theories in their work, often leading to a conflation of restorative justice and Indigenous law in Canadian popular discourse as well as among scholars and activists. The use of terms such as ‘justice,’ ‘corrections,’ and ‘healing’ to describe

³⁸ Jeremy Webber, “We are still in an Age of Encounter: Section 35 and a Canada beyond Sovereignty,” conference paper, University of Toronto, 26 November 2012, 16-17.

³⁹ Borrows 2010, 24-55.

⁴⁰ Napoleon 2010, 61-66.

Indigenous legal practices is common both among Indigenous and non-Indigenous scholars of restorative justice. Hansen, for example, consistently refers to “Cree restorative justice” which is “imbedded in our culture... and philosophy.”⁴¹ Although Hansen’s account of Cree justice practices is informative and successfully argues that the power to implement justice should be placed with Indigenous communities rather than with the Canadian state, by conflating restorative justice and Cree law, he fails to take his argument to its logical conclusion, that Indigenous communities have the capacity and the right to be responsible not only for the implementation of justice in their own communities, but also the creation, deliberation, and implementation of law. Ross’ work faces similar obstacles due to his avoidance of the term ‘law’ to describe Indigenous legal traditions. Instead, he describes Indigenous ‘justice’ and ‘healing.’⁴² This failure to ascribe law to Indigenous peoples is unfortunately common among restorative justice scholars, as well as among legal professionals and theorists.

In the type of analysis described above, Ross and other theorists of restorative justice attempt to understand Indigenous law by framing it primarily as a type of restorative justice. This is particularly damaging because restorative justice is a particular way of doing justice – not a legal order in and of itself. Braithwaite describes it as a process which “gives stakeholders affected by an injustice an opportunity to tell their stories about its consequences and what needs to be done to put things right.”⁴³ In contrast, Indigenous law is a collection of Indigenous legal orders, which include ways of doing justice that are both restorative and retributive. Furthermore,

⁴¹ John George Hansen, *Cree Restorative Justice: From the Ancient to the Present* (Vernon: J Charlton, 2009), 20.

⁴² Rupert Ross, *Indigenous Healing: Exploring Traditional Paths* (Toronto: Penguin, 2014), 185-192, 201-202, 227-274; see also Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin, 2006).

⁴³ John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002), vii.

Indigenous legal orders also consist of systems of laws, justice processes, and the legal reasoning and authority that allow for the deliberation and enforcement of those laws. By reducing Indigenous legal orders to a particular justice process, restorative justice, these other aspects of Indigenous law are erased.⁴⁴ This use of Indigenous law often leads scholars to approach Indigenous legal traditions as novelties, fascinating cultural practices to be studied and maybe even imitated and improved upon by the modern state, rather than as independent, functioning legal orders with unique and well-developed methods of managing legal disputes. Indigenous legal scholars have been rightfully critical of the trend in the study of restorative justice of using Indigenous legal traditions as examples not of law, but of restorative justice processes. Napoleon argues that many restorative justice programs in Canada confuse Indigenous law and restorative justice, while simultaneously erasing the existence of Indigenous law as law:

Most government-sanctioned restorative justice programs, even those that deal exclusively with non-Aboriginal clients, acknowledge or claim roots in pan-Aboriginal concepts of justice or law. Meanwhile, they are completely unrelated to the local Indigenous peoples, ignoring the laws and legal orders of the Indigenous peoples where they function. Finally, while Aboriginal and restorative justice initiatives are obviously considered to be about justice, they generally say nothing about Indigenous legal orders and law... Thus, a false dichotomy between restorative justice and the western criminal

⁴⁴ Some particularly glaring cases of the conflation of restorative justice and Indigenous law by scholars are found in Nicholas A. Jones & Rob Nestor, "Sentencing Circles in Canada and the Gacaca in Rwanda: A Comparative Analysis," *International Criminal Justice Review* 21, no. 1 (2011): 39-66; see also L. Thomas Winfree Jr., "Peacemaking and Community Harmony: Lessons and Admonitions from the Navajo Peacemaking Courts," in *Restorative Justice: Theoretical Foundations*, ed. Elmar Weitekamp & Hans-Jurgen Kerner (Portland: Willan Publishing, 2002), 285-307; Terry Beitzel & Tammy Castle, "Achieving Justice through the ICC in Uganda: Is Indigenous/Restorative Justice a Better Approach?" *International Criminal Justice Review* 23, no. 1 (2013): 41-55.

law is created, which unfortunately constrains other creative possibilities for Indigenous peoples.⁴⁵

Snyder is equally wary of this tendency, arguing that the conflation of Indigenous law and restorative justice “erases the complexity of Indigenous laws and reduces ‘aboriginal justice’ to general pan-Indigenous principles that are contrasted with adversarial state laws.”⁴⁶ Both Napoleon and Snyder also point out that the erasure of Indigenous law through this conflation undermines efforts to achieve Indigenous self-governance and encourages continued Indigenous reliance on the state as the sole source of legal authority.⁴⁷

The conflation of Indigenous law with restorative justice is related to a similar and equally damaging error, the reduction of Indigenous law to ‘mere’ sets of cultural practices, rather than fully developed legal orders. This understanding of Indigenous law is clearly visible in Gehm’s description of Indigenous justice processes – like Ross, he doesn’t use the term ‘law’ – as “rich, symbolic traditions” and in older anthropological work which tended to describe Indigenous cultures as closed and static.⁴⁸ Adams identifies this issue implicitly in his work when he criticizes the “ossification” of Indigenous culture by separating the meaning of traditional ceremonies and rituals from their meanings.⁴⁹ Mackey similarly cautions against the potential for culture, when it is no longer seen as a dynamic, living force, to become simply a

⁴⁵ Val Napoleon et al., “Where is the Law in Restorative Justice?” in *Aboriginal Self-government in Canada: Current Trends and Issues*, ed. Yale D. Belanger, 3rd ed. (Saskatoon: Purich, 2008), 350-351.

⁴⁶ Snyder, 384-385.

⁴⁷ Napoleon 2008, 351-352; Snyder, 385.

⁴⁸ John Gehm, “Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks,” *Western Criminology Review* 1, no. 1 (1998), accessed November 2016, <http://www.westerncriminology.org/documents/WCR/v01n1/Gehm/gehm.html>; Cairns provides a good overview of this tendency in Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) 36-39.

