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"Sunny Ways" and Broken Promises

Tsleil-Waututh Nation v. Canada (2018) and the Liberal Government's Relationship with Indigenous Nations in Canada

By:
Samuel Turpin

A Thesis Submitted to
Saint Mary's University, Halifax, Nova Scotia
in Partial Fulfillment of the Requirements for
the Degree of Bachelor of Arts, Honours in Criminology

April 2019, Halifax, Nova Scotia

Approved by: _____
Dr. Val Marie Johnson
Associate Professor

Date: April 22nd, 2019

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1. Abstract:

This thesis challenges the current Liberal government's depiction of its relationship with Indigenous communities as building what Justin Trudeau and the Liberal Party of Canada have referred to as a "renewed, nation-to-nation relationship" (2015). It does so by analyzing, through the lens of key pieces of Indigenous scholarship, the arguments and positions expressed by the Government of Canada and Indigenous plaintiffs in the *Tsleil-Waututh Nation v. Canada* (2018) Federal Court of Appeal ruling. Secondarily, government policy releases and statements by government officials, including Prime Minister Justin Trudeau, regarding the Trans Mountain Pipeline Project[1], as well as Indigenous media coverage, will be used to support the analysis of *Tsleil-Waututh Nation v. Canada* (2018) in order to understand the relationship between the Liberal Government and Indigenous Nations in Canada. Through socio-legal and narrative criminological approaches, informed by Indigenous scholarship, this thesis will demonstrate that the Liberal government's relationship with Indigenous Nations as seen in *Tsleil-Waututh Nation*

[1] The Trans Mountain Pipeline is intended to transport oil from Alberta to the British Columbian coast. When the arguments of *Tsleil-Waututh* 2018 were heard by the Federal Court of Appeal in October 2017, the Trans Mountain Pipeline was owned by a Canadian division of Texas-based corporation, Kinder-Morgan. In May of 2018, the Canadian Government announced that it would buy the Pipeline, and that it would become a Crown Corporation. The sale was completed on August 31st, 2019, one day after the *Tsleil-Waututh* 2018 ruling was made public (APTN National News, 2018).

v. Canada (2018) does not constitute a renewed nation-to-nation relationship. Rather, these interactions will be shown to constitute a continuation of the colonial domination and state harm perpetuated by previous governments, including the most recent Conservative federal government. This thesis will argue that the Trudeau government’s assertion that a renewed nation-to-nation relationship is being constructed between itself and Indigenous Nations masks this reality of ongoing colonial domination and state harm.

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2. Table of Contents:

4. Introduction:

a. Purpose of Research

The purpose of this research is to critically examine and challenge the Liberal Party and Government of Canada’s assertion that they are constructing a renewed nation-to-nation relationship with Indigenous Nations in Canada, through an analysis of the *Tsleil-Waututh Nation v. Canada* (2018) (hereafter: *Tsleil-Waututh* 2018) Federal Court of Appeal ruling. I was drawn to this subject as a result of the campaign promises made by (now) Prime Minister Justin Trudeau and the Liberal Party of Canada during the 2015 federal election campaign. Like many Canadians, I was optimistic regarding the promise of a new and more progressive era of relations between the Canadian government and Indigenous Nations in Canada that this platform seemed to herald, and the stark contrast it appeared to pose to the Harper Conservative’s stance towards Indigenous rights and issues. Several years into the mandate of the Liberal Government led by Justin Trudeau, in the aftermath of the high-profile legal battle surrounding the Trans Mountain Pipeline project and leading up to the Federal Court of Appeal ruling in *Tsleil-Waututh* 2018, this thesis aims to evaluate the nature of that government’s relationship with Indigenous Nations in Canada.

b. Overview and Central Argument

Through an analysis of two Federal Court of Appeal rulings, primarily *Tsleil-Waututh* 2018, and secondarily *Gitxaala Nation v. Canada* 2016 (hereafter: *Gitxaala* 2016) in light of key concepts from Indigenous scholarship, insights from narrative criminology and socio-legal approaches, and supported by Indigenous news media and commentary, this thesis will argue that the “renewed nation-to-nation” relationship that Prime Minister Justin Trudeau and the current Liberal Government claim is being constructed with Indigenous Nations in Canada does

not exist. Rather, this thesis will demonstrate that this relationship constitutes a continuation of the settler colonial harm and domination that perpetuates, and has historically defined, the relationship between the Canadian Government and Indigenous Nations. As a distinct settler colonial institution, the Court will also be shown to participate in, and legitimate, forms of settler colonial harm and domination engaged in by the Liberal Government, through the *Tsleil-Waututh* 2018 ruling.

c. Background & Context:

Even before the election of the current federal government in 2015, issues widely faced by Indigenous communities in Canada, including the right to self-government, sovereignty, and land title, had increasingly come to the forefront of national and even international media and public attention. Prominent among these issues has been the operation of the Truth and Reconciliation Commission, the upswell of support for grassroots Indigenous protest movements such as Idle No More, Chief Teressa Spence’s lengthy Hunger Strike in protest of the Attawapiskat housing crisis, the National Inquiry into Murdered and Missing Aboriginal Women and Girls, and the failed consultation process, protests, and legal battles surrounding the development and Canadian government’s purchase of the Trans Mountain Pipeline.

These are far from the only issues being faced by Indigenous communities, who are engaged in social and legal challenges to numerous resource extraction projects on Indigenous lands, recent examples of which include a Supreme Court Ruling on logging operations in Tsilhqot’in territory (*Tsilhqot’in Nation v. British Columbia*, 2014), continuing concerns regarding the serious impact of oil extraction in the Alberta tar sands on the health of nearby Indigenous communities (Smandych & Kueneman, 2010), and resistance to fossil fuel related development here in Mi’kma’ki (Howe, 2016). Inadequate levels of federal funding provided to Indigenous

peoples for education, housing, medical and community mental health resources, the underfunding of critical infrastructure on reserves (Assembly of First Nations, 2018), and the disproportionately high rates at which Indigenous persons, most dramatically women, are victims of violence and overincarceration in Canada (MacLellan, 2018), are also increasingly being recognized on a national level.

It is important to note that there are approximately 634 Indigenous bands, comprised of more than 50 distinct Nations and language groups in Canada (Assembly of First Nations, n.d.). It would be a gross generalization to state that all Indigenous communities in Canada face the aforementioned issues. However, these issues are experienced in Indigenous communities to an extent not experienced by other groups in Canada, including racialized groups. These issues are the result of highly colonizing dynamics caused by the direct intervention, or lack of intervention, by the Canadian government. According to Wolfe, “land and territory are the... fundamental motivations of settler colonialism. In this pursuit, Indigenous political economies present an obstacle and must be liquidated, and replaced with regimes that facilitate a different, contrasting type of economic activity.” This “logic of elimination” is undertaken violently (2006, in King 2017, p.113) through a variety of settler colonial frameworks. Some of the most obvious examples of this in Canada include the removal of Indigenous presence from the land through frameworks of settler colonialism, including through the imposition of colonizing legal, economic, and political frameworks (King, 2017, pp. 107-108), the century of imposed residential schooling for Indigenous children with ongoing intergenerational effects, the continuing removal of Indigenous children from their communities through the foster care system (Rule, 2018) and lack of funding for clean water, housing, and other basic infrastructure in Indigenous communities (Assembly of First Nations, 2018).

It is within this context that the Liberal Party under Prime Minister Justin Trudeau was elected to power in 2015 with a majority government promising to engage in, “sunny ways” politics (Liberal Party of Canada, 2016), and to create a “renewed nation-to-nation relationship with Aboriginal communities,” by recognizing them as “full partners in Confederation” (Trudeau, 2015). Despite a historic apology to the victims of Canada’s Residential School System (Dorrell, 2009), the previous Conservative Government’s rule became known grimly in many circles as the Harper Decade. Their mandate was marked by the gutting of Canada’s Navigable Waters and Environmental Assessment Act (strongly protested by Indigenous peoples) as well as then Prime Minister Stephen Harper’s infamous comments that the epidemic of missing and murdered Indigenous women and girls, “isn’t really high on our radar” (Kappo, 2014), and that Canada has “no history of colonialism” (Ljunggren, 2009). After a government which seemed so unconcerned with issues facing Indigenous Nations, the promises made during the 2015 federal election campaign by the Trudeau-led Liberal party seemed like a breath of fresh air to many Indigenous Canadians (Aboriginal People’s Television Network [APTN] National News, 2015). This government, it seemed, would be the one to finally take Indigenous issues in Canada seriously, as journalist Robert Jago of Kwantlen First Nation has written (2017), and enact real change, as its campaign slogan declared, to end the systemic racism and relationship of colonial domination which continues to impact, and for centuries has marred, the relationship between the Canadian federal government and Indigenous Nations (APTN National News, 2015).

Just as it is important to note that the experiences, structures, and members of Indigenous communities and Nations cannot be generalized about, it is also important to note that the Canadian government and legal system are not monoliths, and that within these institutions there

exists considerable institutional and legislative complexity which affects the Canadian government’s relationship and interactions with Indigenous Nations. The first major element that must be considered is the interaction between the governing and legal bodies in Canada. According to the Supreme Court of Canada (*Mikisew Cree First Nation v. Canada* 2018), Parliament has the legislative authority to enact laws that affect Indigenous communities in Canada, without consulting them before they are enacted. However, the Supreme Court of Canada maintains the authority to determine whether these laws are constitutional. Although legally and politically distinct, both of these colonial frameworks maintain the authority to enact (in the case of Parliament) and uphold or strike down (in the case of the Courts) legislation that directly affects Indigenous Nations in Canada, without first consulting these Nations.

Additionally, the legislative frameworks that govern the settler colonial relationships between the Canadian government and Indigenous Nations are themselves complex and multilayered. While this legislation is not the primary focus of this thesis, it is essential that the reader have some understanding of the framework’s origin and function. Most, although it is important to note not all, Indigenous communities in Canada signed treaties with the Crown and consider their relationship to still be primarily with the Crown, instead of with the Canadian government directly. As described by the Indigenous Foundations resource at the University of British Columbia, “These treaties set out agreements as to the nature and limits of Aboriginal rights and title,” (Hanson, n.d). *The Royal Proclamation of 1763*, which is an essential founding colonial document recognizing some Indigenous sovereignty in Canada, explicitly acknowledges the existence of prior and continuing Indigenous land title, unless ceded by treaty (Hurley, 2000, p. 1). The proclamation also claims the Crown’s sovereignty describing its relationship to Indigenous Nations as “fiduciary,” meaning that the Crown is in a “position of trust” and has,

“rights and powers… [that it may] exercise for the benefit” of Indigenous Nations (Hurley, 2000, p. 2). In the 1950s, the Supreme Court of Canada stated of its relationship with Indigenous Nations that, “these aborigines are… wards of the state” (Ibid.).

