

Kent Academic Repository

Full text document (pdf)

Citation for published version

Ord, Sophia Beatrice (2019) Canada's Conduct of Lawful Relations: The Hul'qumi'num Treaty Group's Jurisdictional Entanglements in Non-Aboriginal Law. Master of Law by Research (LLMRes) thesis, University of Kent,.

DOI

Link to record in KAR

<https://kar.kent.ac.uk/79891/>

Document Version

UNSPECIFIED

Copyright & reuse

Content in the Kent Academic Repository is made available for research purposes. Unless otherwise stated all content is protected by copyright and in the absence of an open licence (eg Creative Commons), permissions for further reuse of content should be sought from the publisher, author or other copyright holder.

Versions of research

The version in the Kent Academic Repository may differ from the final published version.

Users are advised to check <http://kar.kent.ac.uk> for the status of the paper. **Users should always cite the published version of record.**

Enquiries

For any further enquiries regarding the licence status of this document, please contact:

researchsupport@kent.ac.uk

If you believe this document infringes copyright then please contact the KAR admin team with the take-down information provided at <http://kar.kent.ac.uk/contact.html>

**Canada's Conduct of Lawful Relations:
The Hul'qumi'num Treaty Group's Jurisdictional
Entanglements in Non-Aboriginal Law**

Sophia Beatrice Ord

LLM

June 2019

Abstract

The Hul'qumi'num Treaty Group are fighting for legal recognition of their property rights with respect to their unceded lands located in British Columbia, Canada. In examining the available literature surrounding the British Columbia Treaty Commission, it is clear that the domestic processes for negotiation have been structured in such a way so that Aboriginal narratives and laws have been foreclosed upon by the legal architecture and language that underwrites the negotiations between Aboriginal and Non-Aboriginal governments. The Hul'qumi'num Treaty Group's decision to apply to the Inter-American Commission on Human Rights rather than continue with domestic remedies through the courts or treaty-making process represents a chance to compare the two legal spaces. The comparison is made through the use of a *praxis* of jurisdiction, which is a technique that can explore the ways in which person, places, or events make contact with the body of law. The focus of such a jurisdictional endeavour is to use the magnifying lens of jurisdictional thinking to uncover the landscape of legal practice as it is manifest in the two Commissions. Specifically, jurisdictional thinking is about the quality of lawful relations, bringing in to focus the texture of the relationships between the Hul'qumi'num Treaty Group and Non-Aboriginal governments. The Inter-American Commission generates very different opportunities for the articulation of legal relationships, and as such the jurisdictional perspective uncovers the need for Canada to take seriously its commitment to an ethic of responsibility in its conduct of lawful relations, and a pressing need to reconfigure the mechanics of domestic law to make room for different legal scaffolding.

CONTENTS

CHAPTER 1: A PRACTICE OF JURISDICTION

- I. Introduction
- II. The Hul'qumi'num Treaty Group
- III. Jurisdictional Endeavours
- IV. Thinking with Jurisdiction
- V. Jurisdiction as Representation
- VI. Jurisdiction as Authorisation
- VII. Jurisdiction as Inauguration

CHAPTER 2: THE ABSENT NARRATIVE OF THE CANADIAN LAND CLAIMS PROCESS

- I. Jurisdiction and the British Columbia Treaty Commission
- II. Writing as a Technology of Jurisdiction in the BCTC Process
- III. The Role of Precedent Within Treaty Negotiations
- IV. The Shaping of Negotiations through Categorisation
- V. The Implication of Authority in the BCTC Process
- VI. The Premise of Canadian Sovereignty

CHAPTER 3: CONFIGURATIONS OF JURISDICTION AT THE IACHR

- I. The Inter-American Commission on Human Rights
- II. Representations of Jurisdiction through Writing at the IACHR
- III. The Technology of Precedent in an International Jurisdiction
- IV. The Implication of Authority in the BCTC Process
- V. Authority and Authorisation in an International Human Rights Context
- VI. Inauguration as a *Praxis* of Jurisdiction at Law's Threshold

CHAPTER 4. THINKING WITH JURISDICTION

- I. Representations of Writing and Language
- II. Precedent and Jurisprudence
- III. Authority and Authorisation
- IV. Inauguration and the Meeting Place of Laws
- V. The Conduct of Lawful Relations
- VI. Concluding Remarks

BIBLIOGRAPHY

CHAPTER 1: A PRACTICE OF JURISDICTION

I. Introduction

By choosing an alternative jurisdiction outside Canada and bringing their arguments before the Inter-American Commission on Human Rights, the Hul'qumi'num Treaty Group (HTG) has the opportunity to engage with a different meeting place for laws, and initiate a different texture to the speech between Aboriginal and Non-Aboriginal governments. Through a re-description or *praxis* of jurisdiction, the narrative of the Hul'qumi'num Treaty Group can be reconfigured so as to unveil how the different forms of jurisdiction provide a scaffolding for the shape of lawful relations between the crown, the province, and First Nations communities. If Canada is to approach the conduct of law from an ethic of responsibility proceeding from and evaluation of the quality of lawful relations through jurisdiction, it will be evident that the underlying jurisdictional machinery will need to be re-imagined. As it stands, the jurisdictional formulations of the domestic Canadian architecture silence the narratives of indigenous nationhood without needing to say a word.

At the heart of this endeavour is a question about the utility of engaging with a critical approach to law through the method of thinking with jurisdiction. Can a jurisdictional approach be used to provide new or different ways of thinking and speaking about the space in which Canadian land claims issues can be argued? Motivating this issue is the plight of the Hul'qumi'num Treaty Group and their efforts to secure rights and demarcation of their traditional lands in the face of widespread encroachment and environmental degradation. In the face of this, the notion of thinking with jurisdiction has the possibility of drawing attention to the ways in which non-aboriginal governments foreclose on concepts of Indigenous law and draw a perimeter around available legal spaces and remedies - undermining meaningful relations between First Nations in Canada and non-aboriginal governments. In uncovering some of the underlying jurisdictional architecture and the mechanisms for authorising that architecture, it becomes more evident why Canadian land claims endeavours have been less than transformative. By comparing the space made by the Inter-American Commission on Human Rights and its separate body of jurisprudence, we can gain valuable insight in to the alternative jurisdictional arrangements as they are compared to those overseen by the British Columbia Treaty Commission.

As one of the central themes of this paper, jurisdiction is a term that will be used frequently and take a considerable amount of explanation due to its varied and widespread use throughout the document. As a routine legal term, jurisdiction is used as a technical concept that describes the capacity for a legal entity to hear and decide on a given legal matter. This term covers a considerable amount of the work done by legal processes and the varying forms that it can take are not immediately visible beyond superficial questions of the conflict of laws. An account of jurisdiction, without any elaboration as to its function and metaphysics, might be considered the in the light of the authority to speak in the name of the law. However, thinking through jurisdiction

not as a static legal detail but as an active engagement provides a different perspective on the nuances of jurisdiction. Three formulations of jurisdiction from the perspective of its active engagement will be discussed in the following chapters in a way that draws attention to the work that a jurisdiction practice does in organising and shaping law and lawful relationships. Thinking through these forms of jurisdiction as they interact with specific contexts might be considered a *praxis* of “thinking with jurisdiction”. More specifically, and as we will see in the first chapter, jurisdiction connotes authority. It also embodies the speech of law, and in so doing is responsible in some formulations for the inauguration of law itself. As Dorsett and McVeigh put it, “jurisdiction engages law in a variety of ways. Perhaps most importantly, it both gives us the form and shape of law and the idiom of law.”¹ Given the work that jurisdiction does through its various formulations, applying an ethic of responsibility to thinking with jurisdiction generates a productive lens through which to engage with a critical approach to law and evaluate the texture and quality of legal relationships.

Shifting briefly away from the jurisdictional framing, this first chapter will introduce the legal and political context of the Hul’qumi’num Treaty Group (HTG), whose movement through two distinct legal processes is motivated by an effort to secure legal recognition and control over their ancestral lands. The context and content of the HTG case provides the foundation for examining contemporary land claims process in Canada, and marks the only Canadian case that straddles the domestic and international jurisdictions - in the technical sense of the word. As the only endeavour of its kind, it also begs the question – why appeal to an international commission when it has no power to compel? Jurisdictional thinking may in fact provide an answer.

The chapter will then return to an overview of jurisdiction as a practice and describe the turn in academia towards a jurisdictional account of lawful relations and the strength of such a multi-pronged approach. This turn to jurisdictional thinking outlines how jurisdiction as a *praxis* might be useful as a foundation for a critical redescription of the Hul’qumi’num Treaty Group case progression, and the argument that such a *praxis* can provide a foundation for a productive critique of the invisible processes that shape the jurisprudence of aboriginal land claims in Canada. This should provide an explanation of the use of jurisdictional thinking in the particular context of the HTG case.

Having set the stage, the chapter will then introduce the various facets or formulations of a jurisdictional account of law and an introduction to some of the terminology. The overview divides the approach of thinking with jurisdiction into three perspectives that each emphasise an aspect of the work done by a practice of jurisdiction. These forms of jurisdiction are grouped loosely into three modes of jurisdiction: Representation, Authorisation, and Inauguration. Each are further divided into their main themes or approaches, with notions of representation being deconstructed in to four separate technologies of jurisdiction: Writing, mapping, categorisation, and precedent.

The second chapter will illustrate the modes and manner of coming in to and being with law that is the hallmark of the notion of “thinking with jurisdiction”. From this

¹ Shaunnagh Dorsett & Shaun McVeigh, *Jurisdiction*, (New York: Routledge, 2012) [Jurisdiction] at 5.

perspective the chapter will examine the Hul'qumi'num Treaty Group's interaction with the British Columbia Treaty Commission and the ways in which the three formulations of jurisdiction and their attendant themes or technologies shape the processes and outcomes of the treaty negotiations. While identifying the ways in which persons, places, and events might attach to the existing body of law, a jurisdictional account shows how the threshold for the entrance and exit from law is mediated by the jurisdictional machinery. Built in to these jurisdictional assemblages is the reinforcement of architecture that biases the processes towards an inflexible model of law, resulting in the alienation of Aboriginal governments and communities. Most evident in the jurisdictional approach to thinking through this process is the absent narrative of Aboriginal law.

Chapter Three addresses the technologies of representation, structures of authorisation, and questions of inauguration at the Inter-American Commission on Human Rights (IACHR). It introduces a brief account of how The Commission operates before applying a *praxis* of jurisdiction in order to interrogate how the Hul'qumi'num Treaty Group's quality of lawful relations changes through the same jurisdictional formulations as were identified in the prior two chapters. Despite applying the same modes of jurisdiction to the examination of the conduct of legal interaction, we will see that the underlying architecture and shaping of law is quite different. The different jurisprudence of the Inter-American Commission on Human Rights and the more accessible texts make it easier to establish how the performance of the case on an international stage was shaped.

Chapter Four makes a direct comparison between the two commissions – the British Columbia Treaty Commission and the Inter-American Commission on Human Right – through the identified formulations of a *praxis* of thinking with jurisdiction. It concludes that the underlying jurisdictional architectural differences between the two processes generate vastly different opportunities for examining the way in which persons, places, and events are tethered to the domain of law. Given the flexibility of the method, this extends to the notion of attaching ideas and communities to the existing jurisprudence through the same jurisdictional mechanisms. It continues to conclude that the ethic of responsibility towards the conduct of lawful relations is not evident in Canada's interactions with the Hul'qumi'num Peoples. In order to take seriously that ethic of responsibility towards an inclusive Canada and the crown's fiduciary duty towards First Nations communities, the non-aboriginal governments need to re-configure the existing jurisdictional mechanics to allow for different notions of law.

II. The Hul'qumi'num Treaty Group

The Hul'qumi'num indigenous peoples inhabit part of the province of British Columbia in Canada and are the plaintiffs in the case against the Government of Canada that has been heard by the Inter-American Commission on Human Rights (IACHR)². The

² Hul'qumi'num Treaty Group, "Petition to the Inter-American Commission on Human Rights submitted by Hul'qumi'num Treaty Group against Canada", Case documents: Petition, Volume 1 (May 10, 2007). [*HTG Petition 2007*] at 1.

main incidents that prompted new action by the Hul'qumi'num Treaty Group (HTG) have been the clear-cutting and deforestation in ancestral Hul'qumi'num lands by private forestry and real estate corporations. The destruction of the natural ecosystems in these lands impact all aspects of HTG life³. At issues it the ability of the HTG to access systems that allow for reasonable and timely protection of contested ancestral lands⁴, alongside the issue that the land ownership itself is still contested⁵.

Within Canada there is a well-established land reserve system⁶, which nonetheless does not take into account the large tracts of territory traditionally used by aboriginal peoples in Canada. Within the province of British Columbia the federal government has set up the British Columbia Treaty Commission (BCTC)⁷ in conjunction with the aboriginal peoples of Canada in order to oversee the British Columbia Treaty Process (BCTP)⁸, which is responsible for negotiating modern-day treaties in B.C. Further to this, the Supreme Court of Canada has tried numerous cases⁹ concerning Aboriginal Title, which is now recognised in Canadian common law¹⁰.

³ Hul'qumi'num Treaty Group, "Petitioner's Summary of Presentation to the Inter- American Commission on Human Rights During 143rd Period of Session in relation to Case No 12.734 *Hul'qumi'num Treaty Group v. Canada* submitted by the Hul'qumi'num' Treaty Group", Hearing summary, (October 17, 2011). [*Petitioner's Summary 2011*].

⁴ IACHR Hearing and Other Public Events "Session: 134 Period of Session; Date: Monday, March 23, 2009. Petition 592.07 and Precautionary Measures 110/07 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.org/Audiencias/134/20.%20P%20592%2007%20y%20MC%20110%2007%20Hul%20qumi%20num%20Treaty%20Group%20Canada.mp3>> [*IACHR Hearing session 134, 2009*].

⁵ Murdith McLean, "Robert Morales: Can International Law Move Canada Towards Reconciliation?" 19th May 2013, online: youtube <<https://www.youtube.com/watch?v=Ak1y6K68vFs>>.

⁶ *Indian Act*, RSC 1985, c. I-5.

⁷ *British Columbia Treaty Commission Act*. SC 1995, c.45. Online: <<http://laws-lois.justice.gc.ca/eng/acts/B-8.5/>>.

⁸ BC Treaty Commission "Hul'qumi'num Treaty Group" (2017) Online: <<http://www.bctreaty.ca/hulquminum-treaty-group>>.

⁹ See generally, *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14, 153 D.L.R. (4th) 193, [*Delgamuukw*], *Calder v A.G. (B.C.)*, [1973] S.C.R. 313, 7 C.N.L.C. 91, [1973] 4 W.W. R. 1, 34 D. L. R. (3d) 145, (S.C.C.) [*Calder*], *R. v Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C. N. L. R 160, [*Sparrow*].

¹⁰ Canada, Parliamentary Research Branch, *Aboriginal Title: The Supreme Court of Canada Decision in Delgamuukw v. British Columbia*, BP- 459E (Law and Government Division, Mary C. Hurley, 1998 – Revised 2000) Online: <[http://publications.gc.ca/Collection-R/LoPBdP/BP/bp459-e.htm#\(6\)](http://publications.gc.ca/Collection-R/LoPBdP/BP/bp459-e.htm#(6))>. [*Delgamuukw Decision Aboriginal Title*]

In 1993, six of the Hul'qumi'num First Nations formed the legal entity of the Hul'qumi'num Treaty Group for the purposes of treaty negotiations,¹¹ and in 2007 the HTG filed a petition with the IACHR regarding the protection of their traditional lands.¹² Why, when there are three distinct land claims mechanisms available in Canada, does the HTG need to look outside Canada to the Inter-American commission on Human Rights for a legal solution to land disputes in British Columbia? The HTG are asserting, among other things, a right to property in their traditional lands in the province of British Columbia. The petition to the IACHR also addresses the failure of Canada to safeguard and properly demarcate the lands of the Hul'qumi'num First Nations. This is inclusive of a failure to effectively consult with regards to the destruction and unregulated exploitation in HTG traditional lands – lands that contain historic burial sites and locations necessary for the Hul'qumi'num Peoples' cultural survival. This is manifest in the IACHR case as a breach of the right to property in article XXIII, the right to culture in article XIII, the right to religious freedom in article III, the right to a fair trial in article XVIII, and the right to equality under the law in article II.¹³

Of note, however, is the fact that an appeal outside of Canada without exhausting domestic remedies becomes a question of jurisdiction in a strictly technical sense. The initial hearing at the Inter-American Commission on Human Rights is in fact an admissibility hearing where the Canadian government representatives argue that the commission does not have the jurisdiction to hear the case because the Hul'qumi'num Treaty Group had not exhausted domestic remedies.¹⁴ With respect to the necessity of exhausting domestic remedies, the HTG argues from the position of the violation of the right to a fair trial and the invocation of *iura novit curia*¹⁵. In the international context, this means that the court is responsible for deciding upon the applicable law and how that law is implemented given a review of the facts.¹⁶ In this case the IACHR applies to its own jurisprudence regarding the special grounds upon which the domestic remedies need not be exhausted.¹⁷

¹¹ *Supra* note 2 [*HTG Petition 2007*] at para 17.

¹² Hul'qumi'num Treaty Group, "Hul'qumi'num Treaty Group Observations of the Merits of the Case: Inter-American Commission on Human Rights in relation to Case No 12.734 (Canada)" Case Comment, (January 22, 2010). [*Case Merits Observations, 2010*] at para 1.

¹³ *Ibid* at para 4.

¹⁴ *Supra* note 4, See generally [*IACHR Hearing 2009*].

¹⁵ *Supra* note 12 [*Case Merits Observations, 2010*] at para 4

¹⁶ Jo M Pasqualucci. *The practice and procedure of the Inter-American Court of Human Rights*. (London: Cambridge University Press, 2003) at 154

¹⁷ See generally, OAS, Inter-American Commission on Human Rights, *Petition Admissibility: Hul'qumi'num Treaty Group Canada*, Petition 592-07, Report No 105/09 (October 30, 2009).

As with any endeavour in the international sphere, there is also the problem of enforceability, particularly with a case before the Inter-American Commission rather than the Inter-American Court¹⁸. The human rights appeal of indigenous communities to the Inter-American Commission has a well-established history and jurisprudence of its own¹⁹, however this is a novel direction for the jurisprudence of land claims in Canada. The human right to property was explicitly left out of the Canadian Charter of Rights and Freedoms (CCRF)^{20 21}, and unlike the *sui generis* nature of Aboriginal Title²², the human right to property is not established via the pre-sovereignty existence and communal nature of indigenous ownership.

With regards to the form of law created by different jurisdictions, a Canadian court case that argues for Aboriginal Title to traditionally occupied lands functions as a mechanism for generating a particular type of unique interest in the land based on continuous indigenous occupation²³. Similarly, a treaty process has the capacity to negotiate within the parameters set by the government, and with those parameters the possibility of negotiating use rights to resources and authorisation of the transfer of fee simple title in the territories that the HTG already consider to be theirs²⁴.

However, as is argued in the submissions to the Inter-American Commission by the Hul'qumi'num Treaty Group, the progression and advancement of aboriginal land claims in British Columbia is hampered by the cultural and political context written in to the legal and quasi-legal shaping of the legal relationships²⁵. The HTG represent a

¹⁸ See generally, Organisation of American States "Inter-American Commission on Human Rights" (2011) Online: <<http://www.oas.org/en/iachr/mandate/what.asp>>.

¹⁹ See generally, *Case of the Saramaka People v. Suriname* (2007). Inter-Am Ct HR (Ser. C) No. 172, Preliminary Objections, Merits, Reparations and Costs; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. (Judgment of March 29, 2006). Inter-Am Ct HR (Ser. C) No.146, Merits, Reparations and Costs.; *Case of the Xákmok Kásek Indigenous Community v. Paraguay* (Judgment of August 24, 2010) Inter-Am Ct HR (Ser. C) No.214, Merits, Reparations and Costs.

²⁰ *Canadian Charter of Rights and Freedoms*, s.1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. Online: Department of justice <<http://laws-lois.justice.gc.ca/eng/Const/page-15.html>>. [CCRF].

²¹ Canada, Parliamentary Research Branch, *Property Rights and the Constitution*, BP-268E (Law and Government Division, David Johansen, 1991) Online: <<http://publications.gc.ca/Collection-R/LoPBdP/BP/bp268-e.htm>>.

²² *Supra* note 10 [Delgamuukw Decision Aboriginal Title].

²³ *Ibid.* see also note 9 [Delgamuukw] at para 112 -115.

²⁴ Lawyers Rights Watch Canada, "Robert Morales: Seeking Justice Elsewhere" February 23rd 2012, online: lrwc <<http://www.lrwc.org/video-seeking-justice-elsewhere/>>. [LRWC, Robert Morales].

²⁵ See generally, *Supra* note 12. [Case Merits Observations, 2010].

minority of the population within British Columbia. The six nations that form the Hul'qumi'num Treaty Group are: the Cowichan Tribes, the Chemainus First Nation, the Penelakut Tribe, the Halalt First Nation, the Lyackson First Nation, and the Lake Cowichan First Nation. Between them they have 6400 members.²⁶ These nations have little political clout against large corporations, with whom the provincial government has invested part of its pension fund²⁷. The recent deregulation based on the removal of the Tree Farm Licence²⁸ in corporate holdings and the resulting widespread clear-cutting and deforestation in these privately-held lands has caused widespread damage to the traditional lands of the Hul'qumi'num, eighty-five percent of which are held by the "Big 3" timber corporations²⁹. The six Hul'qumi'num Treaty Group nations are among the poorest communities according to the federal government's "Community Well-being Index". Of the 486 communities surveyed nationwide with 1 being the most prosperous, the six First Nations scored between 448 and 482.³⁰ Beyond this, the province of British Columbia refuses to negotiate treaties while indigenous groups undergo any other kind of political or legal action. Furthermore, the government loans necessary to engage with treaty negotiation can become payable as soon as communities exit the negotiation process.³¹

Arguably, First Nations Peoples in Canada have been discriminated against and institutionally marginalised. Without a large population the 'tyranny of the majority' is likely to continue to hold sway against indigenous communities in general, perpetuated by both obvious and not-so-obvious jurisdictional mechanisms. The six Hul'qumi'num Treaty Group nations are at a disadvantage in any type of legal negotiation with the state, their norms and laws unrecognised in the formation of the relationships with non-aboriginal governments. It is the formation and quality of lawful relations that is the organising theme to the notion of 'thinking with jurisdiction' that scholars have turned to in this past decade as a means of reworking and re-evaluating legal relationships, and to that end it is an appropriate means with which to examine the progression of the HTG case from its precursor negotiations in the British Columbia Treaty Commission process to the case before the Inter-American Commission on Human Rights.