⁴⁹ Adams, 35-43; See also Mackey, 48-49, 73-74.

form of colour, folk entertainment, or product for settler consumption.⁵⁰ There is no space for law when culture is understood as static because legal systems are necessarily dynamic and current, actively engaging with the everyday realities of those who create and are subject to the law.⁵¹ Snyder argues that when scholars fail to recognize Indigenous law as law, they are operating in a racist and colonial framework which treats Indigenous law as “so primitive that it is not even law.”⁵² By refusing to acknowledge forms of non-state law as law, talking about Indigenous law only as cultural or justice practices, scholars perpetuate frameworks which degrade and dismiss Indigenous law. When states engage in this same practice, it only furthers the erasure of Indigenous law as law. The conflation of Indigenous legal traditions and Indigenous cultural practices is particularly harmful because it obscures the actual existing relationship between culture and law that is present in both Indigenous and state legal orders.

An approach to Indigenous law which primarily focuses on law as a cultural practice without also granting it status as law obscures the relationship between law and culture by setting up a false distinction between Indigenous and state law in which Indigenous legal orders are depicted as sets of cultural practices, while state legal orders are depicted as more than ‘mere’ cultural practices because they are imbued with legal reasoning and legal authority, which Indigenous legal orders are assumed to lack. Borrows points out that “a legal tradition is an aspect of general culture.”⁵³ Law and culture are not distinct, nor is culture subordinate to law; rather, “legal traditions are cultural phenomena; they provide categories into which ‘the untidy business of life’ may be organized and where disputes may be resolved.”⁵⁴ Understanding legal

⁵⁰ Mackey, 107.

⁵¹ Borrows 2010, 8.

⁵² Snyder, 384.

⁵³ Borrows 2010, 7.

⁵⁴ *Ibid.*, 8.

traditions as one aspect of broader cultural traditions allows for a deeper understanding of the ways law is situated, within its own culture, in its interactions with other cultures, and in relation to existing power structures which influence the way law is interpreted and applied. Law, like culture, is a dynamic, adaptive force which loses its transformative potential when it becomes “overly romanticized, essentialized, and fossilized in an inflexible framework.”⁵⁵ Like culture, then, legal traditions are vulnerable to the same negative impacts of colonialism that Fanon and Adams identify – colonization leads to the ‘ossification’ of Indigenous legal traditions in some fixed moment in the past, negating their real status as dynamic, autonomous legal orders which function alongside state legal orders. Thus, by refusing to see Indigenous law as law, the settler colonial state engages in the same process through which it seeks to promote static, performative cultural practices while ensuring that the dynamic cultural, legal, and political meanings of those practices are suppressed. Fanon’s theorization of culture in the settler colonial context, then, is seen mirrored in contemporary interactions between state law and Indigenous law. By refusing to recognize the legal authority and inherency of Indigenous legal orders, the settler colonial state attempts to establish the superiority of state law over Indigenous law, just as the settler colonial state valorizes the culture of the settler population while diminishing that of the Indigenous, colonized population.

Truth and reconciliation commissions have often served as spaces for interaction between state and Indigenous legal traditions, although often commissions do not explicitly acknowledge the legal character of the Indigenous traditions which they engage. Many TRCs prior to the Canadian TRC have attempted to include Indigenous and other local legal traditions in their procedures, including the South African Truth and Reconciliation Commission (SATRC) and the

⁵⁵ Ibid., 9.

Timor-Leste Commission for Reception, Truth, and Reconciliation (CAVR).⁵⁶ Even states which did not hold a TRC but engaged in other transitional justice mechanisms, such as Uganda, have incorporated Indigenous legal traditions in their programmes.⁵⁷ Because transitional justice approaches such as TRCs necessarily build on existing legal systems, and tend to favor more restorative approaches to justice, it makes sense that many TRCs have turned to Indigenous law as a foundation for their activities. Incorporating Indigenous legal traditions helps to localize transitional justice work, increase the perceived legitimacy of the work among local populations, and provides a partial legal foundation for the work done by these commissions – although most TRCs rely on some mix of international and state legal traditions to provide the primary legal background for their work.⁵⁸ Despite the increasing engagement with Indigenous legal traditions by TRCs, commissions have rarely acknowledged that the Indigenous legal principles on which they rely are, in fact, forms of law. The SATRC, for example, situates itself in the principle of *ubuntu*, which the final report describes as the idea that “people are people through other people;” that people are all connected and that a violation of the rights on any individual or group is a violation of the human dignity of all.⁵⁹ The report understands *ubuntu* as an example of the “African traditional values” which were violated by the violence and injustices suffered

⁵⁶ Christian Gade, “Restorative Justice and the South African Truth and Reconciliation Process,” *South African Journal of Philosophy* 32, no. 1 (2013): 24-26; Ben Larke, “...And the Truth Shall Set you Free’: Confessional Trade-offs and Community Reconciliation in East Timor,” *Asian Journal of Social Science* 37, no. 4 (2009): 657-658.

⁵⁷ Beitzel & Castle, 48-50.

⁵⁸ Michal Ben-Josef Hirsch, Megan Mackenzie & Mohammed Sesay, “Measuring the Impact of Truth and Reconciliation Commissions: Placing the Global ‘Success’ of TRCs in Local Perspective,” *Cooperation and Conflict* 47, no. 3 (2012): 392-393.

⁵⁹ South African Truth and Reconciliation Commission, *Truth and Reconciliation Commission Report*, vol. 1, 1998, PDF, 127, accessed January 2017, <http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>.

during the South African Apartheid, rather than as a legal principle rooted in those values.⁶⁰ More recently, however, TRCs such as the CAVR of Timor-Leste have begun to explicitly incorporate Indigenous legal principles in their programmes. *Chega*, the final report of the CAVR, describes the commitment of the Commission to the incorporation of the “customary law” of the people of Timor-Leste in its community reconciliation processes.⁶¹ While the *nahe biti boot* ceremony on which the community reconciliation processes were based is primarily referred to as a traditional justice practice rather than a legal principle or practice in the report, this acknowledgement that Indigenous law does exist represents a meaningful step forward in the practice of transitional justice.⁶² Furthermore, the report recognizes that the practice of *nahe biti boot* may comprise both retributive and restorative elements, a significant departure from the South African TRC’s depiction of *ubuntu* as supporting a purely restorative understanding of justice.⁶³ The Canadian TRC’s engagement with Indigenous law has been subject to many of the same problems that earlier TRCs have struggled with. The TRCC built on CAVR’s successes by committing itself to the incorporation of two Indigenous legal principles, truth-telling and witnessing, in its operation and by explicitly acknowledging those principles as examples of Indigenous law.⁶⁴ Even CAVR, although it acknowledged the existence of “customary law” in Indigenous communities, did not make explicit its engagement with Indigenous law to the same extent that the TRCC did.⁶⁵ This alone represents a significant step forward for state engagement with Indigenous legal traditions through transitional justice mechanisms such as TRCs.

⁶⁰ *Ibid.*

⁶¹ The Timor-Leste Commission for Reception, Truth, and Reconciliation, *Chega: The Final Report of the Timor-Leste Commission for Reception, Truth, and Reconciliation (CAVR)*, vol. 4, PDF, 2431, accessed January 2017, <http://chegareport.net/Chega%20All%20Volumes.pdf>.