The *Indian Act* (1876) is the primary piece of colonial legislation in Canada governing Indigenous rights, status, reserves, and so on. Originally enacted in 1876, the Act has been modified numerous times, but largely retains its original form. A consolidation of several pieces of colonial legislation, the *Indian Act* grants the Canadian federal government the ability to, “regulate and administer in the affairs and day-to-day lives of registered Indians and reserve communities,” including but not limited to their political, cultural, and economic dealings (Hanson, n.d.**)**. According to Hanson, the *Indian Act* represents a significant living historical element of the Canadian government’s “attempts to terminate the cultural, social, economic, and political distinctiveness of Aboriginal peoples by absorbing them into mainstream Canadian life and values” (Ibid.) and has been long held by the Canadian federal government and Indigenous communities alike to be archaic and problematic (Coates, 2008). Indigenous peoples in Canada especially, view the *Indian Act* a highly oppressive, paternalistic, and homogenizing piece of legislation that enables the “systematic denial of their rights” (Ibid.).

However, proposed replacements – such as the 1969 White Paper tabled by the Liberal Government under Pierre Elliott Trudeau – have faced resistance from Indigenous groups. The complete removal of the *Indian Act,* many Indigenous groups in Canada argue, would not only serve to abolish “a paternalistic and racist law,” but would also attack the rights of Indigenous Peoples laid out in that act, and “speed up the work of assimilation the *Indian Act* started” (Beazley, 2017). Indigenous groups generally argue that the solution to Indigenous rights issues in Canada is not the removal of Indigenous status and integration of Indigenous Nations into

mainstream Canadian society, but rather the full recognition of existing rights and treaty promises (Hanson, n.d.).

Section 35 of the *Canadian Constitution Act* (1982) recognizes the existing or forthcoming treaty or land claim rights held by Indigenous Nations and affirms that “the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons” (Notably making no mention of Two-Spirit individuals). However, underlying the interpretation of these laws, policies, and relationships, are fundamental differences in key elements of political economy adhered to by European and Indigenous peoples. These differences can be seen especially strongly in approaches to land, wherein Canadian Government and court / legal (originally from British and French) frameworks define borders strictly and believe that the land and other “resources” may be exclusively owned, while Indigenous peoples see borders as “flexible, dynamic, and overlapping… mapped by shared jurisdiction,” allowing independent peoples and creatures to simultaneously inhabit the same space with autonomy (King, 2017, p. 109).

Despite the existence of storied, “creative and sophisticated” Indigenous frameworks, and political economies, (p. 107), the legislative frameworks and policies that govern and dictate Indigenous identities in Canada are based primarily on highly colonizing Eurocentric frameworks, giving the federal (colonial) government, “the authority to manage band affairs, supervise Indigenous lands and trust funds, direct the personal and family lives of individual Aboriginal people, and deny basic Canadian civil and personal rights to hundreds of thousands of ‘wards’ of the federal state” (Coates, 2008, p. 2). Through the imposition of these “logic[s] of elimination” onto Indigenous Nations (King 2017, p.113) via legal, economic, political and other settler colonial frameworks, Indigenous understandings of title — which tend to be rooted in

spiritual and “reciprocal relationship[s] with the land” (Cardinal, 1999) — are suppressed and assimilated (King, 2017, p. 107). Central to this thesis will be the examination of the suppression of Indigenous voices through settler colonial frameworks, specifically through analysis of the Federal Court of Appeal rulings in *Tsleil-Waututh* 2018 and *Gitxaala* 2016.

Through this brief overview of but a few aspects of the settler colonial policies and laws that shape Indigenous Nations’ relationships with the Canadian federal government, it is possible to gain a small sense of the ways in which these colonial political, legal, and economic institutions fail to interact with the complex, storied, and sophisticated legal frameworks and political economies of Indigenous Nations. Despite this failure, these frameworks are not necessarily incompatible. As Anishinaabe legal scholar John Borrows lays out in *Canada’s Indigenous Constitution* (2010), “Canada has a ‘Pluralistic’ legal system incorporating Civil Law, Common Law, and Indigenous legal traditions” (p. 8), and the implementation of Indigenous law in conversation with Canadian legal frameworks can lead to the “improvement of each legal tradition” (p. 10). Nonetheless, in reality Eurocentric frameworks and practices are largely imposed on Indigenous Nations in Canada, without consideration of Indigenous law or political economies. The frustrations and limitations in this relationship are an important frame through which to view the 2015 Liberal Party election platform and that party’s subsequent interactions with Indigenous Nations.

During the 2015 election campaign, the subject of consent regarding resource development and extraction projects was broached with Justin Trudeau during a televised APTN town hall interview. The host, Cheryl McKenzie (Anishinaabe and Cree), questioned Trudeau regarding how his government would approach resource development projects that impacted Indigenous territories, to which Trudeau replied, “We cannot have a government that decides where the

pipelines [are going to] go without having proper approval and support from the communities that are [going to] be affected” (in Morin, 2016.) McKenzie pressed Trudeau, asking if under his potential government, “no meant no,” for Indigenous communities that did not consent to the development of these projects on their land. Trudeau responded concretely, “Absolutely” (in Barrera, 2015). However, after his election, Trudeau began backing away from this promise. In a 2016 interview with Postmedia News regarding the Musqueam, Squamish, and Tsleil-Waututh Nations’ opposition to the Trans Mountain Pipeline, he stated, “We have ways of protesting to make your feelings heard, and that is all par for the course and that will happen,” but when pressed about his promise of a veto during the election campaign, he responded, “No, they don’t have a veto” (in Postmedia News, 2016.)

As Anishinaabe scholar Hayden King and ally Shiri Pasternak note, there have been some positive changes to the federal government’s relationship with Indigenous communities in Canada during the current Liberal government’s mandate. These changes include increased funding to address critically dysfunctional or non-existent water infrastructure on reserves, better education funding for Indigenous communities, an end to the third party management program (implemented by the previous government) an official apology to the Tsilhqot’in Nation for hanging chiefs engaged in peacekeeping talks in the 1800s, and the (admittedly, marred by controversy) launch of a National Inquiry into Missing and Murdered Indigenous Women and Girls (King & Pasternak 2018).

However, beyond these important, but largely surface-level, policy changes, more than three years into the Trudeau government’s mandate, many of the sweeping changes to the relationship between the federal government and Indigenous Nations promised during the 2015 election campaign are largely yet to materialize. While there are a plethora of foci through which it is

possible to view this set of relationships, this thesis primarily analyses the Trudeau government’s relationship with Indigenous communities through the lens of the *Tsleil-Waututh* 2018 ruling and depictions of the Trans Mountain pipeline consultation and development process in that ruling, as well as through Indigenous scholarship, media, and commentary, in order to determine if Prime Minister Justin Trudeau and the Liberal Government’s claim that the Government of Canada is constructing a renewed nation-to-nation relationship between itself and Indigenous Nations can be justified.

d. Positionality

I was born and brought up in the fishing town of Yarmouth, Nova Scotia in a family that features white European heritage on both sides. As a white settler conducting research on issues faced by Indigenous Nations in Canada — specifically, analyzing the nature of relationship between the Liberal Government and Indigenous Nations through the lens of the Trans Mountain Pipeline project consultation process — I have become aware of the long and bitter history of European academic frameworks and perspectives being imposed upon Indigenous communities and issues (Tuhiwai Smith, 2013, p. 39). This academic research has been conducted primarily for the benefit of European-descended researchers and their institutions and has frequently resulted in direct harm to the Indigenous communities and individuals being studied. These harms have included the othering, suppression, and destruction of Indigenous identities and frameworks, as well as the theft of Indigenous knowledge for the benefit of colonial researchers and institutions (p. 58).

This thesis seeks to counter this legacy of research as a tool of colonial domination by engaging carefully and respectfully with the knowledge of Indigenous peoples. A key element of

this will be the recognition of Indigenous voices, in the analysis of *Tsleil-Waututh* 2018, in scholarship, and in media coverage and commentary, which is used to contextualize and respond to depictions of Indigenous identities, concerns, and perspectives in *Tsleil-Waututh* 2018. This thesis does not seek to appropriate or claim these Indigenous voices as its own. Rather, it aims to use its limited reach to recognize Indigenous knowledge in relation to the subject matter, particularly with the aim of understanding the relationship of the Liberal Government with Indigenous Nations through the lens of the Trans Mountain Pipeline project consultation and environmental review processes.

e. Methodology:

This thesis employs a qualitative analysis of the *Tsleil-Waututh* 2018 Federal Court of Appeal ruling, using theoretical tools from narrative criminology and socio-legal approaches, and insights from three key pieces of Indigenous scholarship: Borrows’ *Canada's Indigenous Constitution* (2010), King’s “Treaty Making and Breaking in Settler Colonial Canada” (2017); and Tuhiwai Smith’s *Decolonizing Methodologies: Research and Indigenous Peoples* (2013). These tools and insights represent key elements of the framework through which my findings from the *Tsleil-Waututh* 2018 ruling will be examined. My analysis of the *Tsleil-Waututh* 2018 ruling is constructed through a colour-coding of the ruling text to denote the voices of the Indigenous plaintiffs[2], the defendant (the Government of Canada), and the engagement of the Federal Court of Appeal with these voices. This coding permits the identification of key positions and arguments adopted by the Canadian Government and Indigenous Nations, and the extent to which the Court interacted with these voices and arguments. It is essential to note that

[2] The Indigenous plaintiffs in *Tsleil-Waututh* 2018 that are examined in this thesis include Tsleil-Waututh Nation, Stk'emlupsemc Te Secwepemc Nation, the Stó:lō Collective, Coldwater Nation, and Upper Nicola Nation.

this thesis views the Government of Canada as the defendant, and the Federal Court of Appeal as separate actors and constructs its analysis on this basis. This distinction permits the examination of Government and Court voices in the *Tsleil-Waututh* 2018 ruling as the products of distinct colonial actors whose positions sometimes overlap, and sometimes differ. The ways in which the voices of the Canadian Government and Court align and disagree with each other will form an important part of this thesis’ analysis of the *Tsleil-Waututh* 2018 ruling.

The differing voices of Indigenous Nations, the Canadian Government, and the Federal Court of Appeal highlighted in this ruling are key to this thesis’ examination of the distinct legal and political frameworks that underpin the operation of Indigenous Nations in Canada and the Canadian government[3]. These voices will be analyzed in light of theoretical tools from narrative criminology and socio-legal approaches, and the following Indigenous scholarly insights: i) Borrows’ (2010) concept of a pluralistic legal system in Canada; ii) Tuhiwai Smith’s (2013) assertion of the central importance of genuine, reciprocal relationships in Indigenous frameworks; and iii) King’s (2017) examination of Indigenous political economies and their suppression through settler colonial frameworks. The application of these insights in examining Indigenous, Canadian Government, and Federal Court of Appeal voices in *Tsleil-Waututh* (2018) will demonstrate that both the Canadian Government and Federal Court of Appeal fail to consider or implement Indigenous political and legal frameworks in their interactions with Indigenous Nations in Canada, privileging instead Eurocentric frameworks, including most

[3] It is beyond the scope of this thesis to enumerate or engage with the many differences in governance and law that exist between Indigenous Nations, and within colonial structures and traditional and grassroots forms of leadership in Indigenous communities.

importantly in this analysis through conceptions of consultation, Indigenous title, and Indigenous consent.

My central analysis of *Tsleil-Waututh* 2018 is enhanced by further evidence from government policy releases and official statements, including by Prime Minister Justin Trudeau, as well as Indigenous scholarship, media coverage (primarily from the Aboriginal Peoples' Television Network), and commentary on the Trans Mountain Pipeline approval process and ensuing legal battle.