²⁶ *Supra* note 12 [*Case Merits Observations, 2010*] at para 8.

²⁷ *Ibid* at para 19.

²⁸ *Ibid* at para 25.

²⁹ *Ibid* at para 18.

³⁰ *Ibid* at para 26.

³¹ IACHR Hearing and Other Public Events "Session: 133 Period of Session; Date: Tuesday, October 28, 2008. Precautionary Measures and Petition 592.07 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.oas.org/Audiencias/133/B26HulquminumTreatyGroupCanada.mp3>>[*IACHR Hearing 2008 Session 133*].

III. Jurisdictional Endeavours

The on-going authorship in the emergent field of critical jurisdiction arises out of post-modern critical theory³². The developing scholarship of jurisdiction encompasses a considerable diversity of subject matter within legal studies. As Asha Kaushal notes in her 2015 article on the politics of jurisdiction, “there is little scholarship about jurisdiction in mainstream legal theory circles and less still that pulls together the various threads of scholarship about the subject”³³. The consensus is, however, that thinking with jurisdiction can be considered a productive lens to examine how law is expressed and given shape, revealing what the underlying jurisdictional architecture contributes to studies in legal subjectivity³⁴. In the emergent field of jurisdictional studies, using jurisdiction as a tool in a critical redescription³⁵ of legal space is useful because it allows for a close look at the processes that generate or shape legal relationships. It can be used as a methodology to investigate the arrangement of lawful relations without referencing notions external to legal scholarship that might situate a critique of lawful interactions within the realm of context and content rather than process and organisation.

On the surface jurisdiction is most obviously the concept through which law is organised. It is the machinery of the legal processes carried out within the nation state. However, this machinery not only configures the underlying architecture of lawful relations, but also represents the active engagement of law as it attaches persons, places, and events to the living tree of common law and jurisprudence. This active machinery plays a key role in the critical engagement with law through jurisdiction, and further, the use of jurisdiction as a *praxis* that tethers and creates legal relationships is a way of locating space for the meeting of laws, or as Nicholas Blomley explains, the interstitial space between law³⁶. Beyond the technologies of jurisdiction, this critical engagement also encompasses the metaphysics of jurisdiction, which has implications for the threshold at which law operates and the notion of law’s inauguration. As Dorsett and McVeigh explain it:

Jurisdiction ... encompasses the broadest questions of the authority and the founding of legal order as well as the minutest detail of the

³² See, eg, S. Dorsett and S. McVeigh, *Jurisdiction* (New York, NY: Routledge, 2012); E. Mussawir, “The Activity of Judgment: Deleuze, Jurisdiction and the Procedural Genre of Jurisprudence” (2010) 7 *Law, Culture and the Humanities* 463.

³³ Asha Kaushal “The Politics of Jurisdiction” (2015) 78(5) *MLR* 759–792 [*Kaushal*] at 759.

³⁴ *Ibid.*

³⁵ Sundhya Pahuja, “Laws of Encounter: a jurisdictional account of international law” (2013) 1:1 *London Review of International Law*, 63–98. [*Pahuja*] at 65.

³⁶ Nicholas Blomley, “What Sort of Legal Space is a City?” in A. M. Brighenti eds *Urban Interstices: The Aesthetics and the Politics of the In-between* (Burlington: Ashgate publishing group, 2013).

ordering of the business of the administration and adjudication of justice.³⁷

One of the key strengths of the scholarship around jurisdiction is that it does not have a pre-existing ethic that animates the practice of thinking with jurisdiction – beyond that of an ethic of responsibility.³⁸ It does not situate a redescription of events, persons, places, or facts within a specific perspective as might be expected within a Feminist or Marxist account, for example.

As both a strength and a weakness, jurisdiction represents multipronged approach that can be applied to a vast array of different contexts. Jurisdiction does not represent a unified theory that narrates in a linear direction. It is rather a perspective or lens through which a diverse selection of legal relationships can be filtered in order to uncover mechanisms, technologies, and assumptions that might initially have been obscured. Because jurisdiction addresses the modes and manners of coming into law, or the entry and exit from law³⁹ as Asha Kaushal phrases it, this thinking or *praxis* of jurisdiction can be used as a whole or in parts with emphasis on different facets according to the situation at hand. This makes the approach exceedingly flexible and adaptive while rendering the literature somewhat disparate⁴⁰ and loosely connected on occasion.

Of particular interest, however, is the fact that “thinking with jurisdiction” has the possibility to enliven, describe, or create new ways of belonging to law. Because the original authorship of the book *Jurisdiction* by Dorsett and McVeigh focused on the quality of lawful relations, there is the prospect within the approach is to take responsibility for those encounters in law. Because of the metaphysical bent to questions of jurisdiction, this jurisdictional thinking operates at the threshold of law - and in that liminal space between the end of one law and the beginning of another is the possibility of a different account of the meeting place for laws.

At its foundation, jurisdiction represents the most prosaic ordering of how to do things within law; the whole point is that a practice of jurisdiction encompasses the means by which persons, places, and events can be tethered to law and the quality of that relationship of belonging. This productive lens of jurisdiction is situated within law’s mandate and a reshuffling or reworking of existing and historic⁴¹ jurisdictions can enable new and different formulations of lawful relations. It has the capacity and scale to come up with creative re-workings of existing frameworks, making it a truly productive mechanism.

³⁷ *Supra* note 1 [*Jurisdiction*] at *i*.

³⁸ *Ibid.*

³⁹ *Supra* note 33, [*Kaushal*] at 759.

⁴⁰ *Ibid.*

⁴¹ *Supra* note 1 [*Jurisdiction*].

In order to see how this account of jurisdiction has been beneficial, it is important to establish what it means to approach the issues from a critical jurisprudence of jurisdiction rather than to simply redescribed existing relationships via a jurisdictional lens. Inherent in the practices of authorisation is the notion that there is indeed an author. In forming or actioning any practice of jurisdiction, there needs to be an actor or instigator. This authorship in the office of the jurisperit, and paying attention to the authority vested in such an office is how Dorsett and McVeigh attach an ethic of responsibility to their approach of thinking with jurisdiction. While there is more recent literature on the varied use of thinking with jurisdiction and its application in a whole host of different situations, an explanation of being critical and a responsibility for the conduct of law is best described by the above authors.

The above has given an account of three formulations of jurisdiction that configure it as a practice or form of conduct⁴². These formulations of jurisdiction, however, are not in themselves critical. They provide a way to unearth a manner of thinking with law and with jurisdiction in a mode that is sympathetic to a close reading of jurisdiction as more than just a legal technicality. However, before approaching a critical account of jurisdiction it is necessary to investigate the role of language in doctrinal legal writing and the office of the jurisperit as a part of the institutional life of law and jurisdiction. This transmission of authority through the office of the jurisperit and its relationship to the visible representation of the jurisdictional technology of written documentation links the subsequent discussion of an ethic of jurisdiction to the practices of thinking with jurisdiction.

Doctrinal thinking can be conceived of as the principal method of organising legal thought, both from the perspective of an appeal to legal science through reason, and as the systematic and practical organisation of legal materials. This compilation of written legal knowledge is most closely associated with the academic traditions of legal scholarship and the official teaching of law. Doctrinal scholarship, then, is fashioned to represent the authority of law as it is transmitted through the specific language accumulated in the written accounts of law. By way of contrast, a critical thinking approach is attuned to the difficulties of law, and for Dorsett and McVeigh, this is a specific critical enterprise associated with authority and authorisation.⁴³

A considerable amount of philosophy is devoted to distinguishing between law as it is, and law as it ought to be. Pertinent as such a discussion is, it is focused again on the content rather than the conduct of lawful relations. McVeigh and Dorsett argue that this tension between *is* and *ought* obscures the nuances of legal interpretation. A focus on content does not cede anything the work done by the practice of legal writing in representing what law currently is. By drawing attention to the representative aspect of jurisdictional thinking where the technologies of law are manifest in the institutional life of law, Dorsett and McVeigh underscore the importance of the role of the mouthpiece for law in its institutional form. A judge, chancellor, or parliamentarian might embody this notion of the office of the jurisperit. However, the scope for authorship in the institutional life of law is broader than that, and includes the practices

⁴² *Supra* note 1 at 16.

⁴³ *Ibid* at 17.

of the jurist and the scholar.

Traditionally, the role of the jurists has been to articulate, categorise, and comment upon law. Articulation of law through the mouthpiece of such an office is one of the ways in which law is authorised. Conversely, critical approaches to law are also preoccupied with that notion of authorisation and the transmission of that authority to declare the law.

As might be expected, different systems or traditions of jurisprudence relate differently to jurisdiction and its different modes of authorisation. As a result, the authors state that “this approach is not presented as a full theory of law but rather it is an orientation to law that marks certain forms of conduct and commitment to lawful relations”.⁴⁴ This orientation of thinking with law and with jurisdiction brackets discussion to the domain of legality. There is no attempt made to transcend or exceed law, the focus is rather to engage meaningfully with lawful relations. The political middle ground that is expounded by Pahuja is a concern that is touched upon by Dorsett and McVeigh’s perspective as an appeal to justice through the political, however the legal or technical consideration is one of the formation of lawful relations – and that is the foundation for the ethic of responsibility towards conduct. The jurisprudential motivations for this ethic is one that attempts to humanise the conduct of lawful relations.

This critical approach is situated within a history of varied critical responses to law, many of which are centred around a horizon or measurement of justice. Accordingly, the authors situate their critical endeavour within a situation that acknowledges a language shaped by “liberty, equality, dignity and community”⁴⁵ as a modern configuration formulated around equality and human rights within a history of legal philosophical thought encompassing Dworkin, Hagel, Marx, Habermas, and Kantian traditions⁴⁶. However, these traditions situate critique at something of a distance from legality. From a perspective of thinking with jurisdiction, it is important to be able to address the concerns of power relationships through the lens of lawful relations and legality. The theme that underscores the importance of humanising legal relationships is centred around the pragmatic consideration that jurisdiction can be approached as the mode by which human relationships are instituted before the law. As a result, “thinking with jurisdiction invites more concern with means than with ultimate ends”⁴⁷. The authors describe the critique as less formal, focusing rather on the modes and manners of coming into being with the law. How we live with law, and the quality and texture of that belonging is what inhabits an ethic of responsibility towards jurisdiction.

However, in focusing on configurations of authority and legality, a critical engagement

⁴⁴ *Ibid* at 20.

⁴⁵ *Ibid* at 21.

⁴⁶ See also Michael Sandel “The Procedural Republic and the Unencumbered Self” (Feb, 1984) 12:1 Political Philosophy 81 – 96 online: <<http://www.jstor.org/stable/191382>>.

⁴⁷ *Supra* note 1 at 23.

with jurisdiction leaves aside notions of justice and justification. A limit of this critique is that it doesn't seek to move towards that horizon of justice, it rather confined itself to quality and conduct of lawful relations as they are approached through jurisdictional thought and practice. Accordingly,

“a jurisprudence of jurisdiction allows us to take responsibility for a range of practices of authority, representation, and conduct. Here we link an ethic of responsibility to the office of the jurist and a concern for maintaining a connection between lawful and human relations”⁴⁸.

This ethic of responsibility inhabits the office of the jurist or jurist who is the mouthpiece that exercises jurisdiction. Given that jurisdiction connotes authority and through its inauguration of jurisprudence has a form that exists aside from substantive issues, this ethic is located outside the content of any given dispute. However, a plurality of jurisdictional forms gives rise to a similar plurality of jurisdictional responsibility. Sticking closely to the motivating consideration of humanising legal relationships, the authors have taken as a horizon value the acknowledgment of the forms of human relationships. “We treat this in part as a question of attending to the texture or form of jurisdictional practice and in part a matter of orientation towards human relations”⁴⁹

The framing of lawful relations is the main theme runs through each aspect of the Hul'qumi'num Treaty Group case. Because jurisdiction as a critical engagement or *praxis* encompasses the mechanisms, technologies, and metaphysics of the underlying framework of jurisdiction, the movement of the HTG case can be analysed without a pre-existing slant but from a multitude of directions. In addressing the threshold of law, a *praxis* of jurisdiction can make space for other accounts of law and uncover different textures of legal relationships. The Hul'qumi'num Treaty Group case is based on the articulation and formation of lawful relations, and as such a jurisdictional approach can add a dimension to the decision to move from a traditionally sovereign Canadian jurisdiction in the usual sense of the word, to an international one bounded by human rights.

A Jurisdictional *praxis* has the potential to uncover the machinery that underwrites and connects the different processes that shape the relationship between the Canadian state and HTG. The repackaging of the legal evolution of the HTG case exposes the hidden mechanisms that influence the quality of the legal relationship. The texture of lawful relations is filtered through the jurisdictional lens of law's inauguration, authorisation, and representation to reveal an uneven and inequitable landscape or scaffolding that frames the space in which negotiation of new legal relationships takes place. The jurisdictional reshuffling within the Hul'qumi'num Treaty Group case makes it possible to tease out the ways Aboriginal governments and the Hul'qumi'num Treaty Group participants are tethered to the body of law. The jurisdictional approach gives credence to the space generated by enabling a *praxis* of jurisdiction to seek out

⁴⁸ *Ibid* at 27.

⁴⁹ *Ibid* at 29.

meeting place for laws and thereby make more room for negotiations between aboriginal and non-aboriginal governments.

IV. Thinking with Jurisdiction

Because of the varied literature on jurisdiction, the language used to describe the approach in its entirety is different among different authors. This notion of “thinking with jurisdiction” is initially drawn from the work of Shaunnagh Dorsett and Shaun McVeigh in their 2012 book entitled “Jurisdiction” – one of the texts in the series “critical approaches to law”. In this text, they set out to explain a different perspective that not only touches on the broadest questions of law, but also takes into account the practice of law and the formation of legal relationships, right down to the nuances of its technical ordering.⁵⁰ This text is meant as a type of instruction manual to signpost this practice of thinking with jurisdiction, and the authors outline their work through a selection of examples and case studies that each deal with a different formulation or interaction through the lens of jurisdiction. Much of this is historically situated, allowing a perspective that is firmly rooted in legal traditions, while at the same time challenging the reader to re-examine some of the less apparent assumptions made by modern law. From this perspective, a *praxis* of Jurisdiction is a powerful tool to examine the authorisation, recognition and legitimisation of legal relations. The process of unpacking jurisdiction can generate creative outcomes, while still remaining within the legal traditions by relying on historical forms of law that are outside current arrangement of legal organisation.

Considered in the broadest of terms, and drawing on a considerable lineage of legal philosophy from St. Augustine to Coke⁵¹, the starting point for this jurisdictional thinking arrives by way of considering the shape of law and legal relations, and the ways in which law provides the underlying architecture for our everyday interactions. Our daily lives are delimited and shaped by our interactions with the law, and not just a generic or natural law, but oftentimes by the law as dictated by the precise and complex categorisation that attends the notion of jurisdiction.⁵² From the momentous occasions of our births, marriages and deaths – to all the parking tickets, building codes, and safety regulations in between – our social lives are outlined by law. At its most basic, jurisdiction as an organising mechanism provides for the way in which we do things with the law. From the perspective of the legal practitioner, jurisdiction is a familiar notion that is firmly rooted in the “where” and “how” of practicing law. It regulates when one can contest a speeding ticket, which offences can be heard within a magistrate’s court, who can apply for an MG19 form to be filed⁵³, and upon what

⁵⁰ *Ibid.*

⁵¹ *Ibid* at 1.

⁵² *Ibid* at 58.

⁵³ United Kingdom, Home Office, *Manual of Guidance and MG Forms Version 8* (Home Office Asset Publishing April 14th 2015) OFFICIAL SENSITIVE.
Online: <<https://assets.publishing.service.gov.uk/government/uploads/system/uploads>

grounds an appeal can be made to a higher court. Jurisdiction outlines the "where" and "how" of engagement with the processes and practices of law.⁵⁴ At its most practical, it provides a method of organization for how to live with law and engage with lawful relations⁵⁵, while at once also encompassing the point of articulation at which law is mapped onto our everyday lives. In this way we can see the minutiae of legal techniques as they percolate through to the everyday, and yet operate at the threshold of law and at the "limit of its competence"⁵⁶. Another way of conceiving of these technologies are as the representations that the jurisdictional machinery has in our everyday lives.

Dorsett and McVeigh speak about jurisdiction as the embodiment of the institutional life of law. In so doing, they consider varying forms of jurisdiction and create a critical endeavour that they describe as thinking with jurisdiction. Jurisdiction as an institutional process is concerned with the articulation and language of authority and authorisation – and the way that the varying technologies of jurisdiction are manifest in the architecture of lawful relations. In a top-down approach, jurisdiction is the process that authorises law. In many cases jurisdiction is assumed. That founding moment where jurisdiction in fact precedes the law is overlooked in favour of downstream concerns or prior questions of validation. Jurisdiction as a concept can be seen as a practice that gives life to the legal institution, and as such it generates legal meaning. It is in fact a jurisprudence. If jurisdiction generates the legal space in which to create and shape law, it also performs the ongoing practices that build the ever-growing tree of jurisprudence.

The forms of jurisdictional thought outlined by Dorsett and McVeigh make visible aspects of legal processes. This practice of thinking with Jurisdiction through the formulations of inauguration, authorisation, and representation - provide a framework for a jurisdictional practice that can interrogate the complex web of legal relationships. These jurisdictional forms draw attention to the work done by the concept of jurisdiction as it is used in day-to-day legal practice, however the theoretical and philosophical underpinnings of the notion of jurisdiction are brought to the fore in considering the aspects of authorisation and inauguration that go hand in hand with the jurisdictional technologies. Despite the philosophical considerations, an account of a practice of jurisdiction also considers how those forms are actioned and manifest, and in so doing provides an approach to thinking with jurisdiction that can allow for an alternative description of the ways in which persons, places, and events are brought into the sphere of law, or belong to law.

There are a variety of forms of the way in which jurisdiction is manifest, and the vocabulary and explanation of jurisdiction as a practice differs widely between the

/attachment_data/file/488512/Manual_of_Guidance_and_MG_FormsV8.0_EXT_clean.pdf> at 16.

⁵⁴ *Supra* note 30 at 60.

⁵⁵ *Ibid* at 4.

⁵⁶ *Supra* note 27 at 759.

wide-ranging authorship. The forms of jurisdiction that are made evident is dictated somewhat by the content that is being evaluated and the scope in which jurisdiction is being applied. For the purposes of the context particular to the Hul'qumi'num Treaty Group, an account with numerous different facets will be most productive, and in each case borrowing from the different vocabularies that best explain each theme. Broadly speaking, jurisdictional *praxis* will be approached from three distinct but overlapping directions, namely Jurisdiction through representation, authorisation, and inauguration.

What Dorsett and McVeigh term 'technologies of jurisdiction' encompasses the machinery that drives the jurisdictional process. These can loosely be grouped under the umbrella category of representation, so the mode of jurisdiction as representation will continue through each chapter of the work. For the purposes of this endeavour, the machinery for jurisdiction can be described as technologies of mapping, writing, precedent, and categorisation.

The second approach to jurisdictional *praxis* emphasises the relationship between authority and authorisation. Themes of territorial sovereignty and the speech or declaration of law fall under this heading. The theme of authorisation will persist through work done by Berman and Peter Rush as it connects to discussions of sovereignty. However, this notion of authorisation strays closest to the work done by Pahuja, who organises the jurisdictional approach through notions of community, territory, and governance⁵⁷. The attention paid to political community in particular ties concepts of authority and territory to the larger questions posed by a conceptual take on jurisdiction.

The final organising theme refers back to the fundamental question of law's inauguration, where jurisdiction acts at the threshold of lawful relationships. While this overlaps with notions of territorial sovereignty, Douzinas' account of the metaphysics of jurisdiction probes the space in which law exists⁵⁸, and asks not the characteristic question of 'whose law?', which was the purview of the theme of authorisation, but 'why law the first place?'. This particular manifestation of jurisdiction infers the aspect of the space that exists outside of the existing jurisdiction, or the liminal space between multiple existing jurisdictions. This law as one of encounter is configured best through Asha Kaushal's critical redescription of international jurisdictions and narratives⁵⁹. "We locate, then, jurisdiction in the languages of authority and power and in the practices of representation as enacted through the technologies and devices of law".⁶⁰

⁵⁷ *Supra* note 29 [Pahuja].

⁵⁸ Costas Douzinas "Speaking law: on bare theological and cosmopolitan sovereignty" in Anne Orford, ed, *International Law and its Others* (New York: Cambridge University Press, 2006) 35.

⁵⁹ *Supra* note 33 [Kaushal].

⁶⁰ *Supra* note 1 [Jurisdiction] at 15.

V. Jurisdiction as Representation

Representation as an approach to thinking with jurisdiction allows for a description of the processes that operate at the point at which the machinery of law makes visible contact with persons, places or events. How ideas are represented within the legal processes can be considered a mode of jurisdiction, as it is jurisdiction that decides on the validity of the representation offered. Before any thought is given to the pith and substance of the representations, the 'how?' of those representations and their inclusion as appropriate to the specific legal sphere is mediated through jurisdiction.