⁶² *Ibid.*, 2431-2434.

⁶³ *Ibid.*, 2433. See also Allais, 336-338.

⁶⁴ “Mandate,” 5.

⁶⁵ CAVR, 2431.

In this section I have argued that Fanon's insights into the impacts of colonization on culture can usefully be applied to the study of law in the colonial context. Legal traditions, like cultural traditions, suffer both the psychological and material impacts of colonization, and thus both of these aspects must be addressed in order to move towards decolonization. Indigenous legal traditions have been dismissed as primitive and denied the status of law; just as Indigenous cultural traditions in the settler colonial context are treated as inferior to the cultural traditions of the colonizing people, Indigenous legal traditions are seen as less than the legal traditions which inform state law. Materially, Indigenous law is denied legal authority and made subordinate to state law. The dual effects of colonization on Indigenous law mirror the effects of colonization on Indigenous culture. Furthermore, the danger of ossification that Adams and Coulthard identify as a threat to the dynamism of Indigenous culture is also a potential obstacle to Indigenous legal resurgence.⁶⁶ In my discussion of the Canadian TRC, I will explore further how power imbalances in the settler colonial context can encourage that ossification through the interactions between state and Indigenous legal orders.

⁶⁶ Borrows 2010, 7-8.

Case Selection and Method

In order to investigate how the Truth and Reconciliation Commission of Canada engaged with Indigenous legal concepts in the context of the settler colonial power imbalances identified by Fanon, I chose two legal concepts, truth-telling and witnessing, to explore in greater detail. In particular, I will describe the role of each concept, broadly, in Indigenous legal theories, and show that they are essential aspects of many Indigenous legal orders. I will then describe the TRCC's specific commitments with regards to each of these legal principles, and discuss to what extent and in what ways the TRCC was able to fulfill those commitments in each case. In doing so, I explore how the Canadian settler state interacted with Indigenous law in the particular case of the TRCC, providing grounds for further analysis of the relationship between settler state legal orders and Indigenous legal orders. In particular, I aim to gather information on what happens when state legal orders and Indigenous legal orders interact given the power imbalance between these two legal systems created by the settler colonial context.

I chose truth-telling and witnessing as the legal principles to investigate further for two major reasons. First, the most specific commitments made by the TRCC were made with regards to these two concepts. Although the TRCC made a general promise in its mandate to recognize “the significance of Aboriginal oral and legal traditions in its activities,” the mandate only makes direct promises with regards to truth-telling and witnessing.⁶⁷ While the commission did make use of healing circles, which are a common method of doing justice among Indigenous communities, these were engaged less as a legal principle and more as a justice process.⁶⁸ The

⁶⁷ “Schedule ‘N’: Mandate for the Truth and Reconciliation Commission,” *Indian Residential Schools Settlement Agreement*, 2006, PDF, 5, accessed December 2016, http://www.trc.ca/websites/trcinstitution/File/pdfs/SCHEDULE_N_EN.pdf.

⁶⁸ Rosemary Nagy, “Truth, Reconciliation, and Settler Denial,” *Human Rights Review* 13, no. 3 (2012): 359.

commission also held important ceremonies at sharing circles and national events, which generally have roots in legal traditions, even though the legal natures of such ceremonies, as Adams observed, are rarely acknowledged.⁶⁹ While these ceremonies are certainly an example of the TRCC's engagement with Indigenous law, I choose to focus my analysis on the explicit commitments of TRCC with regards to engagement with Indigenous legal principles, which specifically acknowledge Second, truth-telling and witnessing have the advantage of being common to a number of different Indigenous legal systems, although, of course, they are taken up in different ways in each nation and community. Thus, an analysis focussing on these two concepts has the benefit of speaking to a variety of Indigenous legal systems while still minimizing the danger of falling into the trap of pan-indigeneity.⁷⁰ There are, of course, countless other Indigenous legal principles which merit further study, but I felt it necessary to limit this study to those principles which were brought up by the TRCC because my interest in this case is in studying the interaction between Indigenous law and state law.

Finally, I feel that it is important to note that while truth-telling and witnessing have, in various ways, been employed by other commissions, including the South African Truth and Reconciliation Commission and the Timor-Leste Commission for Reception, Truth, and Reconciliation, when I speak of truth-telling and witnessing in this paper, I am referring to a set of Indigenous legal traditions common to some Indigenous peoples residing in what is now Canada, not to a broader set of practices used by many transitional justice mechanisms. While

⁶⁹ For example, see "British Columbia National Event Program," *Truth and Reconciliation Commission of Canada*, 2013, PDF, accessed December 2016, <http://www.trc.ca/websites/vancouver/File/TRC-073.06%20BCNE%20program-web.pdf>; "It's Time for Reconciliation: TRC Closing Event Program," *Truth and Reconciliation Commission of Canada*, 2015, PDF, accessed February 2017, http://myrobust.com/growwithamp/TRC/Ottawa_2015/program/trc-program-web.pdf.

⁷⁰ As I mentioned earlier in the paper, while I have avoided this error to the best of my ability, I wish to acknowledge that my research could not encompass a detailed investigation into individual Indigenous legal orders, and thus may be liable to fall into this trap.

there is some overlap between Indigenous conceptions of these principles and transitional justice practitioners' conceptions of them, it is nonetheless essential to state that as much as possible, I focus on truth-telling and witnessing as examples of Indigenous law rather than as transitional justice practice in this analysis. This difference is important because legal principles carry with them the values and norms of the legal traditions to which they belong, while also informing and shaping those legal traditions in turn. On the other hand, justice processes are merely procedural; while they certainly reflect the legal traditions which employ them, the values of the legal traditions which make use of them are not inherent to any particular justice process.

In conducting my research into the Canadian Truth and Reconciliation Commission, I focussed on several different sources of information. My aim was to gather information from a variety of participants in the TRC process, namely the commission itself, the Canadian government, Indigenous survivors, Indigenous activists and scholars engaged in the process, and non-Indigenous participants and witnesses. My aim was to analyze the experiences of each of the groups involved in the TRC's engagement with truth-telling and witnessing. From the TRC itself, I examined reports, event programs, and publically available information from the TRC website. In order to analyze survivor accounts, I looked at publically available statements made to the commission, interviews conducted with survivors by other scholars, news articles which cited survivors, and written accounts by survivors of their experiences with the TRC. I also reviewed academic work of Indigenous scholars engaged with the TRC, interviews with Indigenous scholars and activists, articles written by Indigenous academics and activists for both popular and academic audiences, and news articles discussing the work of Indigenous activists involved with the TRC. Finally, I read news articles citing non-Indigenous and Indigenous

witnesses and participants in the TRC process, letters to the editor and articles written by witnesses, and interviews with witnesses.