5. Literature Review & Theoretical Tools:

Key Indigenous scholarship will be used to frame analysis of the primary evidence in this thesis, the *Tsleil-Waututh* 2018 ruling. This involves Maori education scholar Linda Tuiwai Smith’s *Decolonizing Methodologies: Research and Indigenous Peoples* (2013), Anishinaabe legal scholar John Borrows’ *Canada’s Indigenous Constitution* (2010), and Anishinaabe political scholar Hayden King’s “Treaty Making and Breaking in Settler Colonial Canada” (2017). This scholarship will provide essential insight into the ways in which Indigenous and Eurocentric frameworks interact and the ways in which unequal power relations have defined and continue to define Canadian Government-Indigenous relationships. Additionally, this scholarship serves to contextualize and situate my analysis of Indigenous voices and perspectives in the *Tsleil-Waututh* 2018 and *Gitxaala* 2016, voices which are largely framed as secondary in those rulings. This thesis does not address these scholarly works in their entirety but rather seeks to engage with and draw from those insights that are most applicable to the topic at hand.

a. Tuhiwai Smith

In *Decolonizing Methodologies* (2013), Tuhiwai Smith highlights the extent to which Western systems of knowledge and government have been complicit in the appropriation and erasure of Indigenous knowledge around the world. Key to this process has been the West’s ability to draw upon, “a vast history of itself and multiple traditions of knowledge, incorporating cultural views of reality, time, and space” in its suppression and erasure of Indigenous voices. Tuhiwai Smith lays out the “organized and systematic” processes of extraction and appropriation (p. 61) through which Western systems of “knowledge and science” have actively become “beneficiaries of the colonization of Indigenous peoples” and Indigenous knowledge (p. 62). As a result, Western instruments of research and knowledge operate as legitimators of colonial practices (p. 63). These processes allow Western academia and knowledge systems to benefit from the theft of Indigenous knowledge, while simultaneously marginalizing and rendering voiceless Indigenous peoples who are reduced to mere “objects of research” (p. 64), and denied active participation in the creation and dissemination of knowledge, including the construction of what it means to be, who is permitted to be, and who is not permitted to be, Indigenous (p. 76).

It is no surprise then, that Tuhiwai Smith asserts that “Indigenous peoples have been, in many ways, oppressed by theory” (p. 39) and that “the outsider ‘expert’ role has been, and continues to be problematic for Indigenous communities” (p. 140). What benefit then, one might justifiably ask, given this history of oppression through research, can research have for Indigenous communities? Through the assertion of Indigenous voices, and the use of theory to plan, control, and organize forms of resistance, Tuhiwai-Smith answers. The “struggle to assert and claim humanity has been a consistent thread of anticolonial discourses” (p. 27) and Indigenous resistance, she notes, going on to state that “theory enables us to deal with

contradictions and uncertainties… it gives us space to plan, to strategize, to take greater control over our resistances. It helps us interpret what is being told to us, and to predict the consequences of what is being promised” (p. 40). This repurposing of theory as a method of resistance is a reassertion of control over Indigenous knowledge, voices, and identities. Tuhiwai Smith asserts: “we don’t need anyone else developing the tools which will help us come to terms with who we are. Real power lies with those who design the tools – it always has. This power is ours” (p. 40).

It follows, therefore, that a reassertion of the primacy of Indigenous voices in Indigenous research requires a redesign of the tools that underlie and permit this research. While the long history of Western research on Indigenous peoples, “through imperial eyes” has relied on assumptions about the inherent superiority of Western knowledge and frameworks, including in the spiritual, intellectual, social, and economic realms (p. 58), the field of Indigenous research that Tuhiwai Smith advocates, “privileges Indigenous concerns, Indigenous practices, and Indigenous participation as researchers and researched” (p. 111). Several key elements form a part of this research, by a settler scholar, that seeks to recognize Indigenous voices and ways of knowing that were “hidden or driven underground” (p. 72) by Western research. These elements include the central focus on healing, decolonizing, and spiritual recovery through the practice of research (p. 122).

To this ends, Tuhiwai Smith provides several key pieces of guidance as to how research may be decolonized. Key to this decolonization, she lays out, is acknowledging the importance of relationships to Indigenous frameworks: “respectful, reciprocal genuine relationships lie at the heart of community life and community development” (p. 125). Additionally, Indigenous researchers must be transparent and clear about the intentions of their research: “they need to have thought about the bigger picture of research and have a critical analysis of their own

process” (p. 138). This critical awareness must include a recognition of the systems of power within which research exists, and of the need for Indigenous research to “‘talk back to’ or ‘talk up to’” power, in order to ensure that Indigenous knowledge and voices are heard (p. 226). While she clarifies that decolonization, “does not mean, and has not meant a total rejection of all theory or Western knowledge” (p. 41), this statement is tempered with the weight of the history of suppression of Indigenous knowledge through Western research frameworks. Furthermore, Tuhiwai Smith asserts that true self-determination can only be achieved when “Indigenous peoples become active participants” (p. 127). This participation and self-determination is key to the privileging of “Indigenous values, attitudes, and practices, rather than disguising them within Westernized labels, such as ‘collaborative research’” (p. 128). In order to ensure that research is being conducted within these parameters, the researcher would be well advised to consider several key questions that Tuhiwai Smith poses: “Whose research is it? Who owns it? Whose interests does it serve? Who will benefit from it? Who has designed its questions and framed its scope?” (p. 10).

These questions are especially important to this research given the white settler identity of its author, and the Westernized frameworks within which it is, in large part, situated. In answering the questions, “whose research is it?” and “who owns it?” the author is faced with two key limitations. This research is both conducted by an outsider about the experiences of Indigenous Nations in Canada, and owned in a sense by the Eurocentric academic institution within which it has been conceived and submitted. Despite this, this thesis aims to be as reflexive as possible in awareness of this position and its inherent limitations. Through the central incorporation of Indigenous scholarship into the design of its questions and framing of its scope, this research aims to recognize the interests of Indigenous Nations in Canada, by highlighting the ways in

which Indigenous law and key elements of Indigenous political economy continue to be ignored by the Canadian Government and Courts in favour of Eurocentric frameworks, as seen through the *Tsleil-Waututh* 2018 ruling. This research advocates that the Government of Canada and the Courts recognize and meaningfully interact with Indigenous law and political economies — including, most prominently in this work, relating to land, sovereignty, and genuine and reciprocal relationships — in their interactions and relationship with Indigenous Nations. In doing so it hopes to draw attention, through its limited influence, to the fundamentally colonizing frameworks and practices that permeate the Government of Canada and the Canadian Court system, and continue to suppress Indigenous voices, law, and political economies.

b. Borrows

In *Canada's Indigenous Constitution* (2010), Borrows examines the complex structure and origins of the Canadian legal system and the role that Indigenous legal ideas and practices do (and do not) play in that system. Borrows lays out that Canada has a “pluralistic” legal system, derived from the English and French traditions of the Common Law and Civil Law respectively, as well as incorporating Indigenous legal traditions, each of which has its own “history of development and application” (p. 8). Despite this plurality of legal traditions, Borrows argues that Indigenous laws have historically been, “ignored, diminished, or denied as being relevant or authoritative” in Canadian legal frameworks and proceedings. This includes in areas relating to Indigenous relations with the land and others, relationships for which Indigenous peoples believe their laws provide significant detail and context (p. 6).

However, despite this historic denial of the relevance and importance of Indigenous legal frameworks, Borrows argues: “Our constitutional arrangements are best worked out through a continuous process of discussion… compromise, negotiation, and deliberation” (p. 10). This

discussion, Borrows states, must include Indigenous legal traditions, which hold relevance for Indigenous and non-Indigenous peoples alike, and are highly useful in helping resolve and cope with conflict, addressing the current and future needs of Canadians, and living peacefully in the present world. Through this increasing engagement with Indigenous legal practices, Borrows states, the potential exists for the broadening and improvement of each of Canada’s legal traditions (p. 10).

While Borrows goes to great lengths to describe the benefits to each of Canada’s legal frameworks of a careful, respectful, and thorough implementation of Indigenous legal traditions, he notes that this is especially essential for Indigenous peoples. Canada, he asserts, must construct its legal traditions on a broader base, which includes the recognition of, “Indigenous legal traditions as giving jurisdictional rights and obligations in our land” (p. 7). Not only would this wider application of Indigenous laws reduce “disputes within Indigenous communities and with other societies,” but it would also be consistent with the Supreme Court of Canada’s acknowledgement of Aboriginal rights in rulings such as *R. v. Van der Peet* (1996). In that ruling, the Court states that “Aboriginal rights are based on Indigenous legal customs and traditions and are concerned with the protection of customary laws.” Further, in *Mitchell v. M.N.R.* (2001), the Court affirmed the survival of Indigenous law post-colonization (p. 11). This acknowledgement of Indigenous legal processes, customs, and rights, and their interactions with European legal frameworks, has been largely ignored in the discussion and teaching of Canadian legal traditions (p. 14) but is a thread that can be traced throughout the history of Indigenous interactions with European settlers (p. 15).

Borrows states that this denial of Indigenous law creates a colonial “fiction that continues to erase Indigenous legal systems as a source of law in Canada” (p.14) and argues that “Canada

cannot presently, historically, legally, or morally claim to be built upon European-derived law alone” (p. 15). This continuing failure to recognize Indigenous law constructs Canadian law on “a faulty premise that places Indigenous peoples ‘lower on the scale of civilization’ because of their non-European organization” (p. 19) and provides a “framework that would most likely create continued conflict and future confrontation” (p. 20). In short, “Colonization is not a strong place to rest the foundation of Canada’s laws” (p. 14). As Borrows notes, “a mark of authentic and living tradition is that it points beyond itself”, and the dogmatic intolerance of one legal tradition by another can only result in the weakening of both traditions (p. 8-9). It is fortunate then, that Indigenous legal practices continue to be relevant to all Canadians can be developed through contemporary practices and can continuously be “reformulated to show us how to create stronger order” (p. 10).

Borrows advocates for a stronger relationship and dialogue between Indigenous and European legal frameworks, arguing that “you cannot create an accurate description of the law’s foundation in Canada by only dealing with one side of its colonial legal history” (p. 15). Borrows argues that this acknowledgement of Indigenous legal practices does not constitute an abandonment of law. Rather, in placing Canada on a firmer legal footing through the acknowledgement of the ongoing relevance of Indigenous law, “we only have to relinquish those interpretations of law that are discriminatory” (p. 20). These acknowledgements strengthen the assertions made by the Supreme Court of Canada noted above and reflect the historical fact that “Canada’s Aboriginal peoples were here when Europeans came, and were never conquered” (p. 20).