Accordingly, notions of truth and fact occupy an interesting place in the configuration of lawful relationships and the threshold of law. Excluding the scholarship devoted to notions of truth in legal proceedings, the main focus here is the concept of representation as a reconfiguration of jurisdiction. If we consider that it is only truthful representations that may be attached to law, then the manner of that representation and the judgement of its accuracy becomes threshold for entry into the existing jurisprudence. What do I mean here by representation? In this case representation could be somewhat analogous to articulation, where only that which is properly communicated and articulated can be deemed appropriate for inclusion at the threshold of lawful relations. The technologies of mapping and writing fall in to this theme of representation. So too, do the notions of precedent and categorisation.⁶¹

Any mode of communication is merely a placeholder for a concept, and as such interpretation of those concepts shapes the fundamental crafting and conduct of lawful relations. As mapping is a tool that can be used to represent and therefore attach notions, particularly property, to the body of law - so too is written language a corresponding technology of representation. Any negotiation of lawful interaction needs-must use some form of language to communicate. However, because of the specific lexicon used within the formation of lawful relations, notions attached to specific words and phrases carry the weight of law. That weight of law brings with it considerations of legal precedent, binding future decisions to the frameworks created through this process.

Mapping, like writing, rather than acting as just an account of the law as it is, actually participates in the crafting of legal relations between persons, places, or events. As with writing, mapping acts as an approachable representation of information, and indeed legal information allows for not only the scope of the known, but also the unknown.⁶² For example, I do not personally know that Antarctica exists, however I have seen it on a map and there are written accounts that allow me to believe that it does exist. As a tool of representation mapping and writing are invaluable. However, as a jurisdictional technology they participate not just in the communication of information but in the generation of jurisdiction and legal space. Something that can be mapped can then be claimed. By giving legal life to the unknown as with co-

⁶¹ *Ibid.*

⁶² *Ibid* at 63.

ordinates on a map, one can see this practice as creating the link between authority and territory via the jurisdictional technology of map making.

From a more proximal perspective, consider that in examining the title to land and the boundaries of physical ownership, one relies on a survey as a proof of the perimeter of one's jurisdiction. The physical proof of that line, in essence a map that is supposed to represent the truth of the boundary, becomes the origin of the truth for the jurisdiction over the land. As mapping is a mechanism for communicating and representing the truth – or one perspective on the truth – so too is it a representation of law and a vehicle for jurisdiction.

The technology of writing occupies a similar place as a jurisdictional technology. By way of illustration, anyone who has arrived just as a parking enforcement officer writes them a ticket can likely attest to the fact that oftentimes the officer regretfully informs us that there is nothing they can do, as the ticket has already been written and there exists an enduring carbon copy of the receipt.⁶³ From the perspective of jurisdiction, the ticket has already entered into the network of law and that point of contact cannot be undone. The ticket can't un-write itself, but neither does this legal actor have the authority to destroy it - so it stands as a physical expression of the point of contact for an engagement with law through jurisdiction.

Writing is the preferred method of legal communication and initiation in the common law system. As a technology of jurisdiction, writing represents not just a means of transmitting the account or fact of law, but as a way in which to engage with lawful relations and the scope of law.⁶⁴ When the law is written down it interacts with, and has the full weight of, all the antecedent laws and precedents that are harnessed to the manifestation or representation of that law. The written presence brings law to legal life as it participates with society. Writing as a practice or technology of jurisdiction rather than simply a statement or representation illustrates the way in which we come in to law. Often that act of writing not only defines the parameters with which we engage in lawful relations, but also authors or initiates our contact with law. Focusing on writing as a technology provides a means to disengage from questions of *what* has been written and move to the fact that something has been written, with the attendant questions of how and why and to what effect that act of writing might have.

These so-called technologies of jurisdiction act as the more tangible representation of law in our day-to-day lived existence, interacting with our everyday lives and participating as tools in the crafting of our lawful relations. The tools of mapping and writing are easily accessible, and with respect to representation, have a life outside the crafting of lawful relationships. The machinery of *stare decisis* and legal categorisation achieve similar results in their jurisdictional work, although they are somewhat more embedded in the legal landscape.

Stare decisis, or the rule of precedent, is a key way in which law is expanded and interpreted to add to the existing machinery of common law. The fact that like cases

⁶³ *Ibid* at 60.

⁶⁴ *Ibid*.

must be treated alike creates a continuous link from past to present. The entire body of case law represents individual instances where persons, places, and events are tested against existing legal frameworks, and often attached and perpetuated as a link in a chain of similar decisions. Cases before the Supreme Court where matters of law rather than fact are in question represent cornerstones of jurisprudence that advance the threshold of how a concept or situation does or does not fit within the existing scaffolding of legal knowledge. The ability of the jurisdictional technologies to infiltrate or influence our lives is clearly seen even in the most innocuous of legal interactions. The regulations that shape our built and lived environment and the laws that configure all of our acceptable social relationships are organised by an overarching structure that is managed by jurisdiction.

That existing jurisdictional management or categorisation is the way in which jurisdiction is most often perceived. This technology of categorisation means that persons, places, and events have a predetermined location and are sorted accordingly, and the sorting dictates outcomes of the legal relationships. Marianna Valverde offers an excellent example in her characterisation of meta-governance⁶⁵ in the case of the Eskimo (Inuit) of Northern Canada. Jurisdiction as a 'governing mechanism for governance' shapes the landscape of interaction where questions of jurisdiction, rather than content, determine the outcome the case. She offers up a Canadian example where a question was posed to the Supreme Court. The question asked if, for the purposes of the *Indian act*,⁶⁶ the Inuit or Eskimos as they were known, were Indians. If they were Indians then the federal government had jurisdiction and responsibility over the Inuit, and they would be subject to the *Indian act*. The Canadian Supreme Court did indeed agree that the Inuit were Indians and that process of categorisation set in motion predetermined routes through law. By deciding how and where a case is heard, jurisdiction acts as a gatekeeper for all aspects of lawful relations. While much of the initial scholarship on jurisdiction focuses on the conflict of law as a concept of jurisdiction, in terms of who has the authority to hear a certain dispute, this practice of categorisation pre-sorts how the cases even presented prior to the typical jurisdictional decisions.

Within the nation-state, the meta-governance or technology of categorisation arranges all of the legal assemblages into their proper places. This categorising process does not leave any space for that which exists outside of law. There is, in a sense, a space for everything – or space in which everything can be decided. However This legal ordering has the capacity to change the outcomes of lawful relations. There are overlapping jurisdictions even within and organised nation-state, and the choice of which jurisdiction or how to change a jurisdiction can have a considerable impact on the forum that any legal remedy or lawful relation can take. In Dorsett and McVeigh's work on jurisdiction, this process of categorisation naturally leads to the legal actors who make those kinds of decisions and the roles they play in the implementation of jurisdiction as a *praxis*. This extends beyond the current discussion of technologies of jurisdiction and moves towards the notion of authority and authorisation as a

⁶⁵ Mariana Valverde. *Chronotopes of Law: Jurisdiction, Scale and Governance* (New York, NY: Routledge, 2015)

⁶⁶ *Indian Act*, RSC 1985, c. I-5.

jurisdictional form. However, it is worth mentioning that these technologies are necessarily implemented by legal actors who play their own role in the machinery of jurisdiction and it is in them that the ethic of responsibility is vested.⁶⁷

Under the theme of 'jurisdiction through representation', we have seen the ways in which the technologies of jurisdiction provide the machinery for persons, places and events to enter into law. In this case jurisdiction as representation brings to light the distinguishing techniques that shape the every-day interactions and landscapes of lawful relations. The tools of mapping, writing, precedent, and categorisation, are all representations of the work done by jurisdiction. The crafting of lawful relations is done by legal actors for the most part, however the tools and processes that underwrite the various ways of being with the law are evident in the jurisdictional technologies. These technologies have the capacity to mediate what, and how, and who, is attached to law. Jurisdiction mediates contact point at which law touches the lives of individuals and the places they inhabit.

VI. Jurisdiction as Authorisation

A *praxis* of jurisdiction can be understood through representation, authorisation, and inauguration. However, to split jurisdictional thinking in this way is to obscure the fact that these separations are not a necessity, merely a convenient way to organise and introduce the subject. Jurisdictional thinking encapsulates the smallest technologies or assemblages of legal machinery as well as the largest questions of law's inauguration. Overlapping between the two are the notions of authority and authorisation, which naturally touch on aspects of both. Just as representation through mapping, writing, precedent, and categorisation had ramifications for authority and territorial sovereignty, so too does the lens of authorisation touch on the technologies of jurisdiction and law's inauguration. Breaking jurisdiction and these three facets cedes some ground to jurisdiction as political community as is argued by Kaushal. She organises approaches to jurisdictional thinking through territory, community, and governance – making room for a jurisdictional account of political community embedded within the whole.⁶⁸ One cannot discuss the threshold of law without also speaking about the community that has formed the law, moving towards a broader sense of community mentioned by Berman.⁶⁹

Connotations of authority reside in the origin of the word jurisdiction, from the Latin *ius dicere* – to speak the law.⁷⁰ Aside from the craft of law, jurisdiction is often the battleground for the conflict of laws⁷¹. In such a dispute, the question often doesn't

⁶⁷ Shaun McVeigh eds. *Jurisprudence of Jurisdiction* (Abingdon, Oxon: Routledge, 2007).

⁶⁸ *Supra* note 33 [Kaushal].

⁶⁹ Paul Schiff Berman, 'The Globalization of Jurisdiction' (2002) 151 *University of Pennsylvania LawReview* 311.

⁷⁰ *Supra* note 1 [*Jurisdiction*] at 4.

⁷¹ *Ibid.*

directly concern the content of a case, but typically addresses where the case should be heard, or more particularly, who has the authority to make a decision.

For example, the division of powers in Canada is outlined in sections 91 and 92 of the *Constitution Act, 1867*⁷², which splits the authority to create law between the federal and provincial governments, with any residual powers resting with the federal government (one of the key ways in which Canadian legal architecture differs from the United States⁷³). Section 91(26) delegates exclusive legislative authority over marriages and divorce to the federal government. However, Section 92 (12) gives the provincial legislatures the authority to enact laws regarding the solemnisation of marriages.

At the point when same-sex marriage was being widely debated in Canada, the province of Alberta passed Bill 202 to amend the provincial *Marriages Act* in an attempt to block same-sex marriage by defining marriage as exclusively between members of the opposite sex. However, based on a Supreme Court Reference case regarding prospective federal legislation on same-sex marriage⁷⁴, the provincial *Marriages Act* was arguably actually *ultra vires* or “beyond the powers” of the provincial government, as the province had exceeded its jurisdiction by passing a law on the definition rather than the solemnisation of marriage.

What can be taken from this example is that the jurisdiction to pronounce the law is the avenue through which the legal argument was framed. From this, one can also clearly see that “jurisdiction connotes authority”⁷⁵, and the locus of that authority is one of the key aspects of jurisdictional thinking that makes it relevant to the *praxis* of jurisdiction. The early literature in jurisdictional theory draws on the work of Peter Rush, and considers as a starting point in jurisdictional thinking the following:

Jurisdiction is not so much a discourse, not so much a statement of the law, but a site or space of enunciation. Jurisdiction refers us first and foremost to the power and authority to speak in the name of the law and only subsequently to the fact that law is stated – and stated to be someone or something⁷⁶.

⁷² *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No.5.

⁷³ Thomas L. Pangle, “The Philosophical Understandings of Human Nature informing the Constitution” in Allan Bloom & Steven Kautz, eds., *Confronting the Constitution: The challenge to Locke, Montesquieu, Jefferson, and the federalists from utilitarianism, historicism, Marxism, Freudianism, Pragmatism, Existentialism....*(Washington, D.C.: The AEI Press, 1990).

⁷⁴ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79.

⁷⁵ *Supra* note 1 [*Jurisdiction*] at 4.

⁷⁶ Peter Rush “An Altered Jurisdiction: Corporeal Traces of Law” (1997) 6 *Griff Law Rev.* 150.

Authority and authorisation play a key role in jurisdictional thinking, as questioning the appropriateness of belonging to law is not an endeavour that is necessarily familiar within the contemporary context of authority via sovereignty. We have a tendency to think almost exclusively in terms of territorial jurisdictions when considering modern law⁷⁷. In thinking about domestic law it is tempting to conceive of questions of jurisdiction within the nation-state framework, where in the end all questions rest with the final federal authority and oftentimes jurisdiction is assumed.

Moving from authority to authorisation however, locates the emphasis on queries of legitimisation. The authority to speak in the name of the law is firmly associated with jurisdiction. This authority remains unquestioned, unless jurisdiction can do the work of interrogating the mechanism by which law is authorised. The structure that authorises and decides on the downstream jurisdictional categorisation is inescapably linked to questions of sovereignty. The project of a practice of jurisdiction is to question the entrance and exit to and from law's domain. Authorisation as a mode of jurisdiction encourages the scrutiny of the authorising apparatus responsible the downstream jurisdictional scaffolding. It's very easy for the perspectives on authority and authorisation to collapse in to the framing of inauguration as they share many points in common. However, where our practice of jurisdiction interrogates the lineage of authority and authorisation through jurisdiction, inauguration focuses on the point of becoming, in the liminal space between laws or between law and non-law.

VII. Jurisdiction as Inauguration

Inauguration as a mode of jurisdiction takes a more metaphysical approach to the method of jurisdictional critique. This is where jurisdictional thinking moves from querying the "how" of law's shaping and organisation, to the question of law's initial existence, and whose law it is to begin with. This notion of addressing law at the limit of its competence⁷⁸ allows jurisdiction to examine the very edges of legal relations. By examining the law's perimeter, a *praxis* of jurisdiction can look beyond the internal generating structures to the space outside law's domain.

A question of jurisdiction can be considered "the first question of law",⁷⁹ because unlike other lines of inquiry, it asks first not what the law is, but rather if law exists at all. Only after considering if something might properly belong to law is there then space for there to be a declaration of what the law is. So, in slowing down this process to that initial query about whether law exists, the debate can move beyond the conflict of laws within the system to the choice of jurisdictions and consequently the choice of laws. If there is to be engagement with the law, it is important to ask if something can appropriately be classified as belonging to that law, and furthermore, to whose law would one be belonging? This is one of the fundamental questions that this framing of *Jurisdiction* provokes.

⁷⁷ *Supra* note 23.

⁷⁸ *Supra* note 33 [*Kaushal*] at 782.

⁷⁹ *Supra* note 1 [*Jurisdiction*] at 5

The advantage to this perspective on jurisdiction is that it can ask the larger questions of ‘does law exist?’, and if so – ‘whose law is it?’. In doing so it makes room for an acknowledgement of that which sits outside the existing jurisdiction, thereby making room for a meeting place of laws. It does not assume *a priori* law’s jurisdiction over the landscape of relations.

When examining those larger notions of laws existence and how it arrived, there is some dispute regarding which came first, sovereignty or jurisdiction. From one perspective, sovereignty arrived first, and jurisdiction is therefore inescapably tethered that authority. Conversely, other authors argue that it is jurisdiction that inaugurates itself and it is only after jurisdiction that sovereignty follows. Formulations of sovereignty, and therefore community, naturally enliven this debate. The “how” of giving oneself the law from the perspective of the community is addressed – particularly pertinent is Douzinas’ discussion of bare sovereignty. Because of this chicken and egg debate, sovereignty sits uneasily between authority and inauguration, adding context to both jurisdictional facets depending on the situation that is being considered and its particular relationship to legitimization through sovereign power. However, as Kaushal points out, various authors argue that an investigation in to jurisdiction effectively sidesteps⁸⁰ sovereignty by projecting the source as technical rather than political. As Bradin Cormack argues, the jurisdictional threshold is the point at which law speaks to itself.⁸¹

Regardless of how jurisdiction is extended into new space, one key aspect of inauguration is that it does not have to be harnessed directly to authority vested in land, regardless of the questions of the “how” of sovereignty and issues of political community. Jurisdiction need not map exactly onto territory, although it has often been designed in that manner. To illustrate the capacity for jurisdiction to inaugurate law and its scope beyond the sphere of the Westphalian state, it is useful to hark back to some of the historic examples used by Dorsett and McVeigh.

Consider the “Popes of the medieval Catholic Church”⁸². The authority of the Pope was considered to extend to the whole world, whereby the Holy Roman Emperor had a universal jurisdiction over all peoples and lands based in part on divine authority and in part as a matter of *imperium* and *dominion*.

By the Papal Bull *Romanus Pontifex*, 8 January 1455... Alexander V1 granted the Monarch and heirs of Castille and Leon (now modern Spain) the exclusive right to acquire territory....limited only by existing claims by Christian princes.⁸³

⁸⁰ *Supra* note 33 [Kaushal] at 783.

⁸¹ *Ibid.*

⁸² *Supra* note 1 [Jurisdiction] at 1.

⁸³ *Ibid.*

This jurisdiction is not one based on the authority as vested in a territorial government, although it does obviously touch on issues of power and the acquisition of property. The salient point is that jurisdiction is not contiguous with a specific geographical location. This law existed and occupied a jurisdiction through a community of thought and ideas. Inauguration as a way of considering jurisdictional thinking allows for the possibility beyond the reach of current jurisdictions, implicating the notion of other jurisdiction and thereby acknowledging space for lawful relations. It has the capacity to ask; does law exist? And if so – how does it work and who authored it?

From the perspective put forward in this chapter it is clear that jurisdiction is a practice, and is meant to be engaged with as such. Each aspect describes the ways in which persons places and events can be attached or tethered to the body of law. The advantage of a critical practice of jurisdiction is that it inhabits the existing structure of lawful relations while at once addressing the philosophical nature of the threshold for law and the limits of it. Percolating through to our everyday lives are the technologies of jurisdictional organisation that shape our interactions with the legal dimension and influence the texture of lawful relations. This jurisdictional machinery provides for the 'how' of everyday minutia as it enters the body of law. The authority to speak in the name of the law allows a jurisdictional account of how law is authorised and propagated, while notions of inauguration address the perimeter of law's influence and the possibilities of the spaces outside or between existing jurisdictions in which new relationships could be formed.

Jurisdiction as a critical engagement or *praxis* navigates the threshold of law and can be used as a means of unpicking or unravelling the image of law as a coherent and impartial machine. Focusing on how meaning is attached to our legal architecture and how the building blocks of our legal lives are authorized, inaugurated, and expressed as a practice or activity allows one to ask different questions of the law - and examine different ways of coming into and being with law.

CHAPTER 2. THE CANADIAN LAND CLAIMS PROCESS

I. Jurisdiction and the British Columbia Treaty Commission

The Hul'qumi'num Treaty Group has a long history of attempting to access a legal solution for land claims dating back to the 1800s⁸⁴. This colonial history naturally informs the experience of the HTG. Despite long-standing barriers to lawful negotiations, it is the recent destruction of the natural landscape that prompts the most recent actions. A practice of thinking with jurisdiction allows for an alternative description and narrative of the HTG's journey through the contemporary land claims mechanisms available in British Columbia. This re-description⁸⁵ makes plain the ways in which a practice of jurisdiction mediates the quality of lawful relations. The technologies and modes of jurisdiction are evident in the British Columbia treaty process, and as such shape the Hul'qumi'num Treaty Group's way of making contact with Canadian law.

Chapter 2 describes the British Columbia treaty commission and its attendant processes, and proceeds to elaborate upon the relationship between Canada and the Hul'qumi'num Treaty Group with respect to the negotiations at the treaty making table. The visible representations of jurisdiction are largely absent from such an informal process. However, because of its capacity to generate lawful relations, the treaty negotiation process is a jurisdictional configuration and is influenced by other technologies of jurisdiction as well as its questions of authority and inauguration. By paying attention to the different forms of jurisdiction it is evident that a narrative respecting Hul'qumi'num lands and knowledge is absent from the British Columbia Treaty commission process.

Further to this, the symbolic violence of the language of treaty negotiations precludes the ways and means of thinking about indigenous law and governance. To this extent, the Crown has used its authority to shape negotiations and the space in which they are held in order to silence First Nations peoples and design the landscape upon which negotiations can occur. Chapter 2 argues that the non-aboriginal governments have intentionally designed such a space through the auspices and assumptions of jurisdiction so as to make it impossible to approach negotiations from a premise that respects Indigenous lands and Laws as a truth of treaty building.

When considering the quality of the relationship between Canada and the HTG, it is clear that the human relations underwriting the legal relationships are damaged by the way in which the Crown and the provincial government have authorised and created the avenues of redress when it comes to land claims endeavours. With respect to an ethic of responsibility, it seems that the non-aboriginal governments have abdicated their duty to take seriously the jurisdictional configurations of the offices of the jurispudent that transmit the authority to speak in the name of law. However, before

⁸⁴ *Supra* note 12 [*Case Merits Observations, 2010*]

⁸⁵ *Supra* note 35 [*Pahuja*]

considering the jurisdictional aspect of the narrative, it is necessary to put the endeavours of treaty building in context.

Unlike parts of Eastern Canada, the lands in British Columbia were not clearly transferred to the crown through historic treaties, and as such, there exists much debate about the ownership of traditional lands in the densely forested province. In the 1850s and 60s, the government invited colonists to purchase lands in the Hul'qumi'num territory through a system of pre-emption. There is no evidence the Hul'qumi'num were ever consulted or compensated for this, and indeed, every evidence that they objected to it. The conflict escalated and resulted in the "death of colonists, cannon fire from naval gunboats, and the destruction of the Hul'qumi'num village of Lamalchi"⁸⁶. The governor promised to purchase the rights to the land but payment was never made.

In 1871 the United Colony of British Columbia joined Canada, and through Article XIII of the Terms of Union, transferred the responsibility of the Indigenous Peoples of British Columbia to the federal government. The particulars of the agreement stipulated the building of a railroad to connect B.C. to the rest of Canada, and to that end the newly minted province donated a two-million-acre tract of land to the State for the provision of the railway. In order to pay the company that built the railroad, the Canadian government allowed the Esquimalt and Nanaimo (E&N) Railway Company to sell off some 700 000 acres of the land⁸⁷. In doing so the state transferred over eighty-five percent of the traditional Hul'qumi'num lands to private entities without consulting the Hul'qumi'num people and without obtaining the surrender of the Hul'qumi'num interests in those lands.⁸⁸

The Hul'qumi'num Peoples can evidence a persistent struggle to oppose the unilateral actions of the state. In 1909 the Cowichan First Nation of the Hul'qumi'num peoples sent a petition to King Edward of Great Britain to request that he protect the rights of the Hul'qumi'num in their traditional lands, which had never been purchased or ceded to the government. The British government referred the petition back to the government of Canada, who failed to take any positive action⁸⁹. The provincial government of British Columbia persisted in its denial of aboriginal rights and maintained a policy that any such rights had been extinguished, regardless of lack of any judicial or statutory proof that would substantiate such a position. Later, in 1927, the federal government amended the *Indian Act* so as to prohibit Indigenous peoples from hiring lawyers to bring any actions against the state without the express permission of the Government of Canada. This law was not changed until 1951, and further to this, the provincial government of British Columbia barred the Hul'qumi'num

⁸⁶ Robert Morales "New Treaty, Same Old Problems" *Cultural Survival Quarterly Magazine* 30:1 (March, 2006) Online:<<https://www.culturalsurvival.org/publications/cultural-survival-quarterly/new-treaty-same-old-problems>>.