I chose to focus on these particular sources of knowledge about the TRC because of the broad variety of perspectives which they cover, ensuring that both state and Indigenous voices were included in my study. The documents published by the TRCC were essential to my understanding of the design and operation of the TRCC, while Indigenous and non-Indigenous participant narratives provided information about how the TRCC functioned in practice, and how its work was experienced subjectively by participants. Through my analysis of these documents, I identified narratives which emerged from the different parties to the TRCC and studied these narratives in order to draw conclusions about how state and Indigenous legal order interacted through the TRCC and how different groups interpreted that interaction. Throughout this thesis, I have endeavoured to centre Indigenous voices, both in my theorization of Indigenous law in the settler colonial context and in my research of the Canadian TRC, because of the unique positionality and epistemic standpoint of Indigenous peoples as subjects of settler colonization and agents of anticolonial resistance.

Evidence from the Truth and Reconciliation Commission of Canada

The Truth and Reconciliation Commission of Canada was not the first TRC to attempt to engage with Indigenous legal traditions, although it was the first to recognize those legal traditions as legal traditions, rather than cultural or justice practices. In this section, I will examine the TRCC's commitment to the use of two Indigenous legal principles, truth-telling and witnessing. I will provide a brief explanation of the role of these principles in some Indigenous legal traditions, and explain how they were taken up by the TRCC. Finally, I will examine the execution of the TRCC's commitments, looking at how these legal principles were in practice engaged with by the TRCC at national events and ceremonies, and in the recommendations made by the commission with the aim of uncovering the ways in which state and Indigenous legal orders interacted in the case of the TRCC, and how the context of settler colonialism affected these interactions. My aim is to uncover narratives about the role of Indigenous law in the TRCC in order to analyze the TRCC as a space for engagement between Indigenous and state legal traditions. Ultimately, I will argue, state engagement with Indigenous legal traditions through the TRCC served to strengthen the position of state law while weakening that of Indigenous law.

The TRCC emerged out of a class action lawsuit against the Canadian government for the atrocities committed against Canadian Indigenous peoples through the residential school system, and its mandate and the funding that made the commission possible was part of the settlement of that lawsuit.⁷¹ The mandate states, rather optimistically, that “the truth of our common experiences will help set our spirits free and pave the way to reconciliation.”⁷² However, this

⁷¹ Ronald Niezen, “Templates and Exclusions: Victim Centricism in Canada’s Truth and Reconciliation Commission on Indian Residential Schools,” *Journal of the Royal Anthropological Institute* 22, no. 4 (2016): 921-922.

⁷² “Mandate,” 1.

idea is not without precedent. Other truth and reconciliation commissions have had similar expectations of truth-telling.⁷³ These commissions have generally attributed significant healing power to truth-telling, particularly the subjective truths that arise through the telling of personal narratives or engaging in community dialogues. Llewelyn describes restorative justice as inherently tied to this dialogical understanding of truth. She calls this truth that is arrived at through a process of negotiation through dialogue a “relational truth... relational truth is truth in all of its nuances and complexities.”⁷⁴ Regan argues that this conception of truth is “congruent with Indigenous philosophical concepts of law, justice, and peacemaking, which are rooted in holistic ideas of interconnectedness.”⁷⁵ Truth seems to have several important functions in the TRCC, then. First, truth-telling is intended to promote healing by facilitating dialogue and through dialogue, an understanding of the shared experiences and needs of victims. Second, truth-telling has a historical function. By compiling the subjective truths of victims who chose to testify, the TRCC set out to create a broader narrative of the IRS program which would become part of the accepted narrative of Canadian history. Finally, truth-telling would encourage reconciliation through this process of dialogue. By sharing these narratives, the TRCC aimed to restore the relationships – the interconnectedness – both among Indigenous peoples and between Indigenous and non-Indigenous peoples that had been severed by the residential schools.

The TRCC also committed itself to conducting its work according to “the Aboriginal principle of witnessing” in its mandate.⁷⁶ While the mandate does not discuss this idea further, in

⁷³ Hirsch, 387.

⁷⁴ Jennifer Llewellyn, “Bridging the Gap Between Truth and Reconciliation: Restorative Justice and the Indian Residential Schools Truth and Reconciliation Commission,” in *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*, ed. Marlene Castellano, Linda Archibald & Mike Degagne (Ottawa: Aboriginal Healing Foundation, 2008), 191.

⁷⁵ Regan, 63.

⁷⁶ “Mandate,” 2.

the Commission's report, there is a short discussion of what 'witnessing' entails and how the TRCC attempted to implement this practice. In an important nod towards the dangers of essentializing Indigenous cultures, the report recognizes the diversity of Indigenous legal traditions across Canada, in particular the diversity of practices of witnessing. However, the report goes on to say that:

Generally speaking, witnesses are called to be the keepers of history when an event of historic significance occurs. Through witnessing, the event or work that is undertaken is validated and provided legitimacy. The work could not take place without honoured and respected guests to witness it. Witnesses are asked to store and care for the history they witness and to share it with their own people when they return home. For Aboriginal peoples, the act of witnessing these events comes with a great responsibility to remember all the details and be able to recount them accurately as the foundation of oral histories.⁷⁷

The commissioners all had strong backgrounds in Indigenous law and a genuine commitment to doing justice according to Indigenous legal traditions. The commission had the advantage of being chaired by Justice Sinclair, a distinguished Indigenous legal professional, and having the support of a ten member survivor's committee whose lived experiences as residential school survivors contributed to the development and operation of the TRCC. Having Indigenous people in these key positions shows a genuine commitment to a victim-centered approach that would privilege Indigenous narratives and ways of being. Furthermore, the commissioners' words and actions leave no doubt as to their honest desire to see a change in relations between Indigenous peoples and the Canadian state.⁷⁸ Unfortunately, the realities of operating a state-based

⁷⁷ Truth and Reconciliation Commission of Canada 2015a, 24.

⁷⁸ "Three New Members Named to Truth and Reconciliation Commission," *CBC News*, 10 June 2009, accessed November 2016, <http://www.cbc.ca/news/canada/3-new-members-named-to-truth-and->

restorative justice commission in a settler colonial context present inherent obstacles to these goals. Fanon's theorization of the colonial power imbalances that lead to the denigration of the colonized culture helps to illustrate how those obstacles are constituted.