Borrows insights have direct bearing on the conceptual framework and execution of this research. Implied in this thesis’ exploration of the failure of the Canadian Government and Court

to interact with or recognize Indigenous law and political economies is a plea for these institutions to recognize and interact in a meaningful and genuine way with these frameworks, especially concerning issues related to Indigenous Nations in Canada. More than this however, Borrows’ assertion that Canadian legal frameworks are pluralistic, and that Indigenous and non-Indigenous groups alike stand to benefit from the broader recognition and implementation of Indigenous law into Canadian legal frameworks is implemented in the discursive and analytical construction of this thesis. This plurality can be seen through its consideration of two Federal Court of Appeal rulings in light of Indigenous scholarship and westernized theoretical frameworks. Through this pluralism, this thesis acknowledges Western legal structures but recognizes the primacy of Indigenous law in issues that relate to Indigenous Nations in Canada, specifically in this case the analysis of the Trans Mountain Pipeline project consultation and environmental review processes.

c. King

In “Treaty Making and Breaking in Settler Colonial Canada,” (2017) King explores the differing characteristics of Indigenous and European political economies. He lays out the centrality of relationships to Indigenous political economies, not only within and between Indigenous communities and with other groups, but also between Indigenous peoples and the land they inhabit. King states that these “creative and sophisticated” relationships have historically been, and continue to be, suppressed by Canadian settler colonialism (p. 107). These frameworks of settler colonialism aim to remove Indigenous presence from the land through the destruction of Indigenous political economies, misinterpretation of treaties, and other logics of elimination (p. 113) and discourses of conquest (p. 108).

King lays out several key ways that reciprocal and sustainable relationships influence Indigenous political economies. Firstly, he lays out the notion of reciprocity among Indigenous peoples in their interactions with the land as well as with other peoples. This means that everything that is taken from the land must be given back, in one way or another, and that any use of the land must be sustainable, as King states, until the end of time. Therefore, the principle of reciprocity also embodies an ongoing dialogue and process of communication regarding how the land is shared and its resources are used. Secondly the “recognition of the agency of the land and the non-human creatures we share it with” is an important element of Indigenous political economies and is representative of the belief that all elements of creation have, “distinct legal and economic orders that must be respected” (p. 109). Thirdly, in Indigenous approaches to land, borders between distinct political and economic regions are not rigid and inflexible, as in European models, but rather “flexible, dynamic, and overlapping… mapped by shared jurisdiction,” allowing independent peoples and creatures to simultaneously inhabit the same space with autonomy (Ibid). This is reflected in Indigenous understandings of their treaties with European settlers (p. 110), whereby treaties did not “entail the surrender of authority or jurisdiction to one another or any political entity, but instead emphasized mutual obligations and responsibilities to each other and to the land, a shared jurisdiction… [and] that politically distinct peoples can share the same territory in peace” (p. 111).

Despite these elements of Indigenous political economy being laid out in treaties with European settlers (most visibly in peace and friendship treaties) King documents the ways in which settler colonial institutions, including but not limited to political and legal institutions, use “discourses of conquest” (p. 108) and “logic[s] of elimination” (p. 113) in order to “legitimize colonial policies and practices” (p. 108) which fundamentally oppose the nature of Indigenous

political economies. These discourses of conquest have included popular settler narratives of Indigenous people as primitive, backwards, and lazy, but also include advocacy against the acknowledgement of Indigenous sovereignty and rights (such as through the United Nation’s 2007 Declaration on the Rights of Indigenous Peoples). These discourses of conquest can also be seen through legal, economic, and political frameworks in Canada, through the forceful appropriation of land, barring Indigenous persons from using the legal system to reclaim land, and disregard of, or limited interpretations of treaties with Indigenous Nations. Discourses of conquest, King writes, “sanitize and valorize colonization while dehumanizing Indigenous peoples and burying their experiences of contact, conflict, war, peace, and life generally” (p. 108).

More than “discourses of conquest,” however, these practices and discourses are also “logic[s] of elimination” which justify the replacement of Indigenous political economies and frameworks with settler colonial ones. The primary goal of these settler colonial frameworks is to overcome, liquidate, and replace Indigenous political economies that are seen as barriers to settler occupation and exploitation of the land and its resources, and to replace them with regimes that facilitate this type of economic activity. To this end and in response to Indigenous resistance, Canada embarked on a “national treaty making campaign” (p. 115) — producing what are known as the numbered treaties — between 1870 and 1921. Indigenous peoples did not understand these treaties to involve the restricting of Indigenous land use, the extraction of minerals, imposition of government agents to oversee Indigenous governance practices, or “interference with Indigenous citizenship and self-determination generally” (p. 116). Despite Indigenous groups’ consistent protest against these forms of “settler arrogance” (p. 115) and resource exploitation, King notes, “Canada believed that through the treaty process it was

gaining legal tenure to a country” (p. 115). He states that the “logic of elimination” is clearly evident in “treaty making that privileges European notions of political economy” (p. 113) and asserts absolute jurisdiction over land and people — a contrast to the forms of treaty making and political economies exercised by Indigenous Nations.

King’s assertions regarding the centrality of reciprocal and sustainable relationships with other peoples and with the land, and the importance of respectful dialogue to Indigenous frameworks, are essential to this thesis. The analysis of two Federal Court of Appeal rulings here will evaluate the ways in which these principles are or are not recognized and interacted with by the Canadian Government and Courts. King will be used to demonstrate the ways in which the failure of these institutions to interact with Indigenous law and key elements of Indigenous political economy contributes to the suppression of Indigenous law, political economies, and voices.

The other set of theoretical tools that this thesis employs are drawn from narrative criminology and socio-legal approaches. In dialogue with concepts drawn from Borrows, Tuhiwai Smith, and King, narrative criminology allows us to compare the character of the relationship between the Canadian Government and Indigenous Nations — as revealed through evidence from *Tsleil-Waututh* 2018 and *Gitxaala* 2016 — with the positive narrative through which the Federal Government frames this relationship as cooperative, respectful, and rights-centred. This positive narrative will be shown to mask the continuing colonial domination and harm enacted upon Indigenous Nations by the federal government, the widespread and serious nature of issues facing Indigenous Nations and peoples, and the inadequate efforts by the colonial government to remedy these issues. Also, through a dialogue with concepts drawn from this Indigenous scholarship, socio-legal approaches allow us to critically examine the role of the

Court in *Tsleil-Waututh* 2018 in reinforcing and privileging the use of Eurocentric legal frameworks and perspectives, while suppressing Indigenous law. Borrows’ concept of a pluralistic Canadian legal system and King’s assertion that Indigenous political economies continue to be suppressed through frameworks of settler colonialism are particularly relevant here.

With insights from Indigenous, narrative criminology, and socio-legal scholars, I hope to work for a kind of decolonizing practice that respectfully recognizes and engages with Indigenous voices and frameworks in examining evidence primarily from *Tsleil-Waututh* 2018, and secondarily from *Gitxaala* 2016.

d. Narrative Criminology

Narrative criminology’s usefulness extends beyond examining the “‘inner narratives’ that motivate crime” (Sandberg & Ugelvik, 2016, p. 132) that it is often associated with. As Presser & Sandberg assert, “The weightiness of what people say is only more evident… where group action is concerned” (2015, p. 5). This broader approach to narrative criminology, incorporating group and structural dynamics, will be essential in this thesis’ application of narrative analysis to assertions made by Justin Trudeau and the current Liberal Government about its relationship with Indigenous Nations in Canada. As Presser & Sandberg lay out, “a narrative is essentially a structure and narrative analysis is a search for that structure” (2015, p. 9).

Storytelling and the creation of narrative, Sandberg & Ugelvik state, is a “basic device for creating, providing, and assigning meaning. Stories are good at making simple what is complicated” (2016, p. 129). Through these accounts, listeners are invited to participate in narratives “and imagine the subject matter is real, even when it is in fact fictional” (Sandberg &

Ugelvik, 2016, p. 130). As a result, “we are not just passive consumers of stories; we interact with them and they act on us” (Sandberg & Ugelvik, 2016, p.130), and narratives can be seen to, “produce experience even as experience produces narratives” (Presser & Sandberg, 2015, p. 4).

Presser (2016, p. 138) argues that narrative criminology can provide valuable insight into, “narratives about individual and/or collective selves,” as well as exploring the role “played by cultural constructions in the doing of harm. Narratives, “allocate causal responsibility for action, define actors and give them motivation and… confer and withdraw legitimacy… by aligning events with normative cultural codes (Smith, in Presser, 2016, p. 138). Narrative criminologists focus on the impacts of stories, through the scrutinization of “how stories are composed, what characters are assigned, and what plotlines are developed.” Presser asserts that through this critical examination of power and agency as expressed through discourse (Presser & Sandberg, 2015, p. 1), narrative criminology engages “the narrative foundations of social action” in a critical fashion. This allows the “law and lawfulness” themselves to be “seen as tropes – devices for structuring stories and laying claim to certain selves” (2016, p. 140).

Notably, through this critical engagement of narratives and their construction, storytelling can be positioned as a device with considerable “emancipatory potential for… marginalized tellers” (Presser, 2016, p. 142). This emancipatory potential means that “narrative is a vehicle for resistance; it has performative significance” (Presser, 2016, p. 143), and a critical engagement with these narratives of resistance “can assist in the project of social change by clarifying how the official truths that keep people in line get constructed” (Scott in Presser, 2016, p. 143). To this end, narrative criminology will allow the examination of political messages and legal frameworks themselves as narratives, and resistance against these agendas as counter-narratives. Particular emphasis will be placed on the harm imparted by the depiction of certain narratives as

legitimate or illegitimate, the privileging of certain practices, frameworks, and narratives over others, and the power relationships that permeate this. This narrative focus is well suited to an analysis of the deeply colonial relationship of domination and resistance that has defined and continues to define interactions between the Government of Canada and Indigenous Nations, as well as Liberal Government narratives concerning its relationship with Indigenous Nations.

e. Socio-Legal Approaches

The broad objective of socio-legal theory, as Tamanaha & Hawkins lay out, “is to nudge the legal system towards a more substantive justice stance. Substantive justice, in this usage, means doing what is ‘right’ in a given case, even if that goes against the weight of the applicable legal rules” (1997, p. 41). It does this by emphasizing the importance of considering context in legal decisions. The importance of context “brings in all sorts of considerations beyond just the rules themselves,” meaning that legal principles, precedent, and rules are no longer the primary means through which a decision is made, rather they become but one of many factors that must be weighed and considered (Ibid).

Through this contextual frame of socio-legal theory, the “analysis of law is directly linked to the analysis of the social situation to which the law applies” (Schiff, 1976, p. 287). In other words, “socio-legal scholarship locates legal practices within the context of the other social practices which constitute their immediate environment” (Lacey, 1996, p. 132). As with narrative criminology, this involves a critical examination of legal frameworks. Socio-legal scholarship also proposes that law institutionalizes particular types of norms in society (Schiff, 1976, p. 294), and seeks to understand the role that “law and the legal system and structure play in the creation, maintenance and/or change of social situations” (p. 287). In doing so, it examines the

discrepancies between “the formal logic of the law and its social/psychological realities” (p. 298). This approach emphasizes that “ends or outcomes are what matter, not just, and perhaps more so than application of the rules” (Tamanaha & Hawkins, 1997, p. 41).

Socio-legal approaches view law and the legal structures that enforce it as only one of many “complex social networks of power” (Lacey, 1996, p. 150). This means that, although the central goal of socio-legal perspectives is effecting social change (p. 143), this change must be “premised on the reconstruction of economic, social, political relations: on massive changes in the configuration of social power at every level” (p. 151). Nonetheless, through its critical approach to examining legal frameworks and their impacts, socio-legal theory sets out to “understand how powerful social practices such as law are implicated in the establishment of some and suppression of other values and ways of life.” Further, it imagines “how such practices might be reinterpreted or otherwise reconstructed” (p. 136).