⁸⁷ *Supra* note 12 [*Case Merits Observations, 2010*] at para 16.

⁸⁸ *Supra* note 68.

⁸⁹ *Supra* note 12 [*Case Merits Observations, 2010*] at para 34.

Peoples from seeking a judicial remedy by persisting in maintaining the doctrine of sovereign immunity until 1974.⁹⁰

In the 1990's, the possibility of existing Aboriginal Title in the face of prospective resource development made the legal fate of land in B.C. uncertain. This economically driven uncertainty, together with political pressures favouring resolution, prompted the formation of the B.C. Claims Task Force in 1991, a body that included First Nations representatives alongside the federal and provincial representatives in the hopes that increased First Nations involvement would generate a more consensus-driven procedure and represent a marked departure from previous land claims endeavours⁹¹. The Task Force put together guidelines for the negotiations for modern-day treaties that included a document of 19 principles that should be adhered to during the negotiations. Following the British Columbia Claims Task Force Report⁹² (the Task Force Report), the six-step treaty negotiation procedure was implemented in 1992 alongside the establishment of the British Columbia Treaty Commission (BCTC) as an independent "keeper of the process"⁹³. However, the BCTC does not have any adjudicatory power to keep participants in line with the recommended principles, merely relying on the pressures of "moral suasion" to persuade the participants to keep to the intent behind the negotiations.

At its outset, the aim of the British Columbia Treaty Process was to provide a fair, creative, and non-adjudicative approach to solving the land claims issues and underlying disagreements between the Aboriginal and Non-Aboriginal governments⁹⁴. As can be seen from the original text of the Task Force Report, the new treaty negotiations in British Columbia did include the acknowledgment of the distinct political, cultural, and legal status of the First Nations.

It is a conflict that speaks to the difficulties in reconciling fundamentally different philosophical and cultural systems... Recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this new relationship⁹⁵.

⁹⁰ *Ibid* at para 35.

⁹¹ See generally Andrew Woolford, "Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process"(Winter, 2004) 29 *The Canadian Journal of Sociology*. [*Woolford Symbolic Violence*].

⁹² Canada, *The Report of the British Columbia Claims Task Force* (June 28 1991)
Online:<http://www.bctreaty.ca/sites/default/files/BC_Claims_Task_Force_Report_1991.pdf> [*BC Task Force Report*].

⁹³ *Ibid*.

⁹⁴ *Ibid*

⁹⁵ *Supra* note 83 [*BC Task Force Report*].

Aside from the existing federal land reserve trust system that exists as part of the widely criticized *Indian Act*⁹⁶, the B.C. Treaty Process was to provide an alternative to expensive adjudication in the court system. However, if they are willing to pursue court proceedings, Indigenous communities can argue for Aboriginal Title to the land based on original occupation and the argument that the original Aboriginal Title hasn't been extinguished. Alongside the options of Aboriginal Title⁹⁷, the protections in the *Canadian Charter of Rights and Freedoms*⁹⁸, and the *Royal Proclamation of 1763*⁹⁹ afford some measure of protection at the constitutional level for the creation of modern-day treaties.

The dominant narrative of Non-Aboriginal actors in the BCTC process is framed through notions of practicality and reasonableness¹⁰⁰. The British Columbia treaty commission widely touts its impartiality as a platform through which the parties can negotiate. It can point to successful treaties that have been negotiated, and the words of indigenous peoples as they express hope for the future relationships with Canada¹⁰¹. The federal and provincial governments fund the British Columbia Treaty Commission, taking ownership of the alternative dispute resolution remedies that facilitate the treaty negotiations. Canada can demonstrate two ways by which the indigenous communities of British Columbia can properly and legally make a claim to territory.

However, since its inception over two decades ago, there has been a significant amount of stagnation in the progress towards equitable treaties overseen by the BCTC. There are a number of long-standing problems with the process, and the outcomes have been less than transformative in the twenty years that the parties have been working towards compromise. Former chief federal negotiator Robin Dodson admitted that the BC Treaty Commission needs to play a wider role in facilitation as a so-called neutral party. However, in order to play a truly independent role as the keeper of this process, the treaty commission needs to be truly independent of the three parties to the negotiations.¹⁰² Because most of the funding for indigenous communities comes by way of government loans, there is a worry that some First Nations have already borrowed more than they can hope to see in any kind of financial settlement agreed by the treaty process. Furthermore, federal representatives have noted that it is actually cheaper for the crown to continue to negotiate, than to settle.¹⁰³

⁹⁶ *Indian Act*, RSC 1985, c. I-5.

⁹⁷ *Supra* note 9 [*Delgamuukw Aboriginal Title Decision*]

⁹⁸ *Supra* note 16 [CCRF].

⁹⁹ *Royal Proclamation of 1763*, R.S.C. 1985, App. II No. 1.

¹⁰⁰ *Supra* note 91 [*Woolford Symbolic Violence*].

¹⁰¹ *Supra* note 3 [*IACHR Hearing 2009*]

¹⁰² Tony Penikett. *Reconciliation: First Nations Treaty Making in British Columbia* (Vancouver, British Columbia, Canada: Douglas & Macintyre Ltd, 2006) 267 [Penikett].

¹⁰³ *Ibid.* [Penikett] at 171.

An account of a praxis of jurisdiction as a mechanism of engagement has the capacity to scrutinize the construction of legal relations from inside the legal framework in order to evaluate the ways in which the architecture could have the capacity to interact with the legal landscape in which it is inescapably situated. This mechanism of “thinking with jurisdiction”¹⁰⁴ is particularly useful when considering that the starting point for the investigation into the Hul’qumi’num case arises first in a domestic commission, and only latterly moves to the Inter-American Commission on Human Rights at the failure of the first legal forum. Despite not attempting an Aboriginal Title challenge in the British Columbia courts, the Hul’qumi’num Treaty Group (HTG) did engage in a limited negotiation with the provincial government via the British Columbia Treaty Commission (BCTC)¹⁰⁵.

The British Columbia Treaty Commission (BCTC) and its attendant treaty process have generated considerable criticism from both academic and government bodies¹⁰⁶. The observations on the procedures, content, and affect of the negotiations arrive via varying fields of economics, politics, political geography¹⁰⁷, sociology¹⁰⁸, native studies¹⁰⁹- many of which take an avowedly political stance. In reviewing some of the literature that addresses the BCTC process from the social context for legal relations, it is evident that these critiques often focus on narratives reflecting politics, power dynamics, and context rather than the conduct of legal mechanisms and legality.

In contrast, the only ethic of *Jurisdiction* is one of taking responsibility for the conduct of lawful relations through the office of the jurispudent¹¹⁰. Using this approach allows for the consideration of the ways in which persons, places, and events come into contact with the law, and the mechanisms or technologies by which they might be enfolded into law. An evaluative use of *Jurisdiction* allows for an examination of the juncture at which law engages with social life, and how these persons places and events are brought into the realm of law – or not, as the case may be. It also allows

¹⁰⁴ *Supra* note 1 [*Jurisdiction*].

¹⁰⁵ *Supra* note 92 [*BC Task Force Report*].

¹⁰⁶ See generally Andrew Woolford, “Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process”(Winter, 2004) 29 *The Canadian Journal of Sociology*; Alfred Taiaiake, “ Deconstructing the British Columbia Treaty Process [Paper in: Indigenous Peoples and the International Sphere” (2001) 3 *Balayi: Culture, Law, and Colonialism*. 39.

¹⁰⁷ Nicholas Blomley, “The Ties That Blind: Making Fee Simple in the British Columbia Treaty Process”(April 2015) 40:2 *Transactions of the Institute of British Geographers* 168 – 79. [*Blomley BCTP*].

¹⁰⁸ *Supra* note 82 [*Woolford Symbolic Violence*].

¹⁰⁹ *Ibid.*

¹¹⁰ *Supra* note 50 at 23.

for that ethic of responsibility to evaluate the texture and quality of the relationships, not just their existence or otherwise. The BCTC process is organised around a negotiation process, and with the informality of this process the jurisdictional techniques that shape it become more difficult to distinguish. The most accessible technologies start with writing and categorisation, moving through to the more formal notions of precedent and modes of authority and inauguration.

II. Writing as a Technology of Jurisdiction in the BCTC Process.

Much of what is actually said in the treaty making process is not readily accessible: the negotiations are confidential and actual text is not available for public consumption. The most direct of the literature that critiques the BCTC process comes from interviews with the participants in both the aboriginal and non-aboriginal governments. While it is not possible to access the language used at the specific negotiation table, it is possible to draw conclusions from what the varying actors have said about the process. This is necessarily non-specific to the Hul'qumi'num Treaty Group, however the experience of the HTG and the British Columbia Treaty Commission's abject failure to negotiate an equitable compromise echoes the experience of the majority of First Nations communities. Text available through the audio recordings of the hearings¹¹¹ and case arguments made before Inter-American Commission on Human Rights¹¹² as well as comments by chief Hul'qumi'num Treaty Group's chief negotiator Robert Morales¹¹³ support the current criticisms levelled at the BCTC process.

The jurisdictional technology of writing in this instance has to be extrapolated to the ways in which the language used in the context of negotiations influences the narratives available to First Nations communities. Beyond the difficulties in analysing an informal process that is secretive and unavailable to external critique, there are certainly questions of legitimacy and authority that overlap into considerations of a lack of oversight that properly mediates the discourse. However, despite a lack of formalised doctrine or text, the possibility of a meeting place for laws and the quality of the lawful

¹¹¹ IACHR Hearing and Other Public Events "Session: 133 Period of Session; Date: Tuesday, October 28, 2008. Precautionary Measures and Petition 592.07 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.oas.org/Audiencias/133/B26HulquminumTreatyGroupCanada.mp3>>; IACHR Hearing and Other Public Events "Session: 134 Period of Session; Date: Monday, March 23, 2009. Petition 592.07 and Precautionary Measures 110/07 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.org/Audiencias/134/20.%20P%20592%2007%20y%20MC%20110%2007%20Hul%20qumi%20num%20Treaty%20Group%20Canada.mp3>>.

¹¹² IACHR Hearing and Other Public Events "Session: 143 Period of Session; Date: Friday, October 28, 2011. Case 12.734 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.org/audiencias/143/36.mp3>>.

¹¹³ Lawyers Rights Watch Canada, "Robert Morales: Seeking Justice Elsewhere" February 23rd 2012, online: lrwc <<http://www.lrwc.org/video-seeking-justice-elsewhere/>>.

relationship is none-the-less evident through the casual use of language perpetuated by the actors and crafters that are party to the formal negotiations. The language used by the representatives of the process both shapes the way in which the relationships are considered, and reflects the ways in which the provincial and federal governments conceive of their relationship with aboriginal governments.

This is where the technology of writing merges to a certain extent with the spoken word, meaning that the text of the shaping of the relationship is influenced by oral arguments prior to being codified. What has to be inferred here is the nature and texture of the engagement with the mechanism of coming in to and being with law that is the hallmark of a jurisprudence of jurisdiction. These negotiations have the capacity to inaugurate law, and as such fall under such a jurisdictional purview. None-the-less, without access to written minutes of negotiations, the challenge in this case is an uphill battle to prove a negative. Arguably, a language that reflects and treats with the laws and property notions of First Nations peoples within the British Columbia Treaty Process is absent. An obvious example is that many First Nations languages do not have either a word or a corresponding concept for land ownership, the closest one being “the place of my ancestors”¹¹⁴. There is no evidence that a common vocabulary was ever introduced into discussions, and every evidence that colonial norms and structures dominate the language of negotiations. This absent narrative forecloses on notions of indigenous nation-building and land tenure by perpetuating the language of the overriding colonial jurisdiction of Canada.

The vocabulary that is used by non-aboriginal governments is indicative of how those governments shape the available entrances and exits to Canadian law. While the B.C. Claims Task Force exhibits acceptable ideals and language, the actual negotiations seem to be conducted in a different manner. Consider by way of introduction the reference in this document to aboriginal and non-aboriginal governments as the means of organising or categorising notions of different types of government. This architecture is actually borrowed from Alfred Taiaiake¹¹⁵, where the articulation of these contrasting jurisdictions gives equal weight to the governments while using Indigenous governments as the term of reference. This set up could in fact arguably illustrate an occasion where the author has inadvertently employed a *praxis* of jurisdiction to mediate the language surrounding the categorisation of legal order. This type of reconfiguring of language seems wholly absent from accounts of the BCTC process, and clearly illustrates the insidious ways in which the language of the authorising mechanism influences the ways in which negotiations are conducted. In kind, while the “First Nations” term of address is built-in to Canadian law, the recognition it is given is exemplified by reference to *the* government when speaking about government bodies and their authority. The recognition of the status of aboriginal governments is absent from the written documents available and reflects

¹¹⁴Leroy Little Bear, "Aboriginal Relationships to the Land and Resources." *Sacred Lands*. Ed. Jill Oaks, et al. Winnipeg: University of Manitoba: Department of Native Studies, 1998. 15-21.

¹¹⁵ Alfred Taiaiake, “ Deconstructing the British Columbia Treaty Process [Paper in: Indigenous Peoples and the International Sphere” (2001) 3 *Balayi: Culture, Law, and Colonialism*.

the ways in which provincial and federal governments see their relationship with indigenous peoples. Other states and bodies internationally recognise this idea that indigenous communities have their own law¹¹⁶, however this is even absent from the idealistic BC claims task force¹¹⁷ and the dialogue between the British Columbia Government and indigenous peoples is phrased without any reference to indigenous law, meaning that negotiations do not represent a meeting place of laws and jurisdictions, rather consisting of an overarching jurisdiction with no place for voicing other laws.

Despite the fact that written records for many of the negotiations are absent, it is possible to see the link between the language used in negotiations, and the prospective written product of the treaty. The part of this that is perhaps obscured, is the fact that language shapes how persons think about laws and relationships, the result being that the use of language influences the conduct of lawful relations and precludes a certain kind of thought about the legal relations between 'the government and her Native Indians'.

Criticism has been levelled at the BCTC process by Woolford, who picks up on this specific notion that what is said influences how one is able to think about the process. He frames this through narrative of symbolic violence, which situates the critique outside law's domain, pointing to the impact negotiations have on indigenous communities. What jurisdiction can add to this point is that to the extent that language and what is written down in the form of formal treaties shapes the jurisprudence of aboriginal and non-aboriginal relations, the choice of this language is the purview of the provincial or federal governments. It reflects their bias and perpetuates a particular way of being with law. From the perspective of jurisdiction, this language acts as a gatekeeper for the engagement with and entrance into productive legal relationships.

There are a few salient points made by Woolford in particular that are relevant to the emerging technologies of jurisdiction in the BCTC process. Of note is the observation that despite equality of process and the use of the Task Force themes of equality and honesty, there still exist a considerable number of discernible issues in the actual practice of negotiations. The first part of Woolford's account argues that the core principles of the BCTC that stipulate the aims of justice and certainty¹¹⁸ as part of the proceedings are fundamentally contradictory. The aims of certainty pertain to the desire for a knowable settlement that persists for the foreseeable future. The interests of the provincial government, Non-Aboriginal communities, and corporate land development, are all evident in the idea that financial security will stabilise the development of the province.

This desire for certainty, particularly financial certainty, is often at odds with the Aboriginal government's desire for justice. In this case, justice contains the idea of recognition of past wrongs, and at least in part, the public acknowledgment of past

¹¹⁶ See eg. *Mabo v Queensland*, [1992] 5 C.N.L.R. 1, (1992) 107 A. L. R. 1 (H. Ct. Aust.).

¹¹⁷ *Supra* note 92 [BC Task Force Report].

¹¹⁸ *Supra* note 91 [Woolford Symbolic Violence].

wrongdoing and appropriate compensation. This justice narrative is seen to undermine the idea of certainty, to which Non-Aboriginal governments are resistant¹¹⁹. This use of language and use of the text of the B.C. Claims Task Force frames the way in which the issues are thought about. This is the foundation for what Woolford refers to as “symbolic violence”. The principles of honesty and openness in negotiations are used in a way that allows the Non-Aboriginal Governments to specify at the outset the parameters the HTG are allowed to negotiate. “By attaching their actions to the valued normative criterion of honesty, the symbolic objective of this statement is to disguise the instrumental, positional basis of the non-Aboriginal government's negotiation policy”¹²⁰. By declaring the facts of the possibilities of the negotiations, they enclose what is possible as existing within the prior conceptions of Canadian law. The notions of the rational person and “being realistic” are used as a mechanism for arguing that redress for past injustices and the transfer of large tracts of land in British Columbia are outside the purview of the process.

The goal of symbolic violence, then, is to persuade the "other" to embrace the interests of the dominant group(s) by constructing the parameters for rational action in a way that makes it difficult to discuss, or even to "think," matters outside of these limited parameters¹²¹

As noted in the first chapter, one of the strengths in the jurisdictional critique or the redescription of legal processes is that it can be used as a productive measure to interrogate the quality of lawful relations and in so doing uncover potential solutions. In the case of using terminology such as aboriginal law and aboriginal governments in the common parlance of negotiations, this should be an easy fix. However, as McVeigh notes in *Postmodern Jurisprudence*, this assumed that the project of post-modernism is still alive and well, in that as long as an adequate mechanism of communication are established, the solutions to conflict will be forthcoming¹²². Engagement with the technologies of jurisdiction that are evident in language and writing would require non-aboriginal governments to take seriously the quality of the conduct of lawful relations. However, Non-aboriginal governments have a vested interest in maintaining the status quo through the use of language. Tony Penikett observes that with a measure of independence from provincial and federal funding, the British Columbia Treaty Commission could open and support negotiations around issues such as co-jurisdiction, but “Peace-making requires a different mind-set than the normal competitions of economic and political life”¹²³.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid* at 121.

¹²¹ *Ibid* at 118.

¹²² Douzinas, Costas; Ronnie Warrington & Shaun McVeigh. *Postmodern Jurisprudence: The Law of the Text in the Texts of Law* (Abingdon, Oxon: Routledge, 1993). [*Postmodern Jurisprudence*].

¹²³ *Supra* note 102, [*Penikett*] at 270.

The technology of writing, making permanent a statement about law and the crafting of lawful relations, can be extended to the use of specific language in the negotiation stage of the British Columbia Treaty Commission Process. Seen from the perspective of jurisdiction, the act of negotiation happens at the threshold of law, and very much represents the *praxis* of jurisdiction. To that end, the language used in the negotiation is crucial to the shaping of the way in which the Hul'qumi'num people interact with Canadian law for future generations. With the speech of legal relations filtered through the language of Canadian jurisprudence, the underwriting architecture overwhelmingly excludes notions outside of its own understanding, thereby excluding notions of Hul'qumi'num law. As Glen Coulthard argues from a similar perspective on power and politics, "colonial relations of power are no longer reproduced primarily through overtly coercive means, but rather through the asymmetrical exchange of mediated forms of state recognition and accommodation"¹²⁴. The language used in the negotiation process can be re-examined through a *praxis* of jurisdiction to uncover the ways in which the speech of law functions as jurisdictional tool that regulates the Hul'qumi'num entrance into Canadian law, and in performing that role it re-affirms existing jurisdictional structures.

III. The Role of Precedent Within Treaty Negotiations

Despite the informal relationships of negotiations, notions of jurisdiction through precedent still shape the arrangement and conduct of lawful relations. As a technology legal precedent is a very powerful tool, particularly in its functions as a link in the chain of like decisions with potential ramifications beyond existing interactions. For the parties to the BCTC Process, the salient aspect of this technology lies in the use of language and the way it is connected to prior decisions. Non-aboriginal governments are wary of the prospect that using specific language will tether them to future decisions and liabilities. Government actors prioritise the monetary requirement of the treaty negotiations, and the use of language within negotiations is carefully calculated to exclude the necessity of redress. With regards to internal discussion on treaty negotiation by the non-aboriginal government, "the operative test is not – as observed by the Auditor General and many others – what must we do in order to make progress against objectives; *it is what minimal investments we can make to avoid being sued*"¹²⁵. While the process of treaty negotiations holds considerable emotional and cultural significance for aboriginal communities, the interests of non-aboriginal governments operate in different sphere with different priorities. An admission of historic injustice by non-aboriginal governments has implications for compensation and restitution. In law, to take ownership of injustice is to acknowledge wrongdoing, and with that acknowledgement typically comes financial penalty, something that governments are typically keen to avoid. Progress is then hampered by the different

¹²⁴ Glen Coulthard "Subjects of empire: indigenous peoples and the 'politics of recognition' in Canada". (2007) 6:4 Contemporary Political Theory 437 –60.

¹²⁵ Canada, Standing Senate Committee On Aboriginal Peoples *Honouring the Spirit of Modern Treaties: Closing the Loopholes: Special Study on the Implementation of Comprehensive land claims agreements in Canada*. (May 2008). [Senate Committee].

connotations associated with specific words within the legal vocabulary and the way the use of some admission might give credence to any decisions to allocate funds to indigenous communities. Once admitted, the process of treating similar situations in the same way could implicate the government in a multitude of different situations with aboriginal communities, resulting in payments required in excess of what the government is able to pay.