Fanon's understanding of the impacts of colonization as having two major components – the material and the psychological – which are inextricably linked, shows that in order for decolonization efforts to be successful, they must address both of these aspects of colonization.⁷⁹ This is doubly important because of the tendency of Indigenous legal traditions to view injustices as part of a broader web of relationships.⁸⁰ Thus, it is rare for Indigenous law to address an injustice in isolation, as the TRCC attempts to do in addressing the residential schools. The importance of dealing with both the material and psychological impacts of colonization that Fanon articulates is thus even greater when engaging with Indigenous legal traditions that tend to engage with injustices in this more holistic manner. The TRCC's limited mandate, then, is an obstacle to its usefulness as a tool of decolonization and as a mechanism for engagement with Indigenous legal orders. However, this limitation is to some extent addressed by the TRCC's recognition that the residential school system was deeply embedded in a settler colonial context which continues despite the eventual closure of the schools.⁸¹ Furthermore, the recommendations made by the commission following the conclusion of TRCC's work attempt to address both the material and psychological impacts of colonization by recommending measures that would work

reconciliation-commission-1.805250; Linda Diebel, "Delays Plagues Truth Commission," *Toronto Star*, 27 November 2009, accessed November 2016, https://www.thestar.com/news/canada/2009/11/27/delays_plague_truth_commission.html; Peter Edwards, "This is not just an Aboriginal Issue. This is a Canadian Issue," *Toronto Star*, 10 June 2011, accessed December 2016, https://www.thestar.com/news/canada/2011/06/10/this_is_not_just_an_aboriginal_issue_this_is_a_canadian_issue.html.

⁷⁹ Fanon [1952] 2008, xiv-xv.

⁸⁰ Ross 2014, 8-9. For examples of this way of thinking, see Napoleon 2010, 61; Borrows 2010, 62.

⁸¹ Truth and Reconciliation Commission 2015a, 43.

against both aspects of colonization. The report recommends increases in funding to both healthcare and education for Indigenous peoples, as well as funding for restorative justice programs for Indigenous offenders and other prison divergence mechanisms.⁸² At the same time, the recommendations address the psychological effects of colonization in their support for training educators and doctors according to Indigenous ways of knowing, providing funding for Indigenous language preservation and teaching, and in their calls for formal apologies from religious groups and the Canadian government for their involvement in the residential school system.⁸³ Unfortunately, because of the TRCC's restricted mandate, these recommendations are framed as being in response to the harms of the residential schools only, rather than the broader Canadian settler colonial context. Thus, the recommendations aim "to redress the legacy of the residential schools" rather than colonization more broadly.⁸⁴ Nevertheless, the recommendations remain important and relevant to the decolonial project, despite the report's failure to explicitly identify this broader context.

The TRCC has overall been quite successful in its commitment to truth-telling. As of early 2014, the commission had collected over 6200 statements, made both publically and privately.⁸⁵ The statement gathering process is ongoing, as those who wish to share their stories can do so online or through the National Centre for Truth and Reconciliation (NCTR) at the University of Manitoba. The commission traveled around Canada, including several remote and difficult to access regions, in order to ensure that everyone who wished to do so would have the

⁸² Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015c), 8, 10.i, 21, 31.

⁸³ *Ibid.*, 13-16, 22, 53.i, 58, 62.ii-iii.

⁸⁴ *Ibid.*, 1.

⁸⁵ Truth and Reconciliation Commission of Canada, "Statement Gathering," website, accessed October 2016, <http://www.trc.ca/websites/trcinstitution/index.php?p=807>.

opportunity to share their experiences. Furthermore, these statements were made public through several reports, of which one, *Survivors Speak*, is composed almost entirely of quotes by survivors of residential schools who chose to share their stories with the TRCC.⁸⁶ Recordings and even mini-documentaries of the publically given statements remain available online through the NCTR website and on their YouTube channel.⁸⁷ Survivors were also given the opportunity to give their statements publically at national events, sometimes with crowds of thousands in attendance.⁸⁸ However, while the TRCC did facilitate truth-telling and ensure that survivors had the opportunity to share their stories and that those who wished to listen had the opportunity to do so, the truth told by the TRCC was at times incomplete and subject to narrative shaping by commissioners, Indigenous and non-Indigenous observers, and the media.

One of the major struggles faced by the commission with regards to truth-telling was its inability to convince perpetrators, such as residential school teachers and government and church officials, to testify before the commission, thus ensuring that their truths were excluded from the larger narrative the TRCC constructed. Other TRCs, most famously the South African Truth and Reconciliation Commission, have offered amnesty to perpetrators in exchange for their testimonies. However, the Canadian TRC was unable to do so, as it was not mandated to “hold formal hearings, nor act as a public inquiry, nor conduct a formal legal process.”⁸⁹ The TRCC also did not have the power to compel witnesses to testify, nor to make any findings regarding

⁸⁶ Truth and Reconciliation Commission of Canada, *The Survivors Speak* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015b), xiii.

⁸⁷ National Centre for Truth and Reconciliation, “Statements and Videos,” website, accessed February 2017, <http://nctr.ca/archives-pages.php#statements>; TheTRCCanada, “TheTRCCanada – YouTube,” website, accessed February 2017, https://www.youtube.com/channel/UCIC_F1QvUBySX2YyyjsXMIg.

⁸⁸ Andrea Woo, “Truth and Reconciliation Event Opens Wounds, Exposes Truths,” *Globe and Mail*, 19 September 2013, accessed December 2016, <http://www.theglobeandmail.com/news/british-columbia/truth-and-reconciliation-event-opens-wounds-exposes-truths/article14406263/>.

⁸⁹ “Mandate,” 2.

the misconduct of individuals.⁹⁰ The commission's lack of legal authority can be seen as a reflection of the failure of the Canadian state to recognize the legal authority inherent to Indigenous legal orders. That is, the settler colonial state wishes to avoid recognizing alternate legal authorities because of the potential threat to the power of the state legal system. It is no coincidence that the commission engaged with certain Indigenous legal principles and traditions, rather than entire legal orders, which carry with them an assumption of legal authority and inherency. Because of the commission's lack of legal authority, it remained based in the state legal system, rather than in Indigenous legal orders.

Narrative shaping was another issue that undermined the TRCC's ability to fulfill its goal of truth-telling. As Niezen and Gadoua argue, the TRCC tended to privilege certain narratives over others.⁹¹ In particular, narratives which rejected forgiveness in favor of more retributive approaches to justice were strongly discouraged. Narratives of trauma and abuse were encouraged so long as they fit within a broader framework of reconciliation and healing.⁹² Narrative shaping is not necessarily a negative; creating a coherent narrative that can be retold in schools and government institutions is essential to the education of settlers.⁹³ Through this narrative, non-Indigenous peoples are forced to accept their settler identity. However, this narrative shaping, although useful in settler education, undermined the TRCC's ability to fulfill its commitment to truth-telling. As part of the opening ceremonies that occurred at each national event, videos were shown that collected 'soundbites' from public statements given at previous community events. These pre-approved testimonies served as templates to help survivors choose

⁹⁰ Ibid.