This critical examination of the role of law in normalizing, stigmatizing and suppressing some identities and voices over others is also well-suited to an analysis of the *Tsleil-Waututh* 2018 and *Gitxaala* 2016 rulings, an analysis that will consider the privileging of Eurocentric voices, practices, and structures over Indigenous law and knowledge. A socio-legal approach will permit a recognition of how privileging Eurocentric frameworks over Indigenous ones constitutes an extension of colonial domination and harm.

f. Bringing Together Indigenous, Narrative Criminology, and Socio-Legal Scholarship

Despite the critical nature of these theoretical tools, the fact remains that the narrative criminology and social legal frameworks, as well as the broader disciplines of Criminology and Sociology within which they are based, are grounded in Eurocentric traditions and perspectives.

Given the focus of this thesis upon the colonial experiences of Indigenous Nations in Canada, as seen primarily through the *Tsleil-Waututh* 2018 ruling, this is a glaring issue.

In order to attempt to address this crucial limitation, this thesis will ground its research in conversation with Tuhiwai Smith’s, Borrows’, and King’s work, and other sources of Indigenous knowledge. By doing so, and by examining the expression and suppression of Indigenous voices in *Tsleil-Waututh* 2018, it will endeavour to conduct research in a way that recognizes “Indigenous concerns, Indigenous practices, and Indigenous participation” (Tuhiwai Smith, 2013, p. 111), and place a strong emphasis on the importance of “respectful, reciprocal, genuine relationships” (p. 125) in Indigenous frameworks. This thesis does so by respecting Indigenous voices in law, and scholarly and media sources, and using them as a frame through which to view the *Tsleil-Waututh* 2018 Federal Court of Appeal ruling, and use the theoretical tools described above. In respect for Tuhiwai Smith, this thesis is written recognizing the need to consider “the bigger picture of research” (p. 138) and “talk back to” dominant power structures and norms. Finally, in order to critically evaluate the position of this thesis and its author, in an attempt not to continue the tradition of exploitative colonial research, the creation of this thesis has been guided by Tuhiwai Smith’s questions: “whose research is it? Who owns it? Whose interests does it serve? Who will benefit from it?” (p. 10).

This research is conducted by a white settler, and is shaped by Eurocentric academic and legal frameworks, but aims to engage in a self-reflective, careful, and respectful dialogue with Indigenous scholarship, media, and voices in law, without laying claim to those voices, or their findings. Tuhiwai Smith states that decolonization “does not mean and has not meant a total rejection of all theory or Western knowledge” (2013, p. 41), but it remains a central goal of this work to avoid conducting Western “research through imperial eyes” (p. 58). Instead, this thesis

aims to, “bring to the centre… Indigenous values, attitudes, and practices,” (p. 128) and engage in what Borrows refers to as a pluralistic and respectful discussion (2018, p. 8) between Indigenous and European-informed tools and voices

g. Scope and Limitations

This thesis examines the *Tsleil-Waututh* 2018 Federal Court of Appeal ruling, and secondarily the *Gitxaala* 2016 Federal Court of Appeal ruling, drawing from the tools of Indigenous scholarship by Borrows, King, and Tuhiwai Smith, as well as narrative criminology and socio-legal approaches. It compares the Government of Canada-Indigenous Nations relationship documented through a critical reading of these rulings, to the renewed, nation-to-nation relationship that the current Liberal government asserts it is constructing with Indigenous Nations. The primary evidences for a critical examination of that relationship include the consultation and environmental review processes detailed in *Tsleil-Waututh* 2018, as well as the Court’s interactions with the Indigenous plaintiffs, and the Court’s ruling.

There exist a plethora of possible frames through which to construct and critically examine the current Liberal Government’s relationship with Indigenous Nations, and this thesis’ findings cannot be generalized into other aspects of that relationship. Other possible areas for research into the relationship between Indigenous Nations and the current Liberal Government include, the foster care program, Indigenous land ownership initiatives, the disproportionately low funding provided to Indigenous communities for community resources and critical services, and the interaction between traditional or grassroots and colonial-formed leadership structures in Indigenous communities. Additionally, the gender dimensions of the issues addressed in this thesis, and in broader Indigenous, and Government of Canada-Indigenous Nation, relations are not examined in this work. Finally, despite my efforts to ground this thesis with respect for

Indigenous voices, frameworks, and scholarship, it remains research conducted about Indigenous Nations by an individual of European descent (a white settler), and conducted, in significant part, through Eurocentric academic and legal frameworks. This must be kept in mind as the primary limitation of this research throughout.

6. Findings

The findings from my analysis of *Tsleil*-Waututh 2018 and *Gitxaala* 2016 can be grouped into three main themes. The first of these themes is drawn from *Tsleil-Waututh* 2018 and involves the fundamentally differing conceptions of consultation and consent that the Canadian Government, Courts, and Indigenous Nations, operate with. This will be laid out through the Court’s ruling that Canada failed to properly consult Indigenous Nations affected by the Trans Mountain Pipeline Project. This failure to consult will be shown to extend, in the perspectives of the involved Indigenous Nations, to the “unilaterally imposed” Crown consultation framework (*Tsleil-Waututh* 2018, para 514). The Court’s assertion that projects may proceed without the consent of the affected Indigenous Nations will be demonstrated to oppose Indigenous perspectives. Secondly, in *Tsleil-Waututh* 2018, the Court will be shown to identify and respond to many of the Indigenous concerns that it deems to be “specific and focussed and thus quite easy to discuss, grapple with, and respond to” (para 772); however the Corut is shown throughout the ruling not to meaningfully acknowledge the more broad and widely impactful Indigenous concerns raised. Thirdly, the continuity between the most recent Conservative Government and the current Liberal Government will be examined through a comparison of the *Gitxaala Nation v. Canada* (2016) and *Tsleil-Waututh Nation v. Canada* (2018) rulings with regard to these governments’ consultation with Indigenous Nations.

Before diving into a more detailed examination of these themes, it is important to briefly note the main conclusions of the Federal Court of Appeal’s ruling in *Tsleil-Waututh* 2018. The Court found that the design of Canada’s consultation process was “reasonable and acceptable” (para 753), but that the Government of Canada failed to reasonably carry out this consultation in three main ways. These three primary failures are shown to be: “the Crown consultation team’s implementation of their mandate essentially as note-takers, Canada’s reluctance to consider any departure from the [National Energy] Board’s findings and recommended conditions on the development of the Trans Mountain Pipeline project, and Canada’s erroneous view that it lacked the ability to impose additional conditions on Trans Mountain” (para 562).

In light of these findings and for clarity’s sake, the requirements of the *National Energy Board Act* as it applies to this case will be laid out, as these requirements are referred to throughout *Tsleil*-Waututh 2018 and in this thesis. The construction of all interprovincial or international pipelines in Canada are subject to approval by the National Energy Board (hereafter NEB or the Board) and their initial operation is further subject to the Board’s approval (*Tsleil-Waututh* 2018 para 54). In order to attain this approval, the company seeking to construct the pipeline must apply for a “certificate of public convenience and necessity” (para 55). Having applied for such a certificate, the NEB must assess the project in relation to section 52 of the *National Energy Board Act*. This assessment must be based on, “all considerations that appear to it to be directly related to the pipeline and to be relevant,” including “any public interest that in the Board’s opinion may be affected by the issuance of the certificate or the dismissal of the application” (para 56).

In all cases wherein the application relates to a “designated” project, the Board’s report must also include an environmental assessment of the project (para 57). This was the case for the

Trans Mountain Pipeline Project. Especially relevant to this case, the report must take into account the environmental effects of the program, including, “changes caused to the land, water or air and to the life forms that inhabit these elements of the environment” (para 60). The Court states:

> The effects to be considered are to include the effects upon Aboriginal peoples’ health and socio-economic conditions, their physical and cultural heritage, their current use of lands and resources for traditional purposes, and any structure, site or thing that is of historical, archaeological, paleontological or architectural significance (Ibid).

The NEB’s report is submitted to the Minister of Natural Resources, who will transmit it to the Governor in Council[4] (para 55). This report includes a Board recommendation to the Governor in Council to approve or deny the certificate. This decision must determine if the significant adverse environmental effects, should any be found, can be justified under the circumstances laid out in the NEB report (para 62). The Governor in Council may direct the Board to issue the certificate, subject to conditions laid out in the NEB report, direct the Board to dismiss the application for a certificate, or “refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration” (para 64). While the above-mentioned actors are identified individually throughout the ruling, in addition to the Crown Consultation Team, the Crown, the Government of Canada, as well as Canada as the defendant in *Tsleil-Waututh* 2018 — these state actors are often referred to collectively as “Canada,” or “Canada’s representatives” in the ruling, especially in its conclusions.

Lastly, it should be noted that Indigenous voices are secondarily presented in the *Tsleil-Waututh* 2018 ruling, relative to the voices of the Court and the Government of Canada. To some extent, this is inevitable, as the character of the Court as an institution necessitates the primacy of

[4] According to the Privy Council Office (2019), the Governor in Council is, “the Governor General acting on the advice of the Queen’s Privy Council for Canada as represented by Cabinet.”

its own voice over the plaintiffs and defendants in any given ruling. More than this, however, in *Tsleil-Waututh* 2018, the Court disproportionately engages with Canadian government perspectives, arguments, and frameworks compared to Indigenous ones. While Indigenous voices and arguments are engaged with in this ruling, perhaps most strongly through the Court’s documentation of the ways in which the Government of Canada failed to properly execute its consultation process, they are most often presented in relation to Canadian Government processes, frameworks, and policies, rather than in light of Indigenous knowledge, law, or frameworks. Using a coloured coding scheme to identify evidence of Court, Canadian Government, and Indigenous voices, I was left with 34 instances in which the Court addresses and documents arguments advanced by the Canadian Government and 20 instances in which the Court addresses and documents arguments posed by Indigenous Nations in *Tsleil-Waututh* 2018. It is important to note that this coding was not exhaustive - but sought to identify which arguments presented by the Government of Canada and Indigenous Nations were most substantially responded to and documented by the Court.

The Court’s disproportionate engagement with Canadian Government frameworks and arguments is indicative of the privileging of Eurocentric legal frameworks over Indigenous voices and law. To counteract this, and to provide context and support to Indigenous voices that are less well represented in the ruling, in addition to the primary source of *Tsleil*-Waututh 2018, Indigenous (and secondarily, allied) media and scholarly sources will be considered in relation to this thesis’ three primary points of discussion. These three points are: a) the opposing views of consultation and consent held by Indigenous Nations and the Government of Canada and Courts in *Tsleil-Waututh* 2018, b) the Court failure to address broad Indigenous concerns in *Tsleil-*

Waututh 2018, and c) the continuity between the federal Conservative and Liberal Governments that can be seen in Gitxaala 2016 and Tsleil-Waututh 2018.

a. Opposing Views of Consultation and Consent in *Tsleil-Waututh* 2018

One of the Court’s major findings in the *Tsleil-Waututh* 2018 ruling was that Canada had failed to adequately carry out its consultation process with Indigenous Nations affected by the Trans Mountain Pipeline project. In paragraph 575, the Court notes that “the Crown consultation team acted on the basis that, for the most part, their role was that of note-takers,” and in paragraph 751, “Canada did not provide any meaningful response… and conducted no meaningful, two-way dialogue” to concerns raised by Indigenous Nations. The Court goes on to state, “This was not reasonable consultation,” (para 751) and that, “More was required of Canada” (para 758). Meaningful dialogue, the Court asserts, would have “required someone representing Canada empowered to do more than take notes — someone able to respond meaningfully to the applicants’ concerns at some point in time” (para 599).