Working through the deliberations of the BCTC process, it is evident that jurisdictional technologies have the power to shape lawful relations, even from a distance. With respect to the content of those negotiations, the acknowledgement and recognition of wrongdoing by non-aboriginal governments is necessary for the ontological legitimacy of indigenous land claims, while also providing a cornerstone for notions of reconciliation. However, the federal representatives cannot interact in a productive manner for fear of the ways in which the articulation of various concepts might form that attachment of events or persons to the processes of existing law. This is stated quite baldly, and is acknowledged by the following admission from a federal government representative to the British Columbia Treaty negotiations

First Nations quite often want us to acknowledge something up front, and I think there is a real legal concern on the part of vulnerability about some bald-faced statement that acknowledges something up front (federal representative).¹²⁶

Specifically, existing Canadian law prompts the Non-Aboriginal governments to bracket ideas of compensation as part of different legal framework that simply can't be addressed through the alternative dispute resolution framework of the B.C. Treaty Process. From the perspective of a member of the Union of British Columbia Indian Chiefs, the efforts of the BCTC process represents the crown's attempt to "capture and tame aboriginal title and rights, and then place them in a cage constructed of words and legal provisions"¹²⁷. This notion that words and legal technicalities enclose processes of negotiation and the narrative of aboriginal governments in the treaty process is one that has not gone unnoticed. However, as Pahuja notes in her article regarding encounters of international law, conflicts are often described against the backdrop of political social, or economic dispute – rather than through the lens of jurisdiction and the threshold for lawful relations.

IV. The Shaping of Negotiations through Categorisation

In the context of the BCTC process, categorisation contributes significantly to the shape of lawful relations. It speaks to the kinds of categories made available by the Crown, as well as the notion that the crown has the ability to define those categories to begin with. From the perspective of a praxis of jurisdiction, the most obvious process of categorisation is that the kinds of land transfers available in negotiations are only

¹²⁶ *Supra* note 68 [BC Task Force Report] at 138.

¹²⁷ Union of British Columbia Indian Chiefs. n.d. "Certainty: Canada's struggle to extinguish aboriginal title" <<http://www.ubcic.bc.ca/Resources/certainty.htm>>

through Fee Simple Title. In a broader sense, the ability to categorise or bracket that which can or cannot be included in negotiations can also be seen through the lens of jurisdiction. Non-aboriginal governments can pre-determine certain legal practices and endeavours as being beyond the scope of negotiation and thereby define away the kinds of legal remedies and forms of law available

Despite a narrative that on the face of it provides options for indigenous communities, the machinery that categorises the forms that the legal remedies can take naturally provides the scaffolding upon which mechanisms for Canadian land claims can attach. This underlying architecture need not exclude formulations of indigenous law and government, however a close look at the underlying scaffolding in the available options indicates an uneven landscape prejudiced against aboriginal nation-building and property concepts. The presumption of non-aboriginal governments in their exclusive right to define the parameters of negotiation to fit fee simple title, extinguish aboriginal title, and bracket discussions of compensation speak to a preordained process where the categories are arranged to exclude rather than include. This is a function of jurisdiction regardless of a bias towards either inclusion or exclusion, the jurisdictional aspect merely comments on the extent to which this technology formulates the conduct of lawful relations.

Within the BCTC process particular attention must be paid to the provincial and federal government's insistence on fee simple title, the extinguishment of aboriginal title, and the bracketing of compensation for historic land takings. Through the process of treaty negotiations, the Crown has the authority to offer the transfer of lands in fee simple to aboriginal claimants. However, in doing so and in completing the treaty process the indigenous communities surrender their interest in aboriginal title to the land. The Canadian courts have ruled that the *sui generis* nature of indigenous ownership generates an actual interest in the land, which is ontologically speaking quite different from Fee Simple. This type of land ownership will allow for large tracts of land to be transferred to aboriginal governments, however the necessity of choosing between these types of land ownership is a process wholly controlled by the policy that does not allow for anything other than fee simple ownership outside of adversarial adjudication in a Canadian court.

The choice between these types of ownership has ramifications for the larger questions of jurisdiction, however for the moment they clearly represent the way static legal configurations of existing Canadian law are unable to evolve to enfold notions of aboriginal ownership. The choice between a court case or treaty negotiations preconfigures the kinds of legal remedies available in the BCTC process precisely because Canadian law has drawn the parameters. What ideally should be a creative and collaborative effort with respect of engineering new ways of being with law is stifled by the inflexible framework adhered to by the federal and provincial governments. As Nicholas Blomley notes, the refusal of the federal government to budge on its insistence on fee simple land ownership has frustrated First Nations negotiators as they are forced to embrace the mechanics of their own dispossession¹²⁸, and in so doing adopt the colonial legal order.

¹²⁸ Nicholas Blomley "Making Space for Property" (2014) 104:1 Annals of the Association of American Geographers 1291 – 1306.

With particular attention to the Hul'qumi'num Treaty Group, despite the pressing concern of the HTG, the crown has insisted that it will not negotiate for lands held privately. Nor will it negotiate a compensation settlement that would allow the Hul'qumi'num Treaty Group to purchase back their traditional lands from the current corporate landowners. Further to this, any crown lands that are transferred would be transferred as Fee Simple Title, meaning that any existing Aboriginal Title to the land would be extinguished by the signing of a treaty. The emphasis on certainty in the B.C. Treaty Process would mean such a treaty would bind future generations in the community from seeking other measures to secure their traditional lands and restrict the growth and development of the community to the structures imposed by fee simple title in what is only a small portion of lands that are claimed by the community.¹²⁹

By bracketing notions of historic takings, the government in one fell swoop undermines the premise and position from which indigenous governments make claims to their traditional territory. If there is no mechanism for the acknowledgement of the territory as theirs, there exists no foothold upon which First Nations governments can establish a position for negotiations. Specific to land title, non-aboriginal governments are fixed in this way of organising land tenure. The way of legally holding land, aside from the prickly notions of authorisation, represents the way in which non-aboriginal governments can engineer the existing legal processes to exclude alternative jurisdictions or overlapping understandings of a relationship with the land through law.

The authority that allows for the categorisation of the forms of legal remedy is where this technology of categorisation or meta-governance percolates through to authority as a mode of jurisdiction. However, it is important to remember that the perspective which divides a jurisdictional approach into different facets is merely a convenient method for explaining what might more appropriately be called a jurisdictional mind-set. The arrangement of where and how lawful relations are established is the project of jurisdiction, however a jurisdictional approach does not in itself have an ethic of inclusion or exclusion, it merely provides a lens through which to look at the threshold of law. However, McVeigh and Dorsett develop an ethic of responsibility that animates their account of thinking with jurisdiction. Aside from the forms that jurisdiction can take, the notion of taking seriously the quality of 'belonging to law' allows for a discussion about the texture of that belonging and the modes and manners of coming in to law and being with law.

If we conceive of a responsible approach to the conduct of lawful relations which is the main organisational theme of a jurisdictional approach, then, as some authors on jurisdiction have noted¹³⁰, a judgement about the nature of that threshold of law and what responsible conduct looks like does add a political slant to the use of jurisdiction as a critical approach. In this case I will contend that the ethic of making space for new and creative lawful relations is the responsible aspect of the conduct of operations. As such, the categorisation and use of the technologies of jurisdiction should enable an

¹²⁹ *Supra* note 1 [HTG Petition 2007].

¹³⁰ *Supra* note 27 [Kaushal].

equitable meeting of laws, and in contrast to that ethic, the technologies of jurisdiction at the BCTC process are not used to create space, but rather to enclose it.

V. The Implications of Authority in the BCTC Process

Part of this notion of taking responsibility for the conduct of lawful relations and the overlay of the political aspects to jurisdictional thinking becomes more evident once we move from the mechanics of jurisdiction to the broader framing of questions of authority, authorisation and inauguration. It is evident from an account of the technologies of jurisdiction within treaty negotiations in British Columbia, that how the legal avenues are organised contributes to how aboriginal land claims are thought about, talked about, and brought into the realm of Canadian law. In considering these downstream technologies it is evident that that the authorship of the architecture plays a central role to its configuration, but beyond that, the use of the technologies of jurisdiction have a reciprocal relationship with the modes of authority and authorisation.

The acceptance of the language, the bracketing of several key issues, and the acknowledgement of the validity associated with the different types of land ownership all reinforce an underlying premise that the Crown has the authority to define the perimeter within which aboriginal governments can operate. The acceptance and use of these technologies of jurisdiction end up influencing and perpetuating the still contested premise of Terra Nullius¹³¹ and Canadian sovereignty. Samson's assertion that the Canadian Land Claims processes are directed at the control of indigenous peoples, a process which was only instigated following "indigenous contestation of the unilateral declaration of sovereignty from Canada, a declaration that the Canadian Land Claims process assumes to be legitimate"¹³². From this perspective, it is possible to see the ways in which jurisdiction acts to perpetuate existing structures, while also reinforcing underlying premises of authority.

This preoccupation with authority is noted not just within the external critical literature, but also in Senate reports and the report by Royal commission on Aboriginal Peoples (RCAP). The Royal Commission on Aboriginal People noted that within treaty negotiations the parties begin from opposing positions, where the priority of First Nations negotiators are to secure the self-government and monetary transfers to provide self-sufficiency and control over lands. In contrast the priority of government negotiators is to protect government authority.¹³³ For example, in entering into Treaty

¹³¹ John Borrows, "The Durability of Terra Nullius: Tsilhqot'in Nation v. British Columbia" (2015) 48 U.B.C. L. Rev. 701

¹³² Colin. Samson "Canada's Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims" (2016) 31:1 Canadian Journal of Law and Society / Revue Canadienne Droit et Société 87.

Curry, J., Donker, H. and Krehbiel, R. "Land claim and treaty negotiations in British Columbia, Canada: Implications for First Nations land and self-governance" (2014) 58 Can. Geogr., 295.

negotiations, the Crown has a blanket policy of a refusal to enter into arbitration. A former Associate Deputy Minister of Indian and Northern Affairs Canada, Dr. Richard Van Loon, explained that the refusal to use arbitration is due to “financial considerations and a desire to maintain control over determinations related to such matters”¹³⁴. This assertion made to the Standing Senate Committee on Aboriginal Peoples clearly illustrates how the authority to designate jurisdictional mechanisms is leveraged by non-aboriginal governments to exclude legal machinery that weakens the overarching control and jurisdiction over the whole legal process.

In this case, it is easily evident from the above that the law as it exists certainly isn't the law of the Aboriginal Governments involved in the BCTC process, or more particularly, not the laws of the Hul'qumi'num Treaty Group. From a jurisdictional standpoint, the focus has to be on the mechanisms for coming into law or being with law, and the practice of the creation of lawful relations. It is possible that the existing machinery of the BCTC process could contribute to the responsible conduct of lawful relations if the jurisdictional arrangements were such that existing mechanisms could be productively used. However, “these mechanisms that are available are not being used because of the ingrained federal belief that one party to a two-party contract should veto all solutions that are not its first preference”¹³⁵. This unsubtle coercive behaviour certainly flies in the face of the responsible conduct of lawful relations. Furthermore, it is the authority vested in the canonical arrangement of jurisdictional forms that allows non-aboriginal governments to arrange these processes to their own advantage. In querying “whose law?”, it is clear that Canadian law does not reflect the avowed multicultural aspirations indicated by the federal government, let alone the fiduciary responsibilities inherent in the established relationship between the crown and Canadian First Nations communities. Hul'qumi'num law has no place in Canadian law, and Canadian law is not conducted with sufficient responsibility to engage with that which does not reproduce its current hierarchies.

In the BCTC process, reconciliation was conceived of as a final colonial act (normalizing the outcome of oppression) that would rationalize and make legal Canada's presumption of governing authority.¹³⁶

As can be seen in the above quote by Woolford, the jurisdictional architecture of the BCTC process reinforces the inequitable arrangement of Canadian law. The authority to declare what the law is, or could be, rests solely with the Non-Aboriginal governments in this context. They are the gatekeepers for the entrance of other laws or systems into the Canadian process, and the mechanisms of exclusion permeate many of the structures at their inception. Dominating the assumptions that provide a foundation for the existing Canadian laws and underwrite the historic struggles of the

¹³⁴ Canada, Standing Senate Committee On Aboriginal Peoples *Honouring the Spirit of Modern Treaties: Closing the Loopholes: Special Study on the Implementation of Comprehensive land claims agreements in Canada*. (May 2008). [Senate Committee].

¹³⁵ *Ibid.* [Senate Committee.]

¹³⁶ *Supra* note 91 [Woolford *Symbolic Violence*] at 111.

Hul'qumi'num peoples, is the exercise of Canadian sovereignty and the unquestioning assumption of the right to exercise power within the territorial jurisdiction known as Canada. *Jurisdiction* can certainly be easily used to question this foundational premise because it speaks to the origin of lawful relations and the antecedent authority to engage in them.

Harking back to jurisdiction in its formulation from its Latin roots of *ius dicere*, the attached inference that jurisdiction connotes authority is manifest the crown's ability to declare and define the legal architecture. That ability to voice, and in some ways create, the scaffolding of lawful relations within the treaty negotiations means that the authority that legal practitioners derive through jurisdiction make them the gatekeepers for law's scope and framing. The responsibility for building lawful relations is mediated through jurisdiction, the praxis of which is a measure of the persons, places, and events that are brought into the realm of law, as well as the measure of those that are excluded.

VI. The Premise of Canadian Sovereignty

It is obvious from the outset that if we are to question “whose law?” when it comes to the interactions between Aboriginal and Non-Aboriginal governments, the answer rests with the Non-Aboriginal law as it applied in its consistency across the country. However, if the initial assumption of the existence of jurisdiction is dispensed with, and the questions can evolve from “whose law?” to “does law exist?” and “how should lawful relations be established?”. While those types of questions of *Jurisdiction* remain within the domain of law – just – it does make room for a different perspective on law, not as a consistent whole, but as an organic amalgamation of processes and practices connected together via the technologies of jurisdiction. Unfortunately, as evidenced by the long history of the legal struggles of the HTG, equality of procedure has no guarantee of a just outcome. However, from a jurisdictional perspective, it is possible to question how persons or places or events might properly belong to law¹³⁷. Similarly, it is also possible to question if there is space for more than one Law in considering the structures and architecture that regulates lawful relations.

If the ways and culture of the First Nations are treated as nothing more than a “normative system” and tradition – accounted for as something less than law, “no meeting place between laws is possible”¹³⁸ And yet, there is every evidence that the Hul'qumi'num peoples consider themselves a distinct community separate from Canada and British Columbia. They have a separate language, territory that they have mapped and demarcated, a distinct community membership, self-government arrangements, traditional laws, and an assertion that they live within occupied Canada.¹³⁹

¹³⁷ *Supra* note 1 [*Jurisdiction*].

¹³⁸ Shaun McVeigh, “Law as (More of Less) Itself: On Some Not Very Reflective Elements of Law” (2014) 4:1 UC Irvine Law Review. 478. [*McVeigh Law as Itself*].

¹³⁹ Morales, Sarah Noel, *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num*

The assertions and actions of the Hul'qumi'num would certainly account for what Douzinas might term "bare sovereignty"¹⁴⁰, and yet without the acknowledged jurisdiction, or the power to speak in the name of the law *and be heard*, there is no place for Hul'qumi'num legal narrative and therefore no place for a meeting of laws between indigenous and non-indigenous governments.

This arrangement of jurisdiction merely makes plain the main aspect implicit in a jurisdictional redescription of the HTG's progression through the BCTC process. The authority to declare the law is missing from the Hul'qumi'num narrative. The laws, maps, and assertions of the Hul'qumi'num Treaty Group hold no truth for Canadian lawmakers, and the HTG have no leverage with which to press the issue. Indeed, the BCTC process requires the acquiescence and an acknowledgement of a system whose architecture is wholly unsympathetic to the arrangement of Aboriginal law and the laws of the Hul'qumi'num in particular¹⁴¹.

The assumption of being heard is implicit in the notions of authorisation and power that are attached to jurisdiction, however the question of who speaks and who listens is a central point to any project of reconciliation. According to Walters, this is the "unwritten principle" of legality¹⁴² as it pertains to the jurisdictional meeting place of laws in Canadian land claims conflicts. However, when looking at the critiques of the BCTC process and the lived experiences of the participants, there seems to be no forum within which Hul'qumi'num narratives are received with any legal meaning. The question of "whose law?" as it arose in the overview of jurisdictional authority at the BCTC Process as an account of lawful relations is answered as: evidently not that of the indigenous inhabitants of Canada. While this is not unexpected, the prior question of "does law exist?" is provoked specifically by a jurisdictional look at the competing layers of legal process and further allows for a different answer than might be expected of a traditional downstream positivist account of lawful interaction and typical jurisdictional arrangement of legal processes.

The overwhelming sense from the First Nations communities is that the B.C. Treaty Process has failed in its attempt at reconciliation. The values that were set out by the British Columbia Treaty Commission are sufficiently vague that they can be reworked

Legal Tradition (PhD Thesis, University of Victoria Faculty of law, 2014) [unpublished]. See also Lawyers Rights Watch Canada, "Robert Morales: Seeking Justice Elsewhere" February 23rd 2012, online: lrwc <<http://www.lrwc.org/video-seeking-justice-elsewhere/>>. And see generally Hul'qumi'num Treaty Group, "Hul'qumi'num Treaty Group Observations of the Merits of the Case: Inter-American Commission on Human Rights in relation to Case No 12.734 (Canada)" Case Comment, (January 22, 2010).

¹⁴⁰ Costas Douzinas, "Speaking law: on bare theological and cosmopolitan sovereignty" in Anne Orford ed, *International Law and its Others* (New York: Cambridge University Press, 2006) 35.

¹⁴¹ *Supra* note 70.

¹⁴² *Supra* note 105 [*McVeigh Law as Itself*].

into competitive interest-based bargaining rather than the honest, truthful, and open dialogue envisioned by the original Task Force.¹⁴³ With this in mind, consider the possibilities of the absent narrative of the jurisdiction to declare the structure of law in the negotiations between the Hul'qumi'num Treaty Group and the BCTC process. The authority to declare the parameters of lawful relations plays a pivotal role in the establishment of the legal architecture. There is no legal or physical space for the HTG to declare their facts as the truth regarding the ownership of traditional lands in British Columbia. By limiting negotiations to lands currently held by the crown, the implicit declaration by the non-aboriginal governments is that the lands do belong to them, and privately held lands were justly transferred from the crown as the original landholder. By transferring the lands as fee simple, the jurisdictional implication is also that the legal scaffolding supports actual title to the land via the crown. There is no legal space to establish an equal foundation that acknowledges an equal truth of Aboriginal law and government.

The jurisdiction to define the perimeter of negotiations and design the structure of lawful relations unsurprisingly means that the legal relationships generated by the process are actually dictated by the ones responsible for the design. This is obviously an unfortunate outcome of a reconciliation process that was supposed to generate new forms of legal negotiations. The architecture of lawful relations shapes the ways in which people, places, and events are tied to law. This means that through jurisdiction one can see the juncture at which individuals act and react to that architecture. The technologies of jurisdiction are not just manifest in the design of the legal scaffolding, but are also evident in the ways the relationships are enacted by the representatives. The perimeters of law are defined away through the jurisdiction of language, and from language to thought. The technologies of jurisdiction make contact through the language used by the legal actors, until the mechanisms for even conceiving of a different law are regulated by the dominant legal framework.

In the specific context of the Hul'qumi'num negotiations, one of the main barriers to negotiation is that any acknowledgment of compensation has a legal ramification, and by bringing negotiations of compensation to the table, the way is opened for legal precedent to require payment in damages that exceeds the capacity of the government to pay¹⁴⁴. The Crown, because of the practicalities of the case, would prefer to delimit the way in which notions of accountability with respect to indigenous populations enter into the realm of law. Because of the automatic power wielded by the federal and provincial governments, they presume to have the jurisdiction to bracket legal discussions¹⁴⁵ and so shape the law in their own self-interest. This shapes the possibilities for the legal remedies through treaty negotiations, but also completely negates the ability of the Hul'qumi'num Peoples to even voice a narrative that speaks to indigenous laws, governance, and restitution based on historic framing of a distinct society and rights to the land. Even if voiced, there is no legal space in which such an

¹⁴³ *Supra* note 13.

¹⁴⁴ *Supra* note 91 [*Woolford Symbolic Violence*].

¹⁴⁵ See generally Nicholas Blomley, "The Ties That Bind: Making Fee Simple in the British Columbia Treaty Process" (April 2015) 40:2 *Transactions of the Institute of British Geographers* 168 – 79. [*Blomley BCTP*].

utterance could be heard. So, while it might prove that the HTG could establish a jurisdiction unto themselves in the inauguration of their own law, to speak the law is not enough in this instance, there needs to first be room for an understanding of more than one conception of the law.

CHAPTER 3. CONFIGURATIONS OF JURISDICTION AT THE IACHR

I. The Inter-American Commission on Human Rights

Chapter Two has indicated that it has been the privilege of Canada to declare the perimeter of law within which the Hul'qumi'num interests can be negotiated in the British Columbia Treaty Process. These negotiations happen both within the physical boundary of British Columbia as well as within the legal space designed by the British Columbia Treaty Commission. These negotiations have the capacity to transfer lands in fee-simple and agree to monetary transfer through the creation of modern-day treaties. The negotiations are confidential in nature, as is reiterated by the Canadian representatives in the case at the Inter-American Commission on Human Rights¹⁴⁶. The account presented in chapter two indicates that the jurisdictional assemblages are arranged in a way so as to create an impermeable threshold between Indigenous and Non-aboriginal law, with the jurisdictional technologies and practices enshrined that preclude notions of Hul'qumi'num law and nation-building.

At the failure of the BCTC process, the Hul'qumi'num Treaty Group took their case to an international forum. The jurisdictional forms reproduced at the Inter-American Commission on Human Rights (IACHR) are configured differently because of the differences in the underlying architecture. The arguments before the Inter-American Commission on Human Rights will naturally be of a different kind than the legal mechanisms within the Canadian state, which rely on treaty making via the BCTC process and the judicial review of Aboriginal title, which at the time of this case had proceeded no further than the original decisions in *Delgamuukw*¹⁴⁷. That is to say, an "unprecedented theoretical framework"¹⁴⁸ for the interpretation of Aboriginal title had been delivered and the protections of section 35 of Canadian Charter of Rights and Freedoms¹⁴⁹ (CCRF, or The Charter) deliberated¹⁴⁹, but the end result was that the court failed to rule on the merits of the Gitksan and Wet'suwet'en Aboriginal title claim.¹⁵⁰ Despite the protections afforded in the Charter as it came into force in 1982 as a

¹⁴⁶ IACHR Hearing and Other Public Events "Session: 143 Period of Session; Date: Friday, October 28, 2011. Case 12.734 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.org/audiencias/143/36.mp3>> [IACHR Case 12.734 2011] at 00h: 22m: 17s.