⁹¹ Ronald Niezen & Marie-Pierre Gadoua, "Témoignage et Histoire dans la Commission de Vérité et de Réconciliation du Canada," *Canadian Journal of Law and Society* 29, no. 1 (2014): 30-31.

⁹² Niezen, 924; Niezen & Gadoua, 24-25.

⁹³ Ibid., 23.

what kinds of memories or stories were ‘acceptable’ to share with the TRCC. Furthermore, commissioners explicitly encouraged positive stories; however, despite this encouragement, such stories were rarely shared.⁹⁴ Whether this is because survivors didn’t feel such stories were the right kind of stories to share with the TRCC, or whether such stories simply weren’t part of the experiences of residential survivors is difficult to say with certainty – likely both explanations are valid to some extent. Calls for vengeance and violence were particularly undesirable in statements. When a Mohawk elder, speaking at the Montreal national event, stated that “[former Prime Minister] Harper and all government should be hung!” he was rebuffed by a moderator who responded that violence would not lead to reconciliation.⁹⁵ The TRCC’s desire to create a narrative of reconciliation and forgiveness led to the marginalization of truths which were incompatible with that narrative. Fanon’s understanding of colonization helps us to make sense of the Canadian state’s desire to create this particular narrative. Building on Fanon’s depiction of colonial relations, Coulthard argues that “in situations where colonial rule does not depend solely on the exercise of state violence, its reproduction instead rests on the ability to entice Indigenous peoples to *identify*, either implicitly or explicitly, with the profoundly *asymmetrical* and *nonreciprocal* forms of recognition either imposed upon or granted to them by the settler state and society.”⁹⁶ The TRCC’s narrative shaping, then, can be seen through this analysis as a mechanism of this desire to entrench colonial power structures by encouraging Indigenous peoples to reconcile with the state in return for state recognition of the wrongs done to them in the past. In doing so, the state extends and solidifies the existing colonial regime without being

⁹⁴ Ibid., 24.

⁹⁵ Anne-Marie Reynaud, “Dealing with Difficult Emotions: Anger at the Truth and Reconciliation Commission of Canada,” *Anthropologica* 56, no. 2 (2014): 374; see also Sonali Chakravarti, *Sing the Rage: Listening to Anger after Mass Violence* (Chicago: University of Chicago Press, 2014) for a broader discussion of the role of anger in transitional justice processes.

⁹⁶ Coulthard 2014, 25, emphasis in original.

forced to make significant material concessions that would threaten the power of the Canadian state.

A commitment to witnessing was the second central promise made by the TRCC with regards to the inclusion of Indigenous legal traditions in the operation of the commission. The TRCC paid considerable attention has been paid to incorporating honorary witnesses and witnessing ceremonies into the major national events and sharing circles organized by the commission. Qwul'sih'yah'maht writes that “witnessing is a huge responsibility because you are asked to pay attention to all the details of the evening.”⁹⁷ Witnesses are responsible for recalling those details later and sharing the information they have learned at the ceremony or event they were called upon to witness. Thus, witnessing is not a passive activity; it is not just listening, but remembering, sharing, and taking action if called upon to do so. The TRCC certainly engaged in the performative or visual activities associated with witnessing. At every event, honorary witnesses were called upon to bear the responsibility of witnessing the testimonies which were shared. Michaelle Jean was the first of these, and several other distinguished Canadian figures acted as witnesses at subsequent events.⁹⁸ Cindy Blackstock, an advocate for First Nations child welfare, Robert Waisman, a well-known holocaust survivor and speaker, and a variety of lieutenant governors, former prime ministers, and other important government officials.⁹⁹ The ceremonial induction of these witnesses was an important part of TRCC events, particularly the national events.

⁹⁷ Qwul'sih'yah'maht, 243.

⁹⁸ Tim Alamenciak, “Fighting for History: Uncovering the Truth of the Residential Schools,” *Toronto Star*, 29 August 2014, accessed November 2016, https://www.thestar.com/news/canada/2014/08/29/fighting_for_history_uncovering_the_truth_of_residential_schools.html.

⁹⁹ Truth and Reconciliation Commission of Canada, “Reconciliation,” website, accessed October 2016, <http://www.trc.ca/websites/reconciliation/index.php?p=331>.

One question that arises from the role of these honorary witnesses is how settlers should witness the TRCC events. Regan asks that settlers “listen and respond authentically and ethically to testimonies – stories of colonial violence, not with colonial empathy but as a testimonial practice of shared truth-telling that requires us to risk being vulnerable, to question openly our... colonial history and identity.”¹⁰⁰ Settlers who have been called upon to witness the TRCC events have a responsibility, then, to engage with the stories we have witnessed on a deeply personal level which demands that we re-examine our position as colonizers. This is our call to action, and our responsibility as witnesses that have been invited to participate in the reconciliation process. However, scholars and survivors have questioned whether non-Indigenous people attending the TRCC events fully understood this responsibility. Carter criticizes the non-Indigenous audiences as passive watchers, “[gaping] at the spectacle and [awaiting] catharsis.”¹⁰¹ To Carter, the non-Indigenous spectators of the TRCC events were searching for a purgation of guilt, a moment of catharsis – Regan’s “colonial empathy” – which would soon be forgotten as they returned to their daily lives. When Indigenous peoples were generous enough to offer colonizers the honor of witnessing their testimonies, settler witnesses grasped that opportunity, but now it must be impressed upon witnesses that their responsibility to survivors is not completed simply by listening. The responsibilities which witnesses now hold mean that settlers must consciously work to undo the colonial structure which oppresses Indigenous people living in Canada and makes settlers complicit in injustice.

There is evidence that the commissioners realized that honorary witnesses might not fully understand their role in the TRC, and that the commissioners took steps to educate witnesses as

¹⁰⁰ Regan, 190.

¹⁰¹ Jill Carter, “Discarding Sympathy, Disrupting Catharsis: The Mortification of Indigenous Flesh as Survivance-Intervention,” *Theatre Journal* 67, no. 3 (2015): 417.

much as possible. Justice Sinclair, for example, met with some honorary witnesses after the publication of the TRC's final report to ensure that they understand their ongoing obligations as witnesses, even following the end of the TRCC's mandate.¹⁰² One honorary witness, Shelagh Rogers, admits that when she was asked to be a witness, she was honored but had "no idea what it really meant."¹⁰³ However, she also recognizes the importance of her role and expresses her willingness to learn; finally, she acknowledges that witnessing means "opening yourself to the truth, allowing yourself to be changed by it." Furthermore, she writes that "everyone who attends these events is a witness," and thus has a collective responsibility to act based on what they have witnessed.¹⁰⁴ At least some of the honorary witnesses, then, took the opportunity offered them by Indigenous peoples to participate meaningfully in their role as witnesses and accept the responsibility which that role imposed on them. Other honorary witnesses were motivated to write articles and letters to the editor.¹⁰⁵ Many witnesses, particularly Indigenous witnesses, were already involved in important work essential to the decolonial project, including, for example, advocacy for Indigenous children's welfare, settler education, and land claims activism.¹⁰⁶ However, some witnesses have simply failed to do the work required of them. For example, Nick Noorani, an advocate for immigrants' rights in Canada who was inducted as an honorary witness

¹⁰² Alemanciak, *Toronto Star*, 29 August 2014.