This finding largely mirrors the assertions of the Indigenous plaintiffs in *Tsleil-Waututh* 2018, who repeatedly state that the simple act of recording and communicating Indigenous concerns does not constitute true consultation. In paragraph 748, the Stk’emlupsemc Te Secwepemc Nation (referred to in *Tsleil-Waututh* 2018 and hereafter as SSN), stated that they were “not satisfied with the current crown engagement model and the lack of addressing SSN’s needs for a nation-to-nation dialogue about their concerns and interests.” In paragraph 591, the Stó:lō Collective (of First Nations) observed that “a high level of consultation means more than simply gathering information on Aboriginal interests… A simple ‘what we heard’ report is inadequate to this task” (*Tsleil-Waututh*, 2018). In paragraph 587, a representative of Coldwater

Nation enquires “what the point of consultation is if all that was coming from the Crown was a summary report.” Even more pointedly, a representative of Tsleil-Waututh Nation states that, “he did not want consultations and a report of concerns… that has occurred and does not work” (para 581).

Although the Court’s findings regarding the inadequacy of Canada’s execution of its consultation framework largely mirror the perspectives of the Indigenous plaintiffs, this convergence does not extend to the design of the consultation frameworks. The Indigenous plaintiffs in *Tsleil-Waututh* 2018 challenge the very design of the consultation framework, expressing concern that the “framework was unilaterally imposed” (para 513), and that “there was no substantive consultation with the Indigenous applicants about the four-phase consultation process” (515). Concerns stemming from this lack of input include the restrictive timelines imposed by the consultation framework, which the SSN “does not believe affords… sufficient time to review the application and participate meaningfully in the review process (748). The concerns of the Indigenous Plaintiffs also include the Board’s failure to allow Indigenous Nations to influence the issues discussed during the consultation hearings, the design of the environmental assessment process, or the final report, and the failure to allow Indigenous Nations sufficient time to understand the complexity of the project and its impact upon their title and land (para 520).

However, the Court does not find these claims to be well founded, ruling, “The Crown possesses a discretion about how it structures a consultation process and how it meets its consultation obligations.” What is required, the Court states, is not the inclusion of Indigenous Nations into the design of the consultation process, but “a process that allows Canada to make

reasonable efforts to inform and consult” (para 513). Similarly, the Court rules, the Board was authorized as a neutral arbitrator to make the decisions required of it under legislation, including decisions about which issues would be decided during the hearing, the composition of the hearing panel and the content of its ultimate report (para 525). As long as these decisions were made in a “fair and impartial” manner and in agreement with the applicable legislation, the Court states, “they were validly made” (Ibid).

Further entrenching the primacy of Colonial State conceptions of consultation, in paragraph 494, the Court lays out that, “The consultation process does not dictate a particular substantive outcome” and therefore, “does not give Indigenous groups a veto over what can be done with land.” Neither does the consultation process constitute “a duty to agree; rather, what is required is a commitment to a meaningful process of consultation” (Ibid). Through this statement, the Court simultaneously affirms the validity of a Government-designed and imposed consultation doctrine — as long as it incorporates “a meaningful process of consultation” — and stipulates that meaningful consultation here does not constitute the right for Indigenous Nations to withhold consent, nor to significantly participate in the design and operation of that process. In short, the Government of Canada reserves the right to both impose an unfamiliar consultation framework onto Indigenous Nations, and to limit the ability of these Nations to express dissent towards, and participate meaningfully within, this framework. While the word “consultation” is present four hundred and fifteen times in the *Tsleil-Waututh* 2018 ruling, the word “consent” is not used in any of the ruling’s 776 paragraphs.

b. Court Failure to Address Broad Indigenous Concerns

While there is evidence that the Court addresses the “specific and focussed” Indigenous concerns documented within the Court in *Tsleil-Waututh* 2018, a consideration of broadly

reaching Indigenous concerns recorded in that ruling challenges the Court’s assertion that, “in largest part, the concerns of the Indigenous applicants were quite specific and focussed and thus quite easy to discuss, grapple with, and respond to” (para 772). While the concerns brought forward by each of the involved Nations support the Court’s finding that Canada failed to engage in a meaningful dialogue with Indigenous Nations surrounding the development of the Trans Mountain pipeline (*Tsleil-Waututh* 2018, para 754), their relevance is far from limited to this case. Rather, these broader concerns challenge the very nature of the consultation and environmental review frameworks. They also highlight the ability of resource development and extraction projects, including the Trans Mountain pipeline, to alienate Indigenous communities from the land, including their harvesting, habitation, and spiritual centres from which, as Secwepemc land defender Kanahus Manuel expresses, “Our culture, our language – everything flows” (Manuel in Brake, 2018b).

The “specific and focussed” concerns referenced in Paragraph 772 of *Tsleil-Waututh* 2018 can be seen throughout that ruling. In paragraph 681, the Court accounts that:

> As part of the Stó:lō’s effort to engage with the Crown on the Project, Stó:lō prepared a detailed technical submission referred to as the “Integrated Cultural Assessment for the Proposed Trans Mountain Expansion Project” also referred to as “ICA”. A copy of the ICA was filed with the Board.

The ICA, the Court documents, was “based on surveys, interviews, meetings and workshops held with over 200 community members from approximately 11 Stó:lō bands” (*Tsleil-Waututh* 2018, para 682). The extensive process of consultation and analysis represented in the ICA culminated in the finding that the Trans Mountain Pipeline project “posed a significant risk to the unique Indigenous way of life of the Stó:lō, threatening the cultural integrity and survival of core relationships at the heart of the Stó:lō worldview, identity, health and well-being” (para 682). However, the ICA also contained 89 recommendations which, if implemented, the Stó:lō

believed would mitigate the harmful effects of the project. The Court characterizes these measures as, “specific, brief and generally measured, and reasonable” (para 684), but notes that, despite being pressed, neither Trans Mountain nor the Board adopted or substantively responded to these conditions.

Additional examples of the specific concerns raised can be found in the Upper Nicola Nation’s assertion that the Board’s economic analysis and characterization of its “economic rationale” (para 625) was incorrect. The Court notes that, “No dialogue ensued about the legitimacy of Upper Nicola’s concern” (para 624). Additionally, the ruling demonstrates that the SSN notified the Crown that it wished for the “jurisdictional room necessary” (para 748) to “impose a resource development tax on proponents whose projects are located in the SSN’s traditional territory” (para 741). The Court states that the only response by the Crown was to note that decision-makers would consider these proposals, and to express the difficulty their implementation would pose in meeting the deadline imposed on Canada’s consultation process (paras 746, 747). Finally, Tsleil-Waututh Nation asserted its disagreement with the Board regarding the likelihood of an oil spill in Burrard Inlet, where both Tsleil-Waututh Nation and the Board had found a spill would cause “significant adverse environmental effects” (para 607). While the Board found that a large spill from a tanker in Burrard Inlet was not likely to occur (para 427), the Tsleil-Waututh Nation found that the implementation of the project would increase the risks of a large spill, and could not accept the risks of even a small spill event, let alone a worst-case scenario (para 649). The Court found that even prior to Tsleil-Waututh’s presentations of its concerns regarding what it believed to be “fundamental flaws… present in relation to the [Board’s environmental assessment] process,” Canada suggested: “we might simply need to ‘agree to disagree’ on all of those issues” (para 605).

In addition to these specific concerns, which are acknowledged and engaged with by the Court, there exists a plethora of more broadly reaching and impactful concerns Indigenous Nations raised throughout the ruling, the scope of which is not acknowledged by the Court. In paragraph 581 of *Tsleil-Waututh* 2018, in response to Canada’s assertion that their intention was to submit a report to Cabinet including the concerns of all the Indigenous Nations they had consulted regarding the Trans Mountain Pipeline project, a representative of Tsleil-Waututh Nation asserted that “he did not want consultations and a report of concerns; that has occurred and does not work.” A representative of Coldwater Nation, in para 587 asked, “what the point of consultation was if all that was coming from the Crown was a summary report.” In paragraph 591, a representative of the Stó:lō Collective observed, “a high level of consultation means more than simply gathering information on aboriginal treaty interests… and reporting those findings to the federal decision makers.” They went on to assert that “a simple ‘what we heard’ report is inadequate to this task and the Governor in Council must be aware of its obligation to either reject or make changes to the project to protect and preserve the aboriginal rights, title, and interests of the Stó:lō Collective.” These statements are representative of the Court’s finding that Canada failed to engage in adequate consultation with the involved Indigenous Nations. However, they also reflect Indigenous frustration regarding the lack of consideration or implementation of Indigenous knowledge and frameworks in the consultation process and a belief that the consideration of these elements is key to the protection of Indigenous interests.

In paragraph 688 of *Tsleil-Waututh* 2018, a representative of the Stó:lō Collective argues that despite Trans Mountain being directed by the National Energy Board to include Indigenous knowledge in its project planning, it had not done so. In order to facilitate the incorporation of this knowledge into the project planning, in paragraph 682 Stó:lō states that it provided Trans

Mountain with, “a detailed technical submission” or the ICA, referred to above. Along with 89 specific recommendations that the Stó:lō believed would “mitigate the project’s adverse effects,” (para 681) the ICA contained a “detailed ‘map of historical waterways… along with a table listing local and traditional knowledge of waterways crossed by the project.’” Representatives of the Stó:lō Collective met with the Trans Mountain Project fisheries manager approximately a year after the submission of this document, and found that they, “had never seen the ICA or any of the technical information contained within it.” As a result, Stó:lō states, “Trans Mountain’s assumptions and maps about the Fraser River were wrong and did not include their traditional knowledge” (para 688). These inaccuracies included Trans Mountain’s claim that there were no traditional plant-harvesting areas in the project area, when the ICA had mapped several, and the assertion that there were no habitation sites within the project area. However, the ICA, “mapped three habitation sites within the proposed pipeline corridor and two habitation sites located within 50 meters of the pipeline corridor” (para 688).

The Stó:lō Collective also disagrees with Trans Mountain’s assessment of the “broader cultural impacts” of the pipeline’s development on the Stó:lō. Trans Mountain assessed these impacts as “not significant… short term, limited to brief periods… reversible in the short to long term, and low in magnitude.” However, the Stó:lō point out that because of the failure to incorporate their traditional knowledge, including that contained in the ICA, “various features known to Stó:lō… were not being factored into [Trans Mountain’s analysis of] project effects” (para 697). As a result, Trans Mountain did not take into account the importance and location of “Lightning Rock, a culturally significant spiritual and burial site.” Stó:lō estimated that Trans Mountain’s plans to place a staging area in close proximity to Lightning Rock, “would totally obliterate the site” (para 698). The Stó:lō Collective asserts that Trans Mountain’s failure to

engage with and implement Indigenous geographical and traditional knowledge in assessing the impacts of its project on their cultural practices would lead to the Trans Mountain pipeline cutting directly through important centers of habitation, gathering, and spiritual activity.