¹⁴⁷ *Supra* note 8 [Delgamuukw].

¹⁴⁸ Canada, Parliamentary Research Branch, *Aboriginal Title: The Supreme Court of Canada Decision in Delgamuukw v. British Columbia*, BP- 459E (Law and Government Division, Mary C. Hurley, 1998 – Revised 2000) Online: <[http://publications.gc.ca/Collection-R/LoPBdP/BP/bp459-e.htm#\(6\)](http://publications.gc.ca/Collection-R/LoPBdP/BP/bp459-e.htm#(6))>. [Decision in Delgamuukw].

¹⁴⁹ *Supra* note 16 [CCRF].

¹⁵⁰ *Supra* note 87 [Decision in Delgamuukw].

constitutional document¹⁵¹, as of 2011 there had been no successful Aboriginal Title claims made by indigenous communities in Canada.¹⁵² On May 10, 2007 the Hul'qumi'num Treaty Group submitted a petition to the Inter-American Commission on Human Rights against Canada. Admissibility hearings took place in October 2008 and March of 2009. The commission issued its admissibility report in October 2009 indicating that the Inter-American Commission did have the jurisdiction to hear the case. The case was presented to the commission in October 2011¹⁵³.

In considering the conduct of lawful relations between Canada and the Hul'qumi'num Treaty Group at the IACHR, There is a distinction to be made between evaluating the jurisdictional modes and manners of being with law that are available through the Inter-American Commission on Human Rights, and the configuration of a praxis of jurisdiction as it is applied to a case whilst it proceeds through the processes. The latter approach borrows significantly from the former, because the existing jurisdictional architecture naturally shapes how the particulars of the case are treated, however the jurisdictional practices will always exist in context rather than at a distance from the case. In this chapter, jurisdiction as it has been characterised through the lens of representation authorisation and inauguration is explored through the progression of the Hul'qumi'num Treaty Group case, from the admissibility hearing through to the case arguments. The technologies and modes of jurisdiction remain the same, while the interaction and conduct of lawful relations differs. This chapter uses the practice of jurisdiction to re-describe the narrative of lawful relations at the Inter-American Commission on Human Rights. As the HTG brings a claim against Canada in respect of the violation of their rights, the representation authorisation and inauguration of the specific international jurisdiction are examined.

To put the international jurisdiction in context, the Organisation of American States (OAS)¹⁵⁴ is an international body that is responsible for overseeing the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The OAS represents the alliance in international law between North and South American states, including Canada, Mexico, and the United States of America. The extent to which nation-states are bound to these international instruments is based on their status as signatories to the various documents. Canada, as a member, is bound by international convention to abide by the charter documents, which includes *The American Declaration of the Rights and Duties of Man*¹⁵⁵. However, Canada is not a full signatory to all of the treaties and therefore cannot be prosecuted at the Inter-American Court of Human Rights. Despite Canada's failure to fully participate in the

¹⁵¹ *Ibid.*

¹⁵² *Supra* note 2 [*Petitioner's Summary 2011*].

¹⁵³ IACHR Hearing and Other Public Events "Session: 143 Period of Session; Date: Friday, October 28, 2011. Case 12.734 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.org/audiencias/143/36.mp3>>.

¹⁵⁴ OAS, General Assembly, Charter of the Organisation of American States. A-41 (1948).

¹⁵⁵ *American Declaration of the Rights and Duties of Man*, Ninth International Congress of American States, 1948.

Organisation of American States, there is some recourse available via the Inter-American Commission. The foundational document of the OAS is a starting point for the jurisprudence of the IACHR, meaning that the legal landscape is unencumbered by older overlapping jurisdictional forms. Along with the other Articles cited by the HTG, *The American Declaration of the Rights and Duties of Man* does stipulate a right to property, meaning that Canada can be held to a human rights code that is more robust than that enshrined in its own constitution, as a right property is notably absent from the Canadian Charter of Rights and Freedoms¹⁵⁶.

II. Representations of Jurisdiction through Writing at the IACHR

In the previous chapter the technologies of writing and precedent were interlinked, with the enunciation of law the central theme that tied the two facets of jurisdictional representations together. From a jurisdictional perspective, it is not necessarily the content of what is said or written, instead, the ways in which it can be articulated. During the HTG case there were two admissibility hearings, followed by a report by the Commission on the admissibility of the case to the IACHR. The Hul'qumi'num Treaty Group presented written submissions to the commission, which detailed their legal struggles within Canada and the current mechanisms available to indigenous peoples with respect to legal protections over their traditional lands. The Inter-American Commission on Human Rights is bound by the conventions of international law not to interfere within sovereign jurisdictions, with provisions written in with regards to specific exceptions. During the hearings Canada argued that the IACHR did not have the jurisdiction to hear the case because the Hul'qumi'num Treaty Group had not met the requirement of exhausting all domestic remedies. In this instance, it would be to pursue a case for Aboriginal Title through the judicial system in order to secure protections over their traditional lands. The HTG elected not to pursue this avenue, as at the time they had yet to be successful implementation of aboriginal title that granted the title in privately held lands¹⁵⁷

From the perspective of the underlying architecture, arguments made to the IACHR must be framed according to their structuring mechanism, which in this case is the language of human rights. Human rights brings with it the configuration of the individual as the primary organising feature of lawful relations. However, because of the language of rights in the legal sphere, one can use that language to bring about an attachment to the body of law that is different in texture and in content. As a technology of jurisdiction, a robust written jurisprudence of human rights provides a different avenue of entrance or attachment to the body of law. The nature of an international system for law would naturally take into account in its architecture the need to accommodate different notions of law and nationality, although this is by no means a given. The extent to which the IACHR does this provides a positive step towards not just a different mechanism for attaching indigenous land rights to the body

¹⁵⁶ *Supra* note 16 [CCRF].

¹⁵⁷ *Supra* note 87 [Decision in *Delgamuukw*].

of Canadian jurisprudence, but due to the language of the framing it also provides a first step in taking seriously an account of the quality of lawful relations.

The arguments made at the IACHR are largely similar in content to that which was argued at the BCTC process.¹⁵⁸ However, from the perspective of available literature there are a few fundamental differences. Rather than being stifled by the non-aboriginal government's insistence on confidentiality, the petitions made to the IACHR are written down, and decisions rendered in a public forum. With respect to available texts, the admissibility hearings and case oral arguments are available via the records kept by the Organisation of American States. These records are maintained as audio files, so it is possible to listen to the arguments made by both sides through each step of the process.

During the hearings and case arguments, one of the elders with the title of Loschiam, or medicine person, is able to speak about the experiences of his people. He gives an account of the needs and views of his people, and their fears regarding their environment and the sustainability of their community¹⁵⁹. To the extent that recordings can be considered a text of the testimony of the Hul'qumi'num people, this speech in itself represents a way for indigenous knowledge to enter the existing international legal framework. Considering how jurisdiction underwrites the conduct of lawful relations, the articulation and representation of Hul'qumi'num truths in this manner illustrates how practices of the IACHR influence how the HTG enter the purview international law. The manner of being with law through written language, or in this case text, exemplifies the way that the smallest technologies of jurisdiction underwrites the machinery of the legal process, which can differ significantly between different venues. Despite the fact that these arguments and representations have been made before in a different forum, their new existence through an accessible text lends different weight to the account.

While the IACHR has room for the testimony of community members, the argument still needs to be framed through the language of a rights framework. To the extent that it is possible, the language of human rights represents an attempt at a universal frame of reference. Despite being formalised method of negotiating the rights and wrongs of disputing parties, it is nonetheless consistent. By using this framework, the representations and ideas put forward by the HTG are harnessed and tethered to pre-existing nations of a common vernacular. The language and text of human rights can be considered a technology of jurisdiction in the manner of writing, and to a certain extent precedent. As with the jurisdictional approach to the text of oral arguments, the language of human rights is a vehicle for re-imagining jurisdiction. The content of the argument, while relevant to the progression of the case, is less important than how those arguments are made and represented. The language of human rights and the enduring representations through text of the arguments made before the IACHR constitute the machinery makes contact with aboriginal laws and meaning.

¹⁵⁸ Supra note 11 [*Case Merits Observations, 2010*]

¹⁵⁹ IACHR Hearing and Other Public Events "Session: 143 Period of Session; Date: Friday, October 28, 2011. Case 12.734 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.org/audiencias/143/36.mp3>>.

In broader terms, the fact that the jurisprudence of the Inter-American Commission on Human Rights speaks specifically to legal culture and ownership systems means that via the avenue of human rights through which the arguments have to be made, there is none-the-less room to ground other ways of modes of being with law through those human rights. In this case the human rights parlance allows for a jurisprudence of jurisdiction whereby the legal cultures of indigenous communities are brought towards the body of existing law. Not only does the architecture of the system allow for a language that accommodates the ideas of indigenous law and nationhood, but that language also attempts to deconstruct the practices and processes of exclusionary language that forms the basis for a construction of legal mechanisms of marginalisation. From the perspective of the HTG Chief Negotiator, despite the possible problems of enforceability and international law, this movement from domestic to international jurisdiction is a movement in the right direction. In his presentation to Lawyers Right Watch Canada, Robert Morales compares the two systems, saying “[S]o the international system has really developed those principles... that can help to counterbalance those old attitudes, and they’re based on human rights”¹⁶⁰.

Despite similar assertions made by the HTG within BCTC process and Inter-American Commission on Human Rights, the way the technologies of writing and its relationship to language and text are implemented is quite different. The undocumented nature of negotiations within BCTC process render the technologies of jurisdiction through writing virtually inaccessible. In contrast, the IACHR is organised in such a way that this technology of jurisdiction represents a viable practice through which indigenous law and meaning can be represented in the body of international law.

III. The Technology of Precedent in an International Jurisdiction

During oral arguments at the IACHR the Hul'qumi'num are actually able to make reference to the specific jurisprudence of the Inter-American Commission. Because of the similar cases heard at the IACHR, the HTG were able to leveraged similarities of their case within an international context of indigenous communities. Is allowed the HTG to become part of the jurisprudence of the IACHR when it decided in favour of the admissibility of the case, connecting the HTG community to other efforts of indigenous peoples internationally. In this way, the HTG were brought in to genuine contact and connected to a growing body of law at international level.

To progress through the admissibility hearings the HTG have argued successfully in favour of harnessing themselves to the prior precedent that allows the exemption from the stipulation that it is necessary to exhaust domestic measures prior to approaching the Inter-American Commission. The lawyer for the HTG explicitly argues for the apparent connections through precedent to prior decisions regarding the case of the

¹⁶⁰ Lawyers Rights Watch Canada, “Robert Morales: Seeking Justice Elsewhere” February 23rd 2012, online: lrwc <<http://www.lrwc.org/video-seeking-justice-elsewhere/>>[*Robert Morales: Justice Elsewhere*] at 00h: 42m :36s.

Saramaka People¹⁶¹, the Xákmok Kásek Indigenous Community¹⁶², and the case of the Sawhoyamaya Indigenous Community in Paraguay.¹⁶³ In this way use of precedent as a technology for jurisdiction is quite evident, as HTG are now linked through precedent to a body of written decisions, which to a certain extent now constitute building block in the body of international law and jurisprudence. As a practice of jurisdiction, the legal precedents presented by the international sphere mediated the experience of the HTG at the threshold of its interaction with the body of international law. Examining all the assertions made by the HTG in their admissibility arguments, and treating does oral arguments as a text, is possible to see the ways in which technology of precedent within the jurisprudence of the IACHR enables the progression of HTG case. This appeal is made possible because of the prior body of previous decisions catalogued and referenced within the Inter-American Commission. These are illustrative of the ways indigenous communities can create connections within law and to each other via use of the jurisdictional technology of legal precedent.

In precise terms, the jurisprudence of the IACHR not only affirms the special connection between indigenous notions of land, ownership, culture, and identity – but explicitly recognises in its decisions the equality of other land ownership mechanisms and the existence of Indigenous law. The jurisprudence of the IACHR supports framing that embeds notions of communal property with the wellbeing of indigenous communities and the rights of those communities to the lands and resources that were traditionally theirs. In their report entitled “Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System”, they state at the outset that:

Preserving the particular connection between indigenous communities and their lands and resources is linked to these peoples’ very existence and thus “warrants special measures of protection.” The Inter-American Court has insisted that States must respect the special relationship that members of indigenous and tribal peoples have with their territory in a way that guarantees their social, cultural, and economic survival.¹⁶⁴

The written jurisprudence reflects a different conceptualisation of the notions of being with law and notions of other law. The jurisprudence no only affirms the special connection between indigenous notions of land, ownership, culture, and identity – but

¹⁶¹ *Case of the Saramaka People v. Suriname* (2007). Inter-Am Ct HR (Ser. C) No. 172, Preliminary Objections, Merits, Reparations and Costs at para. 96.

¹⁶² *Case of the Xákmok Kásek Indigenous Community v. Paraguay* (Judgment of August 24, 2010) Inter-Am Ct HR (Ser. C) No.214, Merits, Reparations and Costs.

¹⁶³ *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. (Judgment of March 29, 2006). Inter-Am Ct HR (Ser. C) No.146, Merits, Reparations and Costs.

¹⁶⁴ OAS, Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09 (2009).p 55.

explicitly recognises in its decisions the equality of other land ownership mechanisms and the existence of Indigenous law.

[t]his notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention... Disregard for specific versions of use and enjoyment of property springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.¹⁶⁵

The use of Article 21, equal protection under law, and its reference to different notions of land ownership along with the statement that legal protections would be illusory if the existence of other mechanisms for relating to the land were not acknowledged, makes a bold step towards a meeting place for lawful relations and the language of recognition. The use of legal precedent is only possible because of the jurisprudence that recognises indigenous law. Without that, these notions would be excluded from existing jurisprudence and the threshold for the entry would not be navigable.

IV. The Jurisdictional praxis of Categorisation at the IACHR

The jurisdictional arrangements are mediated by international convention, and flow from the founding document of the American Declaration of the Rights and Duties of Man. with regards to the general construction other legal processes within the IACHR, the meta-governance aspects of the jurisdictional practice of categorisation is mostly absent due to the absence of complex hierarchical structure. The case is mediated through a filter of human rights, rather than pre-filtered by prior categorisation into varying legal boxes. Regardless, there is still a very prominent jurisdictional question of category that acts as a gatekeeper for the threshold of the commission's purview. As has already been mentioned, by international convention, applicants to the IACHR must exhaust all domestic remedies before moving their arguments to the international sphere. However, this technology is perhaps the most obvious because it is configured through a specific legal process – namely a hearing – that determines admissibility of the case to the IACHR.¹⁶⁶

¹⁶⁵ *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. (Judgment of March 29, 2006). Inter-Am Ct HR (Ser. C) No.146, Merits, Reparations and Costs at para.120 ; *Case of the Xákmok Kásek Indigenous Community v. Paraguay* (Judgment of August 24, 2010) Inter-Am Ct HR (Ser. C) No.214, Merits, Reparations and Costs at para. 87. Cited in OAS, Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09 (2009).

¹⁶⁶ IACHR Hearing and Other Public Events “Session: 133 Period of Session; Date: Tuesday, October 28, 2008. Precautionary Measures and Petition 592.07 – Hul’qumi’num Treaty Group, Canada” online: cidh <<http://www.cidh.oas.org/Audiencias/133/B26HulquminumTreatyGroupCanada.mp3>>.

On the face of it, there are mechanisms in place to account for the negotiation of First Nations claims to traditional territory in British Columbia. Law does exist and it is the law of Canada, making it the only law in a philosophically modern sense of the word¹⁶⁷. The law of Canada is Canadian law. In fact, this is the assertion made by the government of Canada representatives at the Inter-American Commission on Human Rights at the two admissibility hearings. They maintain that the actions of the state through the existing constitutional protections and the prospect of Aboriginal title through judicial review demonstrate that even aside from the BCTC process that provides for the negotiation of modern treaties, there are still legal avenues available to the First Nations communities of Canada.¹⁶⁸ From this perspective, law does exist, and exists equally for all Canadians, as it is Canadian law.

Notably, the HTG successfully argue that the existing domestic remedies do not constitute any real measure of protection in a timely manner for their traditional lands. The commission agreed with HTG, condemning the processes of the British Columbia treaty commission and the access to Aboriginal Title. In the admissibility hearings, the Crown does make an attempt to bracket various aspects of the case in order to define them away from the jurisdiction of the IACHR. The federal government initially argues that they have provided sufficient domestic options for indigenous peoples to pursue the land claims in Canada. When this approach proves unsuccessful, the crown continues to categorise aspects of the case and their attendant responsibilities as being beyond the reasonable reach of the state.

Specifically, Canada argued that its failure to demarcate and thereby protect the lands of the Hul'qumi'num is based on the fact that there are overlapping claims to this land with at least eighteen other first Nations laying claim to land in Vancouver Island, British Columbia¹⁶⁹. This myopic focus on single layer jurisdiction is evident both in the Crown's actions at the BCTC process and this particular argument made at the international level, that competing and overlapping claims to jurisdiction free the crown from any responsibility to protect those lands. This is countered by the fact that First

¹⁶⁷ Costas Douzinas; Ronnie Warrington & Shaun McVeigh. *Postmodern Jurisprudence: The Law of the Text in the Texts of Law* (Abingdon, Oxon: Routledge, 1993). 21.

¹⁶⁸ See generally, IACHR Hearing and Other Public Events "Session: 133 Period of Session; Date: Tuesday, October 28, 2008. Precautionary Measures and Petition 592.07 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.oas.org/Audiencias/133/B26HulquminumTreatyGroupCanda.mp3>> [IACHR Session 133 HTG]; IACHR Hearing and Other Public Events "Session: 134 Period of Session; Date: Monday, March 23, 2009. Petition 592.07 and Precautionary Measures 110/07 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.org/Audiencias/134/20.%20P%20592%2007%20y%20MC%20110%2007%20Hul%20qumi%20num%20Treaty%20Group%20Canada.mp3>>.

¹⁶⁹ IACHR Hearing and Other Public Events "Session: 134 Period of Session; Date: Monday, March 23, 2009. Petition 592.07 and Precautionary Measures 110/07 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.org/Audiencias/134/20.%20P%20592%2007%20y%20MC%20110%2007%20Hul%20qumi%20num%20Treaty%20Group%20Canada.mp3>>.

Nations governments who are the authors of these so-called competing claims, have nonetheless filed amici briefs alongside the Hul'qumi'num petition that supports its endeavour, and declare themselves willing to negotiate together to resolve the legal implications of overlapping land tenure.

Another argument used by the federal government in its attempt at re-categorisation is the argument that the HTG case is primarily about compensation for the historic takings of the land. Historical wrongs might reasonably be outside the jurisdiction of the Inter-American Commission, as the original takings occurred in the 1800s, and the commission was set up in the 1990s.¹⁷⁰ The purview of the IACHR to hear such a case is an argument that is queried by the judge overseeing the arguments, however, the new destruction of the natural environment in recent years constitutes a contemporary context for the HTG's request for precautionary measures against the clear-cutting in the traditional lands while Canada addresses the unresolved land claims issues

The framing of these two arguments along with the initial challenge to jurisdiction illustrates the ways in which categorisation as a technology can have a profound effect on how persons, places, and events might enter into and belong to Law. In different circumstances, these arguments for reclassification might have been successful, further bracketing various aspects of the HTG case. Indeed, in order to proceed, the focus has been on recent destruction of traditional lands rather than compensation for the historic takings. In this way, the necessity of approaching specific legal interactions has caused the HTG to bracket aspects of their own understanding of the situation in order to move forward within the confines of the available legal spheres. The IACHR received submissions regarding the historical struggles of the HTG to find a legal solution, which informed the decisions made by the commission. However, negotiations of compensation are outside the purview of the commission and represent the temporal aspect of categorisation which limits the nature of legal relationships.

Categorisation is a practice of jurisdiction can have transformative results, as it directly and indirectly mediates the delineated steps through existing legal processes. In this situation, it is easy to see how the attempts at categorisation illustrate the means by which persons, places and events and even communities can be included or excluded in the narrative of lawful relations.

V. Authority and Authorisation in an International Human Rights Context

The problems associated with international law falls squarely within the purview of the jurisdictional look at the mechanisms for authority and authorisation. The technologies that attach persons, places, and events to existing legal framework are in some ways simpler at the international level. The language of rights as jurisdictional technology and the existing body of international jurisprudence have already been touched upon as consistent and flexible mediators of lawful relations. In contrast, the authority to speak in the name of the law and the mechanism by which that authority arrives is

¹⁷⁰ *Ibid.*

somewhat more complicated. The Inter-American Commission is authorised and given shape by the consent of the sovereign nations that are party to it. The legal and ontological arguments for human rights are harnessed to the language used in the decisions of the Commission and given the appropriate weight. However, despite The Commission's ability to conceive of other ways of being with law, and to filter those laws through its human rights framework, it is nonetheless limited by the most straightforward aspect of jurisdictional ordering. The Commission does not have the coercive authority, regardless of its judgement, to compel a country to abide by the decisions of the IACHR. The Commission might have the authority to speak in the name of the law as it has been agreed between nation-states, but without a means of enforceability, the decisions of the IACHR do not represent ways for other configurations of laws to enter domestic law through the impenetrable perimeter of sovereignty. The Commission can only ever speak to its own perimeter of law. In this way, to a certain extent, cases of this kind vacate jurisdictional theory for the realm of sovereignty and politics.

Aside from the limitations of international law, the connotations of authority with respect to jurisdiction still carry weight. Referring back to Peter Rush's account of jurisdiction and the action of speaking in the name of the law, we can approach this case from that particular aspect of speech. Implicit in the connotations of speaking aloud in the name of the law, is possibly the notion that there exists a community in existence to hear you. It is this aspect of speaking from the existence of law that is silent in some of the prior processes. We have seen how processes and technologies of jurisdiction mediate how those notions articulated.