¹⁰³ Shelagh Rogers, "Reflections on Being an Honorary Witness for the TRC," *CBC News*, 29 March 2014, accessed December 2016, <http://www.cbc.ca/news/Indigenous/reflections-on-being-an-honorary-witness-for-the-trc-1.2587064>.

¹⁰⁴ *Ibid.*

¹⁰⁵ See, for example, Wab Kinew, Eloge Butera & Jonathan Sas, "Education the First Step to Reconciliation," *Toronto Star*, 3 June 2015, accessed December 2016, <https://www.thestar.com/opinion/commentary/2015/06/03/education-the-first-step-to-reconciliation.html>.

¹⁰⁶ Cindy Blackstock, for example, has been an important advocate for Indigenous children as the executive director of the First Nations and Family Caring Society. Tim Fontaine, "Canada Discriminates against Children on Reserves, Tribunal Rules," *CBC News*, 26 January 2016, <http://www.cbc.ca/news/Indigenous/canada-discriminates-against-children-on-reserves-tribunal-rules-1.3419480>.

at the British Columbia National Event, continues to mention Indigenous peoples only as historical footnotes in his books and seminars for newcomers to Canada.¹⁰⁷ Chuck Strahl, another honorary witness and former Member of Parliament, has continued his work as a lobbyist for Enbridge and other pipeline projects opposed by First Nations groups.¹⁰⁸ Prior to being named an honorary witness of the TRCC, he cut funding to First Nations universities and schools in his role as Minister for Indian and Northern Affairs and heavily implied that the lack of safe and adequate schools in many Indigenous communities was primarily due to poor financial management on the part of those communities.¹⁰⁹ Thus, despite the significant work of many witnesses and the efforts of the commission to ensure that witnesses understood their responsibilities, some non-Indigenous witnesses still struggled to fulfill those responsibilities.

The ceremonial aspect of the TRCC's engagement with witnessing is particularly interesting to this analysis given Adams' critique of ceremonies 'empty' of cultural content.

According to Adams, these ceremonies were encouraged by the Canadian state, while ceremonies which retained their original political and legal character were forbidden.¹¹⁰

Although settler colonialism in Canada has evolved significantly since Adams articulated these insights, this critique remains relevant to understanding the TRCC's engagement with

¹⁰⁷ See, for example, Naeem 'Nick' Noorani & Sabrina Noorani, *Arrival Survival Canada: A Handbook for New Immigrants* (Oxford: Oxford University Press, 2008), 4.

¹⁰⁸ Max Paris, "Chuck Strahl Steps Down as Spy Watchdog amid Lobbying Questions," *CBC News*, 24 January 2014, accessed February 2017, <http://www.cbc.ca/news/politics/chuck-strahl-steps-down-as-spy-watchdog-amid-lobbying-questions-1.2510321>.

¹⁰⁹ Linda Goyette, "Still Waiting in Attawapiskat," *Canadian Geographic*, 1 December 2010, accessed February 2017, <https://www.canadiangeographic.ca/article/still-waiting-attawapiskat>; Chuck Strahl, "Statement by the Honourable Chuck Strahl," 27 April 2008, accessed February 2017, <https://www.canada.ca/en/news/archive/2008/04/statement-honorable-chuck-strahl-394959.html?=&wbdisable=true>; Bill Curry, "Native Pupils ask Strahl for School," *Globe and Mail*, 30 May 2008, accessed February 2017, <http://www.theglobeandmail.com/news/national/native-pupils-ask-strahl-for-school/article1055638/>.

¹¹⁰ Adams, 35-37.

witnessing. The event programs are full of drum dancing, throat singing, and photos of the sacred fire and the bentwood box.¹¹¹ These “cultural performances,” as they are described in the programs, demand little of audiences.¹¹² The inclusion of these performative aspects of Indigenous culture at the expense of cultural practices that would require active participation from settlers recalls Adams’ criticism of Indigenous cultural performances detached from their cultural context, and undermines the credibility of the TRCC overall. The celebration of these performative versions of Indigenous legal traditions is essential to the state’s project of legitimizing the continued colonial dispossession of Indigenous peoples in Canada and suppressing the formation of an Indigenous legal resurgence that would challenge the domination of the established state legal order.

Mackey’s understanding of cultural appropriation as potentially state-driven further illuminates the TRCC’s use of ceremony and ritual to legitimize their work. Through these performances, the state seeks legitimacy through the recognition of Indigenous cultural practices and rights.¹¹³ However, ceremonies and rituals when performed for a settler audience with little understanding of the legal and cultural meaning of these ceremonies can lead to the ossification of culture that Adams sees in state engagement with Indigenous culture. Similarly, when the legal meaning of these ceremonies is not made clear to settler audiences, it means the dynamism of Indigenous law is not communicated to settlers, entrenching settler colonial characterizations of Indigenous law as primitive and lacking in real legal meaning. The inclusion of traditional Indigenous ceremonies, music, and art in TRCC events, in addition to the explicit commitment to incorporating Indigenous legal principles articulated in the TRCC’s mandate, were genuine

¹¹¹ “British Columbia National Event Program.”

¹¹² Ibid.

¹¹³ Coulthard 2014, 26-28.

improvements upon earlier TRCs on which the Canadian TRC was based, and demonstrated a real commitment to centering Indigenous legal traditions in meaningful ways. However, the interaction between state and Indigenous legal orders through the TRCC ultimately remained one of colonial domination because the TRCC was unwilling to recognize Indigenous law as a source of legal authority, one which could potentially compete with state claims to legal authority in Canada.

In Conclusion: Creating Space for an Indigenous Legal Resurgence in Canada

The Truth and Reconciliation Commission of Canada made substantial improvements over previous commissions in its commitment to the inclusion of Indigenous legal traditions in its work, particularly truth-telling and witnessing. However, the commission's goal of reconciliation and forgiveness sometimes served to erase survivor narratives that were incompatible with this aim. Furthermore, settler witnesses often struggled to fulfill their responsibilities as witnesses due to a lack of understanding of those responsibilities and of the ceremonies and legal traditions that accompany them. Despite the importance of the TRCC's work in alleviating some of the most egregious wrongs of colonialism in Canada, the TRCC's engagement with Indigenous law ultimately failed to create space for Indigenous law as a source of dynamic, independent alternatives to state law, instead reinforcing the dominant position of Canadian state law.