The Upper Nichola Nation also raised broad and multifaceted concerns during the course of the consultation process. The Federal Court of Appeals ruling notes, “Throughout the consultation process, Upper Nicola raised the issue of the Project’s impact on Upper Nicola’s asserted title and rights” (para 728). Upper Nicola disputed Canada’s assertion that construction of the Trans Mountain pipeline would have only “a temporary impact in its claim to title” (para 729), and argued “the Project would render 16,000 hectares of land unusable or inaccessible for traditional activities.” As a result, Upper Nicola asserted that this constituted a “significant impact that required accommodation of their rights to stewardship” (para 730). Upper Nicola stated that “Canada had examined the Project’s impact on title without considering impacts on governance and management, and concerns related to title, such as land and water issues” (para 729). In paragraph 733, the Court notes, “no response was made to the request to acknowledge the Project’s impacts and infringement of Upper Nicola’s asserted title and rights.”

In a proposal that strikingly mirrors Prime Minister Justin Trudeau and the Liberal Government’s own use of the phrase, ‘nation-to-nation,’ SSN expressed their belief that the existing environmental consultation process was, “insufficient to tackle the issues that affected their territory,” and the desire to consult with the Canadian government on a deeper level than this framework permitted. The “SSN sought to move forward on a nation to nation basis and wished to formalize a nation to nation consultation protocol using the Project as a starting point for further consultation” (para 737). Paragraph 740 of *Tsleil-Waututh* 2018 notes that “the Crown consultation lead sent a two-page draft memorandum of understanding to the SSN.” The Court

goes on to note that Canada met with the SSN and sought feedback on the draft memorandum of understanding, committing to arrange another meeting to continue revising the document (para 742); however no more meetings occurred, and the memorandum of understanding was not finalized (744).

Moreover, the SSN submitted several proposals regarding their desire to independently review the Trans Mountain Project, “to impose a resource development tax on proponents whose projects are located in the SSN’s traditional territory” (para 741), and “to have a terrestrial spill response team stationed in their reserve,” paid for by a “per-barrel spillage fee charged on product flowing through the pipeline” (para 743). Paragraph 747 notes that “The only response made to the resource development tax during the consultation meetings was the difficulty this would pose to meeting Canada’s consultation deadlines.” In light of this non-response, the SSN expresses “concern about the Board’s legislated timelines [for consultation], and the way these timelines were unilaterally imposed on them,” and stated that they did not believe this structure “affords SSN sufficient time to… participate meaningfully in the review process.” Further, the SSN notes that they “are not satisfied with the current crown engagement model and lack of addressing SSN’s needs for a nation-to-nation dialogue about their concerns and interests” (para 748). The Court agrees, in paragraph 751, ruling that, “Canada did not provide any meaningful response to SSN’s proposed mitigation measures, and conducted no meaningful, two-way dialogue about SSN’s concerns.”

c. Conservative and Liberal Government Continuity: *Gitxaala Nation* 2016 and *Tsleil-Waututh* 2018

The Federal Court of Appeal ruling in *Gitxaala* 2016, wherein Canada was found to have failed to adequately consult with Indigenous Nations affected by the Northern Gateway pipelines project before approving its development, is key to interpreting and contextualizing the ruling in *Tsleil-Waututh* 2018. According to allied legal scholar David Wright (2018), *Tsleil-Waututh* 2018, “is a direct application of the… reasoning and findings in *Gitxaala.*” Regarding the consultation processes detailed in *Gitxaala* 2016, the Court ruled that, “While Canada designed a good framework to fulfil its duty to consult, execution of that framework… fell well short of the mark” (para 8.) The court found that the time allowed for the consultations was too short, that the Crown Consultation Report did not accurately portray First Nations concerns regarding the development of the Northern Gateway pipeline, and that the consultations that were conducted were not meaningful (para 353), due to the lack of any government representative who was, “empowered to do more than take notes,” or “able to respond meaningfully at some point” (para 279).

This ruling is nearly identical to that in *Tsleil-Waututh* 2018, wherein the Court found that the consultation process constituted little more than note taking (para 599). In paragraph 518 of *Tsleil-Waututh* 2018, the Court states, “When the two consultation frameworks [for the Northern Gateway & Trans Mountain Pipeline projects] are compared, there is little to distinguish them.” The continuity between these two rulings is especially relevant when one considers that the Federal Court of Appeal heard the arguments of *Gitxaala* 2016 case in October 2015, during the last days of the Conservative government, while the Court heard *Tsleil-Waututh* 2018 in October 2017. This is nearly two full years into the mandate of the Liberal Government,

whose promise of a new nation-to-nation relationship with Indigenous Nations was a core component of their election platform.

One of the key failures in the consultation and environmental assessment processes found in *Tsleil-Waututh* 2018 is the belief by the Governor in Council that Canada did not have the authority to impose additional conditions upon the development of the Trans Mountain Pipeline project (para 629). However, the Court lays out that this belief had previously been examined in *Gitxaala 2016* and found to be erroneous. The court notes, in paragraph 636 of *Tsleil-Waututh* 2018 that the judgement in *Gitxaala* 2016 was rendered, “five months before Canada wrote to the Stó:lō advising that the Governor in Council lacked such a power and five months before the Governor in Council approved the Project.” The Court further goes on to state, “The record does not contain any explanation as to why Canada did not correct its position after the Gitxaala decision” (para 636).

7. Discussion and Analysis

It is important to keep in mind throughout this analysis the continuities that have been noted in arguments and themes among the primary pieces of Indigenous scholarship drawn from in this thesis. The three primary themes that have been drawn from these works are: i) Borrows’ (2010) concept of a pluralistic Canadian legal system; ii) Tuhiwai Smith’s (2013) assertion of the central importance of genuine, reciprocal relationships in Indigenous frameworks, and iii) King’s (2017) examination of Indigenous political economies and their suppression through settler colonial frameworks. These three scholars share similar insights on the importance of genuine relationships with other peoples and with the land in Indigenous frameworks. They espouse the well-developed frameworks and practices that make up Indigenous political economies, and the

failure of Eurocentric and colonial government and legal institutions to acknowledge or incorporate these elements of political economies into their dealings with Indigenous Nations. Finally, each of these scholars depicts a long and difficult struggle against the destruction of these identities and practices, through the state-sponsored imposition of fundamentally colonizing and Eurocentric frameworks. These insights are key to my analysis of the *Tsleil-Waututh* 2018 ruling, both allowing Indigenous frameworks and voices that are framed as secondary in this thesis’ primary source of evidence to be nonetheless centrally considered, and providing theoretical tools to evaluate Liberal Government narratives regarding its relationship with Indigenous Nations in Canada

The failure of the Liberal government to interact with Indigenous principles of political economy, or to engage in a “respectful, reciprocal genuine” relationship (Tuhiwai Smith, p. 125) with Indigenous Nations regarding the Trans Mountain Pipeline project, can be seen through the Federal Court of Appeal’s finding in *Tsleil-Waututh* 2018 that Canada failed to adequately implement its own consultation process. During this process, the Court found, Canada’s consultation team acted as little more than note-takers (para 575), documenting the concerns of Indigenous groups, but failing to “provide any meaningful response” or “meaningful, two-way dialogue” (para 751) in response to these concerns. While this is a significant failure of that process, and a challenge to the assertion that a nation-to-nation relationship exists or is being constructed between Indigenous Nations and the current Liberal Government, perhaps even more damning is the response of the Court itself to the Indigenous plaintiffs’ assertions that the environmental assessment and consultation processes were “unilaterally imposed” (para 514). The Court finds that the Government of Canada’s imposition of the consultation and environmental review frameworks cannot be seen as a barrier to the legitimacy of that process,

because “the Crown possesses a discretion about how it structures a consultation process and how it meets its consultation obligations.”

While the Court does agree with the Indigenous Plaintiffs that the Liberal Government failed to adequately consult with Indigenous Nations regarding the development of Trans Mountain, it did not reach this verdict through the consideration of Indigenous law or principles of political economy, but by measuring the Government’s consultation efforts against the requirements of its own consultation framework, and “The Supreme Court’s Jurisprudence” (*Tsleil-Waututh* 2018, para 559). Similarly, when the Court finds that the “unilaterally imposed” nature of the consultation process (para 514) cannot be considered to challenge the legitimacy of that process, it does so by measuring this argument against Eurocentric (colonial) law, as opposed to Indigenous law and frameworks. Both the Government of Canada in its interactions with Indigenous Nations in *Tsleil-Waututh* 2018 and the Court in assessing the legality of these interactions and the validity of Indigenous challenges to them, impose Eurocentric frameworks onto Indigenous Nations in Canada, and singularly fail to implement or acknowledge the laws that “Indigenous peoples believe… provide significant context and detail for judging our relationships with the land and with one another” (Borrows, 2010, p. 6).

As allied legal scholar Robert Hamilton states, the Federal Court of Appeal ruling in *Tsleil-Waututh* 2018 indicates that consultation does not require Indigenous consent. “The ‘Free, Prior, and Informed Consent’ (“FPIC”) standard articulated in United Nations Declaration on the Rights of Indigenous Peoples is not part of the [Government of Canada’s] consultation doctrine and was not applied in this case” (2018, p. 3). Hamilton asserts that the Court is less concerned with Indigenous opposition to the Trans Mountain Pipeline Project than it is with the proper implementation of the consultation process: “This case clearly retains the aspects of the

[consultation] doctrine that allow the Crown to act in the face of Indigenous opposition if certain procedural benchmarks are met” (Ibid).

This consultation doctrine differs substantially from the perspectives of many Indigenous Nations in Canada, which are laid out above, regarding the principle of reciprocity in political and economic frameworks, as well as the centrality of genuine and respectful relationships. In a concrete application of these principles to the consultation process for resource development projects on Indigenous land, and Indigenous title in Canada generally, Assembly of First Nations Chief Perry Bellegarde argues, “we maintain the standard of free, prior, and informed consent has to be our path going forward” (in Brake, 2018a). While, as previously mentioned, the word “consent” does not appear in the *Tsleil-Waututh* 2018 ruling, the Indigenous plaintiffs argue throughout the ruling for the right to exercise and withhold consent through their challenges to every element of the consultation and environmental review processes. These processes, the plaintiffs assert, failed to involve proper consultation with Indigenous Nations, through the flawed design and execution of the consultation process (para 511), through its unilateral imposition, and through the inadequacy of the National Energy Board environmental review process to fulfil consultation obligations with Indigenous Nations (para 512).

Therefore, key to Indigenous Nations’ concerns around the development of the Trans Mountain pipeline is their fight for sovereignty, including the right to express and withhold consent, and to make decisions regarding their own lands and resources; a sovereignty which the Government of Canada does not recognize in its consultation and environmental review processes, and that the Federal Court of Appeal does not recognize in *Tsleil-Waututh* 2018. This lack of sovereignty can be seen through both the inability of Indigenous Nations to substantively influence the design of the consultation and environmental review processes, as seen above, but

also through the inability to withhold consent for resource development and extraction projects. In paragraph 494 of *Tsleil-Waututh* 2018, the Court asserts: “The consultation process does not… give Indigenous groups a veto over what can be done with land.” Neither does it constitute “a duty to agree; rather, what is required is a commitment to a meaningful process of consultation.” This statement by the Court confirms the legality (in Eurocentric colonial law) of the Government of Canada’s consultation doctrine, which has been shown to deny the sovereignty of Indigenous peoples over their land and to fail to engage with Indigenous law in the design and execution of the consultation process.