Particular to the HTG context, any arguments made in the space of the BCTC process are unheard by any parties external to that endeavour, as the negotiations are kept confidential. If constrained by the perimeter set by Canada with regards to interest-based negotiations and the refusal to negotiate title to privately-held lands, any declaration of Hul'qumi'num truths or Hul'qumi'num laws remain unheard and therefore in some sense unspoken. Given that we might argue that Canada has vacated its duty to listen attentively and act in a fiduciary manner¹⁷¹, despite any utterance of the framing of indigenous law and truth in any negotiation process, there exists no one to listen. Canada is seemingly deaf to any such declaration, and nowhere in any of the texts generated by the case before the IACHR or the discussions of the BCTC process is there any reference made to the prospect of Hul'qumi'num laws.

Canada's disinclination to acknowledge Indigenous law is illustrated not just in the absent narrative adjacent to the British Columbia treaty process, but also in the way in which the parties at the IACHR speak about the case. The non-aboriginal government representatives approach the facts of the case with a different texture than the HTG. The Crown representative who argues the case before The Commission is recorded as saying the following:

¹⁷¹ Canada, Parliamentary Research Branch, *The Crown's Fiduciary Relationship with Aboriginal Peoples*, PRB 00-09E (Law and Government Division, Mary C. Hurley, 2000 - revised 2002).

The key to the allegations of violations in this petition appears to be the allegations in respect to the right property. In essence, the HTG alleges that Canada must demarcate the land contained in its claim to ancestral territory, and should have done so long ago. All other allegations of the petitioner flow from this central issue. Canada takes issue with all aspects of the petition. An essential element of its defence, however, is the significant gap between what the HTG *claim* is their property or their ancestral territory on the one hand, and on the other hand what in fact *are* the property rights of the HTG.¹⁷²

What is evident from this text of the oral arguments is the presumption of the Crown to authorise and limit the HTG property rights. This gap between "claim" and "are" so to speak uncovers not just the bias in the language, but the presumption that Canada has the authority to speak about the laws for the Hul'qumi'num Treaty Group. The federal representative goes on to say that "This claim has never been proven. It has never been subjected to a determination by a domestic decision maker". This assertion indicates a viewpoint that conceives of only one law for Canada, and the locus for the authority of that law rests firmly with the federal government. Despite its arguments before an international body, the arguments made by the Crown do not seem to reflect any understanding of flexibility with respect to other authorities other methods of authorisation. These arguments seem to reflect a position that conceives of authority is being mapped directly onto geography, making it synonymous with notions of territorial sovereignty.

Despite this intransigent view by federal representatives, it is clear from prior chapters that authority is not necessarily vested in territorial sovereignty, and it is this aspect of jurisdiction that allows one to distinguish it from discussions of sovereignty. While the Inter-American Commission might not have the authorisation to compel nations-states to comply with its decisions, it does represent an endeavour where jurisdiction is not mapped onto physical space, but extended through agreements and ideas to occupy the metaphorical space between nations. The scaffolding for the IACHR it is built around a jurisdictional authority that is vested outside a specific geography. While as an organisation it is still shaped by the building blocks of sovereign nations, it actually represents a jurisdiction that need not align itself with a particular place.

At the Inter-American Commission on Human Rights, the authority to speak in the name of the law is vested outside the specific spaces contained within typical notions of territorial sovereignty. Irrespective of this, this framing of the organising structure is not manifest in the oral arguments made by the Canadian state as is illustrated in its myopic focus and adherence to the one configuration of Canadian law vested in the authority other sovereign nation.

¹⁷² IACHR Hearing and Other Public Events "Session: 143 Period of Session; Date: Friday, October 28, 2011. Case 12.734 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.org/audiencias/143/36.mp3>>.

V1. Inauguration as a Praxis of Jurisdiction at Law's Threshold

Inauguration represents the broader questions of law, writ large so to speak. Conceiving of a jurisdictional address from the very limits of its capacity, jurisdiction represents the best approach from which to view the space outside law's domain. Law does not see very far past that which it does not encompass, however this notion of giving oneself the law implicitly extends the focus beyond the boundaries what already exists. To this extent, the IACHR is better able to conceive that which is beyond it.

In lectures given by the Hul'qumi'num Treaty Group's Chief Negotiator Robert Morales, it is clear that part of the motivation for bringing this case is that the "Inter-American Commission starts out with the premise of ownership" by the indigenous inhabitants of the land¹⁷³. While the assumption of ownership is not something overtly mentioned in the laws of Canada, the myopic focus on territorial sovereignty excludes the possibility of the above premise because it is not internally consistent with Canadian jurisdiction. In evaluating a space for the meeting place of laws and the conduct of lawful relations, this type of architecture is essential to the framing of any negotiations or decisions that are implemented by the Commission.

The creation of the space as one for the meeting place of laws is supported by the documents of the commission with respect to indigenous peoples and recognition of their traditional lands.

The right to indigenous communal property is also grounded in indigenous legal cultures, and in their ancestral ownership systems, independent of state recognition. The origin of indigenous and tribal peoples' property rights is, therefore, also found in the customary system of land tenure that has traditionally existed among the communities.¹⁷⁴

The critical part of this quote is the reference that is made to state recognition. The recognition of prior legal cultures is not foreclosed upon by a framework of human rights, and therefore has a place at IACHR. The more significant questions of "does law exist?" Are clearly evident in how the Inter-American Commission conducts lawful relations. In the interplay between sovereignty and inauguration, in the configuration where the community gives itself the law and thereby inaugurates itself in law as a formulation of their sovereignty, the existence and practice of the Hul'qumi'num Treaty Group as an independent entity before the IACHR certainly constitutes such formation. As a site or space for enunciation, the IACHR performed its purpose and provides a

¹⁷³ *Supra* note Robert Morales: Justice Elsewhere] at: 00h: 41m: 40s.

¹⁷⁴ *Case of the Saramaka People v. Suriname* (2007). Inter-Am Ct HR (Ser. C) No. 172, Preliminary Objections, Merits, Reparations and Costs at para. 96 Cited in OAS, Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09 (2009).

stage upon which the aboriginal governments that constitute the Hul'qumi'num Treaty Group can declare the existence of their own law.

Indigenous nationhood is evident from how the Hul'qumi'num comport themselves in the evidence before The Commission. The elder and medicine person from the Cowichan tribe introduces himself in the following manner when asked to identify his nationality for The Commission. "... Thank you, I am known as Loschiem in our community. My English name is Charlie, Arvid Patrick Charlie. My Nationality is...would be Canadian, but we're Coast Salish, (Hul'qumi'num language) Indian" ¹⁷⁵. This statement by Hul'qumi'num member Loschiem is indicative of the community and the way in which it conceives of its laws and practices, and how they relate to the overriding Canadian jurisdiction. Such a statement might have been articulated at the BCTC process, however, there is no way of knowing if this is the case without any written documentation. There would be no way this for such a declaration of indigenous nationhood to enter into the text or jurisprudence of Canadian law, and without witnesses, the state has no impetus to recognise a perspective that exists outside its own interpretations of correct lawful relations. As it is, the assertions and perspectives of HTG at least documented, and speak to a system of laws and culture that in no way needs validating by the Canadian the mechanisms beyond their acknowledgement of its existence. The IACHR creates the space for this utterance because it is designed in a way to create space for alternative lawful relations and in that respect takes responsibility for the equitable conduct of those relations.

¹⁷⁵ IACHR Hearing and Other Public Events "Session: 143 Period of Session; Date: Friday, October 28, 2011. Case 12.734 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.org/audiencias/143/36.mp3>> at 00h:15m :53s.at 00h:15m:15s.

CHAPTER 4. THINKING WITH JURISDICTION

I. Representations of Writing and Language

Chapter 1 introduced the notion of thinking with jurisdiction and why it can be considered a productive lens through which to filter concerns over the conduct of lawful relations. Chapter 2 analysed the British Columbia Treaty commissioned process and its interaction with the HTG through a selection of jurisdictional approaches. Chapter 3 addressed the meeting place of the Inter-American Commission on human rights and the way in which that influenced the jurisdictional assemblages that influence the relations between the Hul'qumi'num Treaty Group and the Canadian state. Chapter 4 will bring together these observations and compare the ways in which thinking with jurisdiction can uncover the machinery of inclusion or exclusion that operates at the threshold of legal relationships.

The technologies of writing and precedent came to the fore in their absence as a productive mechanism for change in the British Columbia treaty commission process as compared to the IACHR. Because the negotiations are kept confidential, the quasi-legal nature of negotiations operates at the far reaches of the mechanisms by which persons places and events are attached to the body of law. As representations of jurisdiction, the connection is drawn between the language and texts available surrounding the British Columbia Treaty Commission process and the jurisdictional technology of writing. Operating at the edges of legal relations is the ways in which language influences the conduct of lawful relations through jurisdiction. This is seen in the casual use of language by the participants in the negotiations. The way in which legal mechanisms are spoken about, and that extent thought about, influences the conduct of the legal actors and the communication between the parties. The vocabulary of non-aboriginal governments is indicative of the legal mechanisms they make available for indigenous communities. The use of the vocabulary of non-aboriginal and aboriginal governments is not one that is seen in the negotiations or comments by federal or provincial representatives. Using the vocabulary of aboriginal government as the frame of reference is absent even from most of the critical academic literature and Senate committee documents surrounding the British Columbia Treaty Commission process.

These BCTC negotiations, while secret, are the precursor to written documents that bind indigenous communities to particular ways of being with law for the foreseeable future. The ways in which the prospective relationships are discussed and formulated will naturally underwrite the outcome of treaty negotiations. The federal and provincial government negotiators have used the language of certainty and honesty that is written into the BC claims task force report and the commission documents to advance the agenda of interest-based negotiations, where certainty is conceived of as economic certainty, and defining the limits of possible remedies is interpreted as honesty. To this end, the non-aboriginal government representatives use what little is written down to manipulate the process in a way that defines what can be talked about

and how. To that end, this notion of symbolic violence put forward by Woolford's critique of the BCTC process is given shape. By defining the perimeter of lawful relations through language, the non-aboriginal governments make it difficult to speak and even think beyond the parameters that they engineer¹⁷⁶. In this way, the use of language works in both directions, both to continue the work of assimilation by reframing indigenous knowledge through colonial language, but also to perpetuate the jurisdictional configurations through language into increasingly formal documents that enclose indigenous law, policy, and culture within the perimeter of Canadian law. There is further work to be done from this perspective, a productive endeavour being a close look at the specific negotiation language over the years of negotiations and following the language through to the resulting treaty documents. From the perspective of legal language as a technology of jurisdiction, this type of investigation could provide a more robust look at how the language used by federal and provincial representatives shapes the entrance of aboriginal governments into the domain of Canadian law through jurisdictional technologies.

Despite the limits of available written documentation around the BCTC process, once the case moves into the international forum the arguments before the Commission are recorded, and this generates a text from which to build a picture of the Hul'qumi'num Treaty Group legal arguments and lived experiences. Unlike the subtle ways in which language was linked to jurisdiction in chapter two, the manifestation of jurisdiction as a technology through a practice of writing or the generation of the text is much more obvious. The fact that there is a record within the legal proceeding of the experiences of the Hul'qumi'num Treaty Group nations, already indicates the initial mechanisms by which they may contact with the network of international jurisprudence. Spoken aloud before an impartial third party and recorded, the arguments and experiences enter into the realm of jurisdiction.

However, the international sphere is not without a language of its own through which arguments must be filtered in order to be heard. In this case, it is not possible to escape jurisdictional ordering of some kind that organises the way in which the conflict of laws must be discussed. At the Inter-American Commission on Human Rights, this language and the attendant weight of law harnessed to it are manifest through the language of human rights. A human rights framework ontologically organises its mechanism for understanding around the individual, which is at once at odds with indigenous notions of collective property ownership. That being said, the IACHR in particular has mitigated the effects of this organising technology through its existing jurisprudence and reports that emphasise equality before the law - and with that the notion that respects the other laws of indigenous communities and in many cases the particular relationship with property.

As a technology of jurisdiction, the practice of writing down interactions in the legal sphere crafts the ways in which the conduct of law is approached and practised. Language as an extension of this writing process shapes the way persons, places, or events interact with the codified law. The use of this technology to either include or exclude from existing domains of law can either be written into the pre-crafted

¹⁷⁶ Supra note 67 [*Woolford Symbolic Violence*].

organisation of lawful relations or implemented by legal actors as a practice that has the capacity to generate an outcome of their own design.

While Canada and the province of British Columbia have the capacity to use this approach in its informality to subdue and subvert indigenous law and nation-building¹⁷⁷, the readily available texts at the Inter-American Commission on Human Rights quite openly attempt to create a common language to open a border between existing laws and the persons, places, or events, that might be tethered to them. While both situations use language in arguments and negotiations as precursors to written documents that engineer the type of belonging to law, the attendant processes of the IACHR attempts to mitigate any bias in the crafting that underwrites that platform. Conversely, there is evidence to suggest that Canada manipulate the law through language to exclude indigenous notions of law, property, and culture.

The weight and legitimacy of any declaration or framing of indigenous law are absent from the language used by the non-aboriginal governments. The BCTC process has failed to exist as a meeting place of laws for the HTG, as the laws of the Hul'qumi'num Peoples go unrecognised and unheard. As a meeting place for laws, the IACHR provides a vastly different space both in the form and function of the prospective creation of lawful relations. as a party outside the sphere of Canadian interests, the IACHR by its very nature provides a separate space in which to bear witness to the voices of the Hul'qumi'num Treaty Group. Even if Canada chooses to remain deaf to the arguments and legal narrative of the Hul'qumi'num Peoples, the mere fact of a different space makes the voicing and demarcation of indigenous lands and narrative a new endeavour. By considering a jurisdictional account of this movement of the conflict from the BCTC to the IACHR, we are able to see that the law that exists is 'Canadian law', and while laws of the Hul'qumi'num do exist and run in parallel, they have no power through jurisdiction to be acknowledged by the Canadian state, and no current mechanism for attachment to the main body that is Canadian law.

II. Precedent and Jurisprudence

As with language and the act of writing, the technology of precedent can be used as a piece of jurisdictional machinery to tether persons, places, or events, and in some cases, communities¹⁷⁸ to a more extensive network of law both spatially and temporally. As a cornerstone of common law, the considerations of precedent feature largely in all aspects of formal arrangements of law, in part because it carries with it notions of liability. This situates parties to a conflict of law on opposite sides because the words used to define an issue will have ramifications one way or the other. Regardless of its implications for downstream legal liabilities, the practice of precedent

¹⁷⁷ Taiaiake, Alfred. "Deconstructing the British Columbia Treaty Process [Paper in: Indigenous Peoples and the International Sphere" (2001) Balayi: Culture, Law, and Colonialism].

¹⁷⁸ See generally *Supra* note 27 [Kaushal].

still represents the primary way in which persons, places, ideas, and communities become known to the body of common-law within the Canadian state.

In the analogy of gatekeeping as it applies to the use of jurisdictional technologies, the legal actors can take the place of the gatekeeper, where the technology itself represents the actual gate. In the case of the BCTC process, the federal and provincial governments are wary of admitting anything in through that gate that does not fit a predetermined size. Once inside the boundaries of law, existing mechanisms have the opportunity to attach to notions of liability, injustice, and restitution - meaning that there are consequences that overshadow the practice of making a connection with those terms and all the antecedent laws that are tethered to them. The challenges faced by indigenous peoples in the negotiations with a powerful state entity are often understood through other forms of ordering or effect, meaning that they are described in their political, social, and economic frames of reference rather than as a piece of jurisdictional machinery. The importance of a jurisdictional re-description of the encounters is that with the will to change the machinery, the processes can be reconfigured and inequalities mitigated.

In contrast the jurisdictional technology of precedent that might limit the negotiations at the BCTC process, the Inter-American Commission on Human Rights functions in a similar way, but with wholly different effect. While the notion of setting a dangerous precedent shaped the quality and conduct of lawful relations at the British Columbia Treaty process and excluded the Hul'qumi'num Treaty Group and aboriginal governments from ways of entering Canadian law, the existing use of legal precedent at the Inter-American Commission explicitly allows for the entrance of the HTG to international law in order to mitigate those power imbalances that often characterise relationships between aboriginal and non-aboriginal governments. The permissive aspect of this rule of precedent depends entirely on what has gone before and the gatekeepers of the decisions. The entrance of the Hul'qumi'num to international law is an example of how the jurisdictional technologies of categorisation and precedent crafted that attachment of the HTG to international relations. Having crossed that threshold via the admissibility hearings, the case as it is argued by the Hul'qumi'num Treaty Group is now part of the jurisprudence of the Inter-American Commission on Human Rights and is established, once a decision has been rendered, as a link in that chain of *stare decisis*.

In each case, while the jurisdictional technology remains, in essence, the same, the shaping of lawful relations was in turn influenced by the actions of the gatekeepers and a pre-existing body of jurisprudence or accepted practice. As mentioned in chapter one, a *praxis* of jurisdiction does not have an ethic biasing it necessarily towards inclusion or exclusion, merely one of responsibility towards the conduct of lawful relations. It does, however, have vastly different effects based on how it is implemented and approached. As Kaushal notes, "This is jurisdiction's multivocality: it looks different in different places and has different meanings in different circumstances"¹⁷⁹. Despite using the same jurisdictional lens, the outcomes from different facets can generate widely different accounts of law. This responsibility, then, rests within the offices inhabited by the legal actors.

¹⁷⁹ *Ibid* at 762.

III. The Scaffolding of Categorisation

The use of categorisation as a jurisdictional tool can preconfigure the shape of lawful relations. An analogous term for this which alludes to that shaping is the term meta-governance, where the content of a question of law is already decided by the jurisdiction in which conflicts are assigned.

This process of categorisation features quite strongly in the BC treaty negotiations. By drawing the perimeter around what can and cannot be negotiated, the Crown engineers through language the ways of coming into and being with law. Similarly, the practice of categorisation within law's domain preordains the kind of relationship available to those who make contact with it. In the specific context, the most salient and contentious point of legal classification is the insistence by the Crown that any lands negotiated at the process must be transferred in the form of fee simple title. This specifically precludes a communal ownership of the land, while at once also extinguishing any other kind of interest in land. Not only does this classification arrange the jurisdiction so as to shape the prospective legal relationship, this particular classification of fee simple explicitly negates the possibility other relationships that might already exist specific to aboriginal peoples.

Fee simple title to land arrives at the bidding of the Crown. The authority over land arrives via that classification through the auspices of the sovereign state and all its colonial attachments.¹⁸⁰ This is in contrast to the *sui generis* nature of the actual title over the land that is generated if Aboriginal Title is confirmed by the Canadian courts¹⁸¹. This insistence that the land be classified as fee simple dictates the kind of legal relationship that aboriginal peoples could have with their land.

This type of prearranged legal categorisation determines the way in which persons and communities, events or ideas might be attached to the body of existing law. Similar in scope is the practice of bracketing uncomfortable notions that is undertaken by the non-aboriginal governments. This practice where specific subjects are unilaterally set aside and excluded from the prospective landscape of lawful relations also necessarily underwrites the type of content and way interacting with law that can enter into a negotiation narrative. The processes of categorisation and bracketing define the parameters or boxes into which the HTG or any aboriginal government must fit their understanding and the articulation of their needs, laws, cultures, and truths in order to participate in negotiations.

Unlike the BCTC process, the Inter-American Commission on Human Rights does not engage in this boxing of content into possible legal outcomes. It does not have the same kind of hierarchical structure that contributes to this notion of meta-governance where the content is arranged based on the preconfigured jurisdictions. It does,

¹⁸⁰ Blomley, Nicholas. "The Ties That Bind: Making Fee Simple in the British Columbia Treaty Process" (April 2015) 40:2 *Transactions of the Institute of British Geographers* 168 – 79.

¹⁸¹ *Supra* note 8 [Delgamuukw].

however, have a formalised process, in that admissibility hearing to determine if it is appropriate for a case to be brought before the commission is in itself a categorisation process, although the outcome is either to be heard or not heard, not to enclose the space in which lawful relations are permitted.

At the entrance of the HTG to the domain of the Inter-American Commission, Crown representatives attempted similar techniques of bracketing and categorisation to exclude various aspects of the case and defend against allegations made by the Hul'qumi'num. They categorised the content as either outside temporal jurisdiction of The Commission or, as a partial defence to their inaction, the existence of competing claims of other First Nations communities to the same land claimed by the Hul'qumi'num Treaty Group. None of these attempts to bracket issue were in any way successful, however, the only reason that they were not was because there was an independent third party to adjudicate these attempts to remove certain portions of the Hul'qumi'num Treaty Group narrative from consideration.

This practice of categorisation is perhaps the most apparent use of jurisdiction as a tool to preclude certain engagements with law and thereby shape lawful relations. The manner in which this can be done depends to some extent on the mechanism for authorisation which will be addressed shortly. However, as a praxis of jurisdiction as it is applied to the varying contexts in which the Hul'qumi'num Treaty Group finds themselves, the technology of categorisation plays a pivotal role in determining how lawful relationships are negotiated. This technology can be transformative in what it allows or disallows in the way in which it shapes the prospects for engagement between individuals and communities as they make contact with each other through law.

IV. Authority and Authorisation

As previously discussed, any notion that thinking with jurisdiction is precisely split into these particular approaches of technologies, authorisation, and inauguration is misleading. The practice of jurisdiction is properly a holistic approach applied from any multitude of directions to an examination of the ways, manners, and modes of being with law. However, the locus of authority and authorisation is when the broader questions of jurisdiction become more evident in the shaping of legal interactions.

Within the British Columbia Treaty Commission process, it would not be an overstatement to assert the Crown and the province of British Columbia had a vested interest in maintaining the dynamics of power that are reinforced by the locus of authority vested in the presumption of Canadian sovereignty. That process of justification for initial takings when it comes to land claims disputes is where the aspects of sovereignty and the politics of colonialism overlay this mechanism of tracing and justifying the jurisdiction. The re-enactment of the initial violence of sovereignty through the mechanisms of established Canadian law would be the purview of studies specific to sovereignty. However, the relationship that authority has with the downstream technologies of jurisdiction, and thinking of jurisdiction as a holistic practice, it is possible to see how the acceptance of the locus for authority as a

reciprocal and reinforcing relationship with other practices of jurisdiction.