In my study of the Canadian TRC, I have found several serious obstacles that served to undermine the TRC's commitment to Indigenous law. First, the TRCC's limited mandate which understood the harms inflicted by settler colonialism as tied entirely to the residential school system made it impossible for the TRCC to address the ongoing exploitation and appropriation of colonialism in Canada effectively. Furthermore, the emphasis placed on relations in Indigenous legal traditions is incompatible with the single issue focus of the TRCC which discourages narratives which place the IRS system in the context of Canadian settler colonization. Second, the commission's commitment to truth-telling, while successful in gathering numerous survivor testimonies, was prone to narrative shaping and lacked the legal authority to compel perpetrators to testify, limiting the truths which were shared by the TRCC. Third, while many witnesses, particularly Indigenous witnesses, were fully aware of and

committed to carrying out the responsibilities imposed on them as honorary witnesses of the events of the TRCC, other witnesses, despite the considerable efforts of the TRCC to educate settler witnesses on the meaning of witnessing as an Indigenous legal principle, were not willing to carry out those responsibilities. Some Indigenous observers, as I argued earlier, felt that certain non-Indigenous participants in the TRCC even took advantage of the willingness of survivors to be open about the harm they experienced in residential schools to achieve a sort of catharsis without performing the necessary anticolonial work that witnessing these narratives should entail. Finally, the ceremonies and rituals which were showcased at the national events were often poorly understood by non-Indigenous observers, allowing settlers to dismiss these ceremonies as mere performances devoid of legal meaning. These ceremonies contribute to settler perceptions of Indigenous peoples as lacking dynamic, independent legal traditions which would provide viable alternatives to the current Canadian legal system. These findings, while pessimistic about the TRCC as a space for Indigenous legal traditions to establish themselves as alternatives to Canadian law, do not dismiss the important contributions which the TRCC has made to decolonization despite its failings. If the commission's recommendations are, in fact, implemented, it would be an important alleviation of many of the worst psychological and material harms caused by ongoing settler colonialism in Canada. The collection of survivor testimonies by the TRCC will ensure that the truths of Indigenous peoples are heard and remembered, hopefully preventing the erasure of Canada's colonial practices. Many witnesses, both Indigenous and, to a lesser extent, non-Indigenous, have been active in fighting ongoing settler colonialism in Canada; for some non-Indigenous witnesses and observers, the TRCC was a genuinely educational experience that inspired them to take action against Canadian colonialism. However, the TRCC's engagement with Indigenous law only served to strengthen

the position of state law in Canada rather than encourage the growth of Indigenous legal orders by recognizing the inherency of their legal authority. Thus, we must look elsewhere if we are to create space for an Indigenous legal resurgence that would see Indigenous communities turning to their own legal systems for guidance in legal matters and as sources of legal authority.

If the TRCC remains, finally, a mechanism of ongoing colonial domination and appropriation which erases Indigenous law as law, as I have argued in this paper, where can we find space for anticolonial resistance that encourages an Indigenous legal resurgence? The work of Napoleon and Friedland which I discussed earlier in this paper points us to a tentative answer to that question, one which empowers Indigenous communities to reimagine their legal systems in terms which explicitly recognize the foundation of these legal system in Indigenous law.

Napoleon argues that by examining oral histories, shared stories, lived experiences, and memories of Indigenous communities, it is possible to uncover the legal principles which form the basis of Indigenous legal orders.¹¹⁴ Because of the harm done to Indigenous legal orders by settler colonialism, many are no longer in operation, or are not understood as having any legal authority, or are interpreted as static cultural artifacts which are irrelevant to modern lawmaking.¹¹⁵ However, the legal principles which animate Indigenous legal orders remain and in many cases, are still functionally employed by Indigenous communities in making legal decisions, even if they are sometimes not recognized as such. In turning to Indigenous stories, experiences, and histories, there is the potential to rediscover Indigenous legal orders as dynamic, independent sources of legal authority and reasoning; this legal resurgence is already

¹¹⁴ Val Napoleon, “Ayook: Gitksan Legal Order, Law, and Legal Theory” (doctoral dissertation, University of Victoria, 2001), 30.

¹¹⁵ *Ibid.*, 89.

underway, drawing strength from the Indigenous communities, scholars, and activists who have committed to undertaking this difficult but essential work.

These findings regarding the TRCC's engagement with Indigenous law has serious implications both for transitional justice practitioners and for Indigenous activists attempting to create space for an Indigenous legal resurgence in Canada and move towards the decolonization of Indigenous-settler relations. If state-based transitional justice mechanisms tend to legitimize and reinforce the dominance of state law over Indigenous law even when they attempt to incorporate limited forms of Indigenous law in their operations, new methods must be found to strengthen Indigenous legal orders as alternatives to state law. For transitional justice practitioners, this might look like ceding greater control to survivors in the development of transitional justice mechanisms. In settler colonial contexts where Indigenous legal orders have been suppressed, this might mean the abandonment of state-based processes altogether and encourage the development of community based processes that operate according to the legal principles of each Indigenous community engaged with the transitional justice process. For Indigenous activists, recognizing that state-based mechanisms tend to affirm the supremacy of state law over Indigenous law and erase those aspects of Indigenous which threaten the dominance of the state legal order may encourage Indigenous activists to turn away from the state to create space for an Indigenous legal resurgence which does not seek to work within state institutions. Because Indigenous law is inherent to Indigenous communities, Indigenous peoples have no need for state mechanisms to reaffirm the authority and dynamism of Indigenous legal orders. In fact, as I have shown, state mechanisms tend to crowd out Indigenous legal orders and reduce space, rather than create it, for Indigenous law to flourish. As Johnny Mack explains:

It seems to me our best hope in resisting imperialism is not through negotiating complex treaty agreements, drafting a proper constitution, or securing a right to self-determination. Imperialism has shown itself quite adept at manipulating these structures to its own ends. Our challenge is to thicken our connection to our stories through sustaining simple practices... These practices will provide the inspiration and instruction as we move to rebuild... in the present.¹¹⁶

Indigenous stories and legal principles contain everything that is necessary to sustain an Indigenous legal resurgence that builds on the dynamism and power inherent in Indigenous law. While mechanisms such as the TRCC can provide important avenues for interaction with the state and can provide some temporary psychological and material relief from the injustices of colonization, the legal framework for decolonization will ultimately come from Indigenous legal orders themselves.

¹¹⁶ Johnny Mack, "Hoquotist: Reorienting through Storied Practice," in *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community*, ed. Hester Lessard, Rebecca Johnson & Jeremy Webber (Vancouver: UBC Press, 2011), 304.

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