The result of this consultation doctrine, designed and implemented by the Government of Canada and legitimized by the Federal Court of Appeal, is what Hamilton describes as an “approval process that allows the Crown to act without Indigenous consent” (2018, p. 4). This approach to consultation with Indigenous Nations as implemented by the Liberal government is fundamentally opposed to key principles of Indigenous political economies as laid out by King, which are centred around ongoing processes of communication regarding the way in which land and resources are shared (2007, p. 109). This failure to recognize and engage with Indigenous law, to draw from Borrows “places Indigenous peoples lower on the scale of civilization because of their non-European organization” (2010, p. 19).

Additionally, this doctrine of consultation poses a sharp contrast to the position of Liberal Party Leader Justin Trudeau regarding Indigenous consent before his election, when he stated: “We cannot have a government that decides where the pipelines [are going to] go without having proper approval and support from the communities that are [going to] be affected” (Morin, 2016). Indeed, the ability to approve resource development and extraction projects on Indigenous territory without the consent of Indigenous peoples much more closely reflects the reality of

King’s assertion that settler colonial actors view Indigenous political economies as obstacles to the occupation and exploitation of land and resources (p. 115), more than it does the Liberal Party and Government’s assertions regarding a “renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition, rights, respect, co-operation, and partnership” (Liberal Party of Canada, n.d.).

The failure of the Liberal government to engage in a nation-to-nation relationship with Indigenous Nations can also be seen through its lack of response to the concerns presented to it during the Trans Mountain Pipeline consultation process by the involved Indigenous Nations. These concerns have been shown to range from the specific—such as the 89 recommendations brought forward by the Stó:lō Nation, and the concern of Upper Nicola Nation about the accuracy of the Board’s economic analysis—to the very broad, including the identification of serious errors in the Board’s environmental assessment by both of these Nations, informed by the failure to incorporate Indigenous knowledge into the assessment’s construction. Additionally, unsatisfied with the current model of Crown-Indigenous relations, the SSN sought to use this opportunity to “formalize a nation to nation consultation protocol using the Project as a starting point for further consultation” (para 737). In much the same way that the development of this nation-to-nation consultation protocol was not finalized by the consultation team (para 740), the Court found that time and time again, “Canada did not provide any meaningful response,” and “conducted no meaningful, two-way dialogue” (para 751) regarding the concerns raised by Indigenous participants in the consultation process.

Additionally, while the Court acknowledges that Canada failed to meaningfully respond to the concerns of the Indigenous Nations involved in the consultation, it erroneously characterizes all of these concerns as “specific and focussed and thus quite easy to discuss,

grapple with, and respond to” (para 772), despite a plethora of broad and widely impactful Indigenous concerns raised during the application process. These range from the lack of incorporation of Indigenous knowledge and voices to the very basis of the relationship between Indigenous Nations and the Government of Canada. This relationship underpins not only the consultation framework and environmental assessment process, but every aspect of Indigenous Nations’ interaction with the Government, as well as other colonial legal and economic institutions and practices in Canada, and cannot be characterized as “specific and focussed” or “easy to discuss, grapple with, and respond to” (Ibid).

This complete failure of Canada to respond meaningfully to the Indigenous concerns brought to it during the consultation process demonstrates a fundamental unwillingness to engage in a genuine or reciprocal relationship with Indigenous Nations, and the forceful imposition of Eurocentric (in other words, colonial) legal and political frameworks onto these Nations, offering no opportunity for Indigenous law to be integrated into, or shape the design and operation of these frameworks. The Court’s failure to acknowledge the more broadly-reaching concerns expounded by Indigenous plaintiffs in *Tsleil-Waututh* 2018 also demonstrates both the Court’s and Canadian Government’s failure to engage in a genuine conversation with Indigenous voices and frameworks, a key component of Indigenous political economies. This suppression of and failure to interact with Indigenous political economies means the recognition of only those concerns which can be addressed within Eurocentric, colonial frameworks, and the failure to acknowledge Indigenous concerns that challenge the very basis of these frameworks.

Finally, the Liberal Government’s assertion that it would engage in a “renewed nation-to-nation relationship with Aboriginal communities” (Trudeau, 2015) is challenged by the similarity in key elements of the Federal Court of Appeal rulings in *Tsleil-Waututh* 2018 and *Gitxaala*

2016. In both cases the Court rules that, “while Canada designed a good framework to fulfil its duty to consult, execution of that framework… fell well short of the mark” (*Gitxaala* 2016, para 8). Of particular note by the Court is the erroneous belief of the Governor in Council that it did not have the ability to impose additional conditions upon the development of the project (*Tsleil-Waututh* 2018, para 629). The Court notes that the ruling in *Gitxaala* was delivered five months before the Governor in Council committed the same error in *Tsleil-Waututh* 2018 and that no explanation was offered for this lack of adjustment in light of the Court’s ruling (para 636). Despite the current Liberal Government’s repeated narrative of commitment to the implementation of a “renewed nation-to-nation relationship” (Trudeau, 2015), through a critical analysis of these two Federal Court of Appeal rulings, it is clear that this relationship has yet to materialize.

Interpreting these findings from *Tsleil-Waututh* 2018 and *Gitxaala* 2016 through the narrative criminology approach, Justin Trudeau and the Liberal Party of Canada’s assertion that a “renewed nation-to-nation” relationship (Trudeau, 2015) is being created between the Liberal Government and Indigenous Nations in Canada invites listeners to participate in a narrative that us not based in reality, to draw from Sandberg & Ugelvik (2015, p. 9). This narrative legitimizes the federal government’s approach to interacting and consulting with Indigenous Nations by presenting it as a relationship between two equals entities. This one-sided presentation defies the reality of this relationship as found within the two Federal Court of Appeal rulings examined here, which shows the relationship between the federal Liberal Government and Indigenous Nations to be one of continuing colonial domination and state-inflicted harm. In much the same way as the Canadian Government dictates the settler colonial frameworks that Indigenous

Nations must exist and operate within, it also exercises the ability to depict the nature of their relationship in the light it chooses.

The broad objective of socio-legal theory, Tamanaha & Hawkins have argued, “is to nudge the legal system towards a more substantive justice stance,” and the means through which this is accomplished is a consideration of context (1997, p. 41). This analysis of context in the reaching of a legal decision is especially vital in the case of Indigenous Nations in Canada, who have been the victims of centuries of colonial domination, violence, assimilation efforts, and exploitation for centuries, but a few recent examples of which have been documented in this thesis. This fundamentally unequal historical and current relationship should be a key consideration in Court judgements regarding Indigenous issues in Canada, especially as relates to issues of sovereignty and title in relation to land and resource development and extraction projects.

This does not appear to have been a major concern of the Courts in the two rulings examined in this thesis however, and resultingly, the Courts’ judgements can be seen to contribute to the social, economic, political, and legal inequalities that continue to affect many Indigenous communities in Canada, as a result of the imposition of exploitative and damaging settler colonial frameworks. While the legal recognition of these historical and continuing harms is only one of a vast number of structural changes that need to be affected in Canada, in order to begin to address these issues, the two rulings examined in this thesis represent a missed opportunity in this regard. While the Courts are a settler colonial institution that is separate and distinct from the Canadian Government, the Federal Court of Appeal has been shown to disproportionately engage with the frameworks, and uphold the voice, of that Government in *Tsleil-Waututh* 2018, compared with the voices of the Indigenous plaintiffs. As a result, the

Court has, in many ways, contributed to and legitimized the practices of settler colonial domination demonstrated by the Canadian Government.

8. Conclusion

In conclusion, the Federal Court of Appeal rulings in *Tsleil-Waututh* 2018 and *Gitxaala* 2016 have been examined in light of concepts from three main pieces of Indigenous scholarship: i) Borrows’ (2010) concept of a pluralistic Canadian legal system; ii) Tuhiwai Smith’s (2013) assertion of the central importance of genuine, reciprocal relationships in Indigenous frameworks; and iii) King’s (2017) examination of Indigenous political economies and their suppression through settler colonial frameworks. The analysis of these two rulings through respectful interaction with Indigenous voices, including insights from narrative criminology and socio-legal approaches, has produced three primary themes: i) the fundamentally differing standards of consultation and consent adhered to by Indigenous Nations and the Government of Canada; ii) the failure of the Government of Canada and the Court to acknowledge broad Indigenous concerns; and iii) the continuity between the previous Conservative and current Liberal Governments.

Through an analysis of these three primary themes, in conversation with Indigenous voices and theoretical tools, including from narrative criminology and socio-legal approaches, it is evident that despite promises and statements made by Candidate and Prime Minister Justin Trudeau, and the Liberal Party and Government of Canada, a renewed nation-to-nation relationship between that Government and the Indigenous Nations involved in the *Tsleil-Waututh* 2018 ruling does not exist. Rather, the Liberal Government of Canada and the Court have been shown to fail to consider or implement key principles of Indigenous political economies and

legal frameworks in the consultation and environmental review processes related to resource development and extraction projects.

This failure to engage with principles of Indigenous political economies involves a failure to engage in what Tuhiwai Smith refers to as a “Respectful, reciprocal genuine relationship”, which lies “at the heart of [Indigenous] community life and community development” (p. 125). In failing to incorporate Indigenous frameworks, knowledge, and voices in interactions with Indigenous Nations, both the Canadian Government and Courts create and perpetuate a relationship dictated by one party to the other, recreating a fundamental colonial power imbalance. These fundamentally unequal relationships contribute to “The enormous lack of respect which has marked the relations of Indigenous and non-Indigenous peoples” (p. 125), as Tuhiwai Smith asserts. These relations involve the denial of what Borrows highlights as Canada’s pluralistic legal history, which is founded upon both Eurocentric and Indigenous law, and supports King’s finding that distinct and storied Indigenous political economies continue to be suppressed through settler colonialism. The ability of the Liberal Government to characterize its relationship with Indigenous Nations as a “renewed nation-to-nation” relationship (Trudeau, 2015), despite a lack of evidence to support this assertion, and the Court’s failure to acknowledge and engage the historical and ongoing reality of harms effected by Eurocentric colonizing frameworks in Canada, have been shown to constitute a continuation of settler colonial domination.

The recognition of these harms and meaningful interaction with Indigenous law and key elements of Indigenous political economy in Canada will not only be beneficial to Indigenous Nations, but also to settlers as well. As Borrows asserts, “we can do a better job of building our country upon our highest ideals. We can respect and fortify the rule of law, even as we identify

areas in which we can improve” (2010, p. 7). The integration of Indigenous law into Canadian legal frameworks will help to address and “speak to the present and future needs of Canadians.” These include the needs to live peacefully in the current world, to create stronger social order, and to “appropriately channel and cope with conflict” (p. 10.). As King writes, Indigenous political economies and law can help us address the “fragility of a settler political economy premised on theft and deceit. Indigenous peoples can and will continue to offer alternatives, away from exploitation and towards obligation, to one another and to the land” (2017, p. 123).

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