Canada has a long-standing policy of not engaging in any legal remedy where they are not the final authority for the conduct of law, although with the hierarchy of a sovereign state, escaping the crown as the final authority is difficult. By acknowledging and accepting the authority of the Crown and all its antecedent legal practices, the options for aboriginal governments decrease and are assimilated into the narrative and workings of the Canadian system whose founding authority arrives via a denial of anything beyond itself.

However, there is more to authority than the power to compel and exclude, although that would seem to characterise Canada use of it. Returning to this notion of the speech of law and the authority to speak on its behalf, it is evident that within the BCTC process the HTG lack both the authority to speak on behalf of a law that is not theirs, and the space in which to declare their own. Their only recourse is to challenge that mechanism of authorisation that validates the actions of non-aboriginal governments and so refused to engage with processes that would only reinforce the authority of the Canadian nation-state.

In contrast, the Inter-American Commission on Human Rights is limited and shaped by its authorising mechanism. The remedies available, as with any international instrument, are limited to an understanding of the inviolable sovereign state. While the Inter-American Commission on Human Rights might have the space and authority to speak in the name of the law, it does not have the coercive mechanism to enforce its decisions, as it is authorised via the consent of the member nation states. This means that Canada is free to ignore the decisions of The Commission, although it would be ill-advised to do so. Nonetheless, the jurisdiction of the IACHR does not practically extend to authority over the practices within a sovereign nation.

Nonetheless, the IACHR does represent a mechanism for authorisation that extends beyond territorial jurisdiction. The preoccupation with authority that maps precisely on to the sovereign state forecloses on the thought that authority might be generated and organised in different ways and thereby allow for different ways of belonging to law. While the IACHR is configured by the participation of nations within the Organisation of American states as consenting sovereign jurisdictions, the use of human rights locates the ontological foundations for authorising the decisions both in the consent of the governed as it were, but also in the legal and philosophical foundations for the human rights dialogue. This extends jurisdiction in a way that is not bounded by territorial sovereignty but rather exists in the space in-between. The IACHR is not entirely free of sovereignty as a constituent part, however, it can present a different arena for processes, places, and events to be tethered to a legal framework that is rooted in something partially outside the colonial hierarchies reproduced by territorial sovereignty.

The utility of international law as a partial escape from the stranglehold of territorial sovereignty can be seen but the comparison between the reinforcing structures of jurisdiction through authority in the British Columbia Treaty Commission process, in contrast with the different modes of authorisation available through the human rights arguments at the Inter-American Commission on Human Rights. However, the viability and effectiveness of a right-discourse based account of indigenous self-government

and property rights is one that does not go undisputed. The framing in terms of human rights in international law still shapes modes of jurisdiction through the nation-state, and the "saltwater thesis" ratified by the UN general assembly established the limits of decolonisation whereby only those locations separated by water or geographically separate from the colonising power could invoke self-determination.¹⁸² Nevertheless, the human rights dialogue contributes a platform through which other notions of law can be communicated, even if the main categorisation and framing of the Inter-American Commission on Human Rights occurs through the format of the existing nation-state. The human rights aspect of the Inter-American Commission as it is compared with the informal dispute resolution process of interest-based treaty negotiations still indicates that in this case, human rights provides a possible jurisdictional vehicle for the meeting place of laws.

V. Inauguration and the Meeting Place of Laws

The framing of jurisdiction through inauguration addresses the larger metaphysical questions of jurisdiction, and therefore the threshold of law at the limits of its capability. This is where jurisdiction takes a step back, so to speak, to re-describe the parameters outside of its existence. The implication with aspects of authority and authorisation is that it relies on a context where the speech of law can be heard. When querying "whose law?", the answer rests with the authorship that organises the jurisdictional mechanisms downstream of its original shaping. The initial moment when law comes into existence is where that initial speech of law inaugurates its own existence, arguably followed closely by notions of sovereignty – although that formulation is somewhat contested.

The acknowledgment of the creation and perimeter to existing law has implications for the British Columbia Treaty Commission process as well as the Inter-American Commission on Human Rights. The BCTC seems wholly incapable of addressing the assertions of law made by indigenous communities despite a well-established history of self-government and community structure. In practice, Canadian law seems incapable of questioning its own jurisdiction and in this way excludes any prospect of a consideration of the different ways of entering in to and belonging to law from perspectives external to the sovereign framework.

In querying if law exists in the first place,¹⁸³ a metaphysical perspective on jurisdiction locates this as the first question of law. It is one of the few viewpoints that acknowledges the space around law's terrain, both physically and temporally. By doing so it does not pre-suppose the existence of the current legal order, and in the case of the IACHR, allows for the presumption of Indigenous ownership in contested traditional lands rather than the presumption of sovereign ownership that the

¹⁸² Taiaiake, Alfred. "Rethinking self-determination: Lessons from the Indigenous-Rights discourse" in Jen Sai eds. *The Movement of Movements: Part 1: What Makes Us Move* (Oakland, CA, USA: PM Press, 2017) 203.

¹⁸³ *Supra* note 30 [*Jurisdiction*].

community must disprove or renegotiate.

The description of the space occupied by a legal entity through the widest lens of jurisdiction allows for the prospect of creative outcomes to questions of laws existence and extent. Overlapping jurisdictions and jurisdictions based on that of ideas rather than territory are not automatically excluded from the conception of what it means to belong to law and interrogate the mechanisms of attachment and the creation of relationships at the threshold of entry and exit.

VI. The Conduct of Lawful Relations

The practices of jurisdiction configure the shape of lawful relations. The approach of thinking with jurisdiction can be divided in a multitude of ways, although in this case it has been approached from the technologies of representation, the modes of authorisation, and the questions of inauguration. This project has taken the multilevel approach of unravelling the progress of one particular case by approaching it from the varied perspectives generated by a *praxis* of thinking with jurisdiction. As a result, If Canada is to take seriously an ethic of the responsible conduct of lawful relations, the analysis of the jurisdictional machinery that underwrites the domestic processes in comparison to the international ones indicates that the jurisdictional mechanisms need to be rewritten.

An ethic of jurisdiction is mentioned elsewhere in this text, however an account of the conduct of lawful relations is incomplete without acknowledging how that ethic sits in relation to the *praxis* of jurisdiction. Jurisdiction as a critical enterprise is concerned with the quality of legal relationships. In order to have a relationship one has to have parties to said relationship and a way of making an evaluative judgement about how that relationship is manifest. A *praxis* of thinking with jurisdiction applies a magnifying glass to the scaffolding of the living processes that shape lawful interactions. It also unveils landscapes of legal thought and practice that underpin how that scaffolding is built and implemented. As mentioned briefly in earlier chapters, this *praxis* does not contain within it a judgement about the value of the processes it uncovers. To understand the quality of lawful relations, an ethic of responsibility must sit adjacent to the jurisdictional methods and acts as a means of evaluating the quality of those relationships, which was the avowed aim of the jurisdictional endeavour at the outset.

The salient point in this is that there must be individual or parties in this relationship, and beyond that those who participate or mediate and as such they play a key role as legal actors or law holders. As we have seen, those who inhabit key positions as gatekeepers at the limits of law's capacity wield a delegated authority vested in their office. Beyond the ways in which human beings act towards one another, those involved in the legal system are authorised through jurisdictional mechanisms to act in the name of the law. This could be judges, government officials, legal representatives – all these have the capacity to influence who is added to the body of existing law, along with how and to what extent. It is to this position of responsibility that one has to attach an ethic, as these are the authors of the language of law; the builders of the scaffolding of legal relationships.

It is in this manner that McVeigh and Dorsett attach an ethic of responsibility to the office of the jurist when considering the engagement with a jurisdictional endeavour¹⁸⁴. Beyond the responsibility vested in the office that each law holder may inhabit, the practice of jurisdictional thinking is to consider in its way of thinking the scope and humanity of lawful relationships. Dorsett and McVeigh emphasise this in the final chapter of their book on jurisdiction, saying;

...the ethic of office has been ordered around the practice of humanising law and acknowledging forms of human measure and of common humanity. How this is done is as much a matter of acknowledging the limits of office as of the acknowledgement of human relations.¹⁸⁵

While the ethic of responsibility is not a fully developed methodology as such, as admitted by the authors, it achieves the end of pairing the method of thinking with jurisdiction with the ability to evaluate and be critical in the sense of discerning the flaws within or beyond a system of law when situated within a pertinent context. In this instance that context would be in evaluating how the different jurisdictional mechanisms and technologies were used – intentionally or unintentionally- by the law holder in both the domestic and international spaces. The project has been to add texture and a means of evaluating the quality of lawful relations between the Non-Aboriginal governments of Canada and the Aboriginal Governments and representatives of the Hul'qumi'num Peoples. This critical enterprise that is based on thinking with Jurisdiction allows us not only to consider how the technologies and forms of jurisdiction act to attach persons, places, and events to Canadian law, but also to consider the quality of the relationships that are inaugurated or excluded. In identifying the inconsistencies that are revealed by paying attention to the jurisdictional landscape, it means that there is also a locus from which identify problems and to attempt change.

The ethic of responsibility is tightly woven in to the fabric of a praxis of jurisdiction, particularly when it touches on authority and authorisation. Thinking about the BCTC it is easy to see where the issues lie when authority for the speech of law, which would naturally flow from the legislature, is delegated to a representative with instructions on what they are and are not allowed to negotiate. This authority to speak in the name of the law, but only to a limited extent, means that this office of negotiator as law-holder is undermined by the legitimacy of what they are able to execute. And yet, the office is one that should encompass all possibilities if the treaty process of negotiation between equal nations is adhered to as it is supposed to be. To think jurisdictionally about the conduct of lawful relations in this instance is to think about the flow of authority through the legal system and the difference between being designated authority and given authorisation.

This ethic of responsibility attached to the office of the jurist is aptly located in those that speak in the name of the law and who act for those who do. We have seen many examples of this and it is in them, as the architect or participant to the legal relationship that can ultimately influence its humanity. The ethic of the office of

¹⁸⁴ *Ibid.* 26

¹⁸⁵ *Ibid.* 140

the jurispudent, while inhabiting numerous manifestations, ultimately in this case rests with the Canadian state. While there is arguably an ethic of responsibility attached to the legal offices inhabited by individuals, in this case that obligation to act in a responsibly manner and be judged accordingly rests inescapably with the Canadian government. In 2017 the department of Justice released the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*. Of the ten principles outlined by the document regarding Canada's conduct, some do touch on the right of indigenous peoples to self-determination and self-government. Specific to acting in a responsible manner however number three states that the Government of Canada "recognises that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous people".¹⁸⁶ This statement, along with the longstanding fiduciary relationship that should govern the actions of the Government of Canada when it relates to Indigenous Peoples, attaches McVeigh and Dorsett's ethic of responsibly to those who would act on behalf of Canada with respect to the relationship to Aboriginal governments.

I would also contend that the Government of Canada has a duty to conduct themselves with an ethic of responsibility not just for the jurisdictional consequences flowing from those who inhabit the office of the jurispudent, but also for the conduct of law. I would argue that inherent in this ethic of responsibility with respect to the conduct of lawful relations is the notion of equality between parties and in law. Given the uneven landscape that has been unveiled by this jurisdictional approach to thinking through the quality lawful relations, it could be argued that this fundamental inequality is a result of the inability of Canadian law to undertake a decolonising task of looking beyond itself for sources of law. In that case, equality and an attendant ethic of responsibility as it is construed in this context might be interpreted to mean that lawmakers and legal actors have a duty to embrace the multicultural heritage of Canada. It is evident from the jurisdictional approach in this thesis that the foundations for Canadian law do not represent a configuration that enables different notions of law in a multicultural Canada.

In comparing the two venues for legal arguments, it is clear that an ethic of responsibly is not being adhered to with respect for the conduct of lawful relations within the BCTC Process. By removing themselves from domestic law, the Hul'qumi'num Treaty Group move their arguments for the right to their property within Canada to an international forum where the articulation of the existence of aboriginal law, culture, and property are given a different texture and are correspondingly heard differently. The inbuilt shaping of legal space so as to influence the human relationships that are latterly defined by Canadian law make speaking of first Nations laws and territories a difficult prospect. Despite the jurisdiction vested in its universal application to human rights, IACHR presents clear space in which to create lawful relations because the underlying structure does not preclude notions of indigenous knowledge and law. Canada has a fiduciary duty in its actions towards first Nations communities, and in that respect it would follow that it has a responsibility for its practices and processes. The ethic of responsibility attached to a critical approach of thinking with jurisdiction allows for commentary on texture and quality of the legal relationships in the language of

¹⁸⁶ Canada, Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous People*, (February 2018)
Online: <<https://www.justice.gc.ca/eng/csj-sjc/principles.pdf>>

authority.

Unfortunately, recent authorship raises some doubt as to the ability of those who inhabit the office of the jurist to effectively be able to act other than the way in which they have been. That ethic of responsibility attached to those who would speak in the name of the law does not evolve in to change if the law-holders in question are still unable to see the jurisdictional technologies that shape the living tree of common law. Jill Stauffer comments that “settler colonial ways of perceiving and inhabiting worlds fail to acknowledge and remember and appreciate and honour as equal indigenous lives and indigenous ways of world building -and that’s an ethical failure with deadly consequences”.¹⁸⁷ In speaking of the way in which the trial judge in *Delgamuukw* interacted with the Indigenous narrative with respect to understanding jurisdictions beyond his own, she notes that he seemed incapable of seeing that “...Modern law is as much of a mythology as is the story of the supernatural bear that he cannot make himself hear”¹⁸⁸.

The need to disrupt the thought pattern that inhabits western legal practice and is in fact what this *praxis* of jurisdiction is able to do, although the prospect of its utility in bringing about that disruption is based on the ability of those participants within the legal system to engage with a critical approach to law through thinking with jurisdiction. Regardless of the duty vested in those who act as gatekeepers to the tree of modern Canadian law, this ethic of responsibility remains unrealized if those within the system are not able to think differently about the forms of law they inhabit and reproduce.

VII. Concluding Remarks

Thinking with jurisdiction is a practice of approaching the conduct of lawful relations through the ways those relationships are shaped by the underlying architecture of law. Because the notion of a *praxis* of jurisdiction describes the threshold at which bar organises and makes contact with persons places and events, these modes of jurisdiction can be leveraged to understand the underlying architecture that represents the contact point in the shaping of lawful relations either on its smallest scale or its largest. Jurisdiction as a critical endeavour addresses the existence and articulation of law as well as how it interacts in everyday life. The approach of a *praxis* of jurisdiction does not have a preconceived notion of what the law should or should not do. It does, however, have an ethic of responsibility with respect to the conduct of lawful relations. In this reading of jurisdiction, that ethic of responsibility is translated to the cornerstone of jurisprudence in the equality before the law.

¹⁸⁷ Stauffer, Jill. “Can Law Be Fair to *Delgamuukw*? A Panel on Legal Violence and Temporal Resistance in Law Process.” *University of Ontario Institute of Technology: Technologies of Justice Conference* (January 26 2018) Online :<<http://socialscienceandhumanities.uoit.ca/legalstudies/media-hub1/technologies-of-justice-conference---2018/jill-stauffer-can-law-be-fair-to-delgamuukw-on-legal-violence-and-temporal-resistance.php>>. at 00:05:54

¹⁸⁸ *Ibid.* at 00:10:48.

A *praxis* of jurisdiction has been used to examine the Hul'qumi'num Treaty Group's arguments before the Inter-American Commission on Human Rights. Prior to its engagement with the human rights discourse, the HTG interacts with the domestic British Columbia treaty commission and a contrast is drawn between those two processes via the filter of the jurisdictional lands. As the two processes are interrogated and compared, it becomes evident that the jurisdictional technologies of writing, precedent, and categorisation along with the modes of authority and inauguration can be used together to mediate both the inclusion and exclusion of persons, places, and communities from the body of law. In this case, these jurisdictional processes are being mobilised by the non-aboriginal governments in Canada to manipulate the domestic land claims processes and to limit the ways in which First Nations communities can belong to existing Canadian law.

Canada's myopic preoccupation with territorial sovereignty and exclusive control over the legal process precludes it from considering other ways of belonging to law. In truth, the practice of categorisation does a lot of the work of jurisdiction, however, this does not exclude the possibility of overlapping jurisdictions, and indeed that already exist within existing frameworks. Canada's insistence that there be only one law and one corresponding truth is inconsistent with any efforts to engage with honest alternative dispute resolution, which should be the hallmark of the British Columbia Treaty Commission process. This would indicate that Canada's intransigence is the reason for the failure of the BCTC process, and far from engaging with this process in the spirit in which it was designed, the jurisdictional technologies and assemblages are actually used to reinforce the persistent assumptions of Canadian sovereignty and legitimacy.

Given the resounding feedback from academic literature and government bodies alike, the government representatives cannot be unaware of the criticisms levelled at the domestic process. As it is, Canada's persistence in this vein constitutes a use of jurisdictional practice to exclude notions external to the dominant authorising structures and enclose other notions of law outside the domain of Canadian negotiation, relegating them to categories no longer relevant with respect to contemporary negotiations with First Nations governments.

The authorising structure for land claims negotiations and land transfers reinforces existing hierarchies and lawful relationships that are shaped by premises that arrive through the colonial history of Canada. Despite the capacity of federal and provincial governments to inaugurate different jurisdictions and create new ways of belonging to law, they have remained silent and unmoved with respect to the creation of responsible lawful relationships.

Despite an organising structure that on the face of it is quite contrary to communal land ownership desired by the HTG, the human rights language at the IACHR proved to be a better platform for the meeting place of laws, mediated by the pre-existing jurisprudence that seeks to overcome the colonial assumptions of Crown ownership and entitlement. While the international place of the Inter-American commission means that it does not have the authority to enforce any of its decisions on sovereign jurisdictions, it does make the space for a different articulation of lawful relations and a new addition to indigenous land claims jurisprudence in the international sphere.

Despite formal mechanisms of coercion, the IACHR can encourage a different dialogue between the HTG and non-aboriginal governments so that the laws and assertions of the Hul'qumi'num peoples do not go unheard and undocumented.

Despite not finding a way to equitably belong to Canadian law, HTG has found an entry point via the language of human rights to an international jurisprudence that respects the right of the Hul'qumi'num Treaty Group to speak in the name of their own law and knowledge. This international sphere can act as a meeting place for laws without the overt and covert workings of jurisdictional technologies co-opted to reinforce the premises of colonial rule and sovereignty. Regardless of any decisions made by the Inter-American Commission, the fact of the speech of law in the utterance of jurisdiction adds to the texture of First Nations land claims with respect to Canada. The quality of the belonging to international law and the mechanism by which it was mediated reinforces the importance of the content and language used by legal actors as they negotiate the particulars of belonging to law and what that could mean for varying communities. The respect of the international sphere and the jurisprudence that assumes indigenous knowledge and law without resorting to an adversarial mechanism is imperative to any further shaping of interactions between the Hul'qumi'num peoples and the governments of Canada.

Given the actions of the non-aboriginal government representatives, it cannot be said that Canada is responsibly conducting a value-driven engagement of lawful relations. With the ethic of responsibility and equality in mind, the jurisdictional approach to the British Columbia Treaty Commission identifies the way in which the technologies and machinery of jurisdiction are used irresponsibly to exclude Indigenous nation building, law, governance, and knowledge. This shading of the political precludes the jurisdictional mechanisms from reaffirming and enabling full and adequate participation of the Hul'qumi'num peoples in the legal life of Canada.

BIBLIOGRAPHY

LEGISLATION

British Columbia Treaty Commission Act. SC 1995, c.45. Online: <<http://laws-lois.justice.gc.ca/eng/acts/B-8.5/>>.

Canadian Charter of Rights and Freedoms, s.1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. Online: Department of justice <<http://laws-lois.justice.gc.ca/eng/Const/page-15.html>>.

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No.5.

Indian Act, RSC 1985, c. I-5.

Royal Proclamation of 1763, R.S.C. 1985, App. II No. 1.

CANADIAN JURISPRUDENCE

Calder v A.G. (B.C.), [1973] S.C.R. 313, 7 C.N.L.C. 91, [1973] 4 W.W. R. 1, 34 D. L. R (3d) 145, (S.C.C.) [*Calder*]

Delgamuukw v British Columbia, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14, 153 D.L.R (4th)193, [*Delgamuukw*].

R. v Sparrow, [1990] 1 S.C.R. 1075, [1990] 3 C. N. L. R 160, [*Sparrow*].

Reference re Meaning of the Word "Persons" in s. 24 of British North America Act, [1928] S.C.R. 276, [1928] CanLII SCC 55, Online: <<http://canlii.ca/t/fslfx>>.

Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79.

Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

Rodriguez v. British Columbia (Attorney General) [1993] 3 S.C.R. 519.

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256.

INTERNATIONAL MATERIALS

American Declaration of the Rights and Duties of Man, Ninth International Congress of American States, 1948. Online:
<<http://hrlibrary.umn.edu/oasinstr/zoas2dec.htm>>.

Case of the Saramaka People v. Suriname (2007). Inter-Am Ct HR (Ser. C) No. 172, Preliminary Objections, Merits, Reparations and Costs at para. 96.

Case of the Sawhoyamaya Indigenous Community v. Paraguay. (Judgment of March 29, 2006). Inter-Am Ct HR (Ser. C) No.146, Merits, Reparations and Costs.

Case of the Xákmok Kásek Indigenous Community v. Paraguay (Judgment of August 24, 2010) Inter-Am Ct HR (Ser. C) No.214, Merits, Reparations and Costs.

Hul'qumi'num Treaty Group, "Hul'qumi'num Treaty Group Observations of the Merits of the Case: Inter-American Commission on Human Rights in relation to Case No 12.734 (Canada)" Case Comment, (January 22, 2010).

Hul'qumi'num Treaty Group, "Petition to the Inter-American Commission on Human Rights submitted by Hul'qumi'num Treaty Group against Canada", Case documents: Petition, Volume 1 (May 10, 2007).

Hul'qumi'num Treaty Group, "Petitioner's Summary of Presentation to the Inter- American Commission on Human Rights During 143rd Period of Session in relation to Case No 12.734 *Hul'qumi'num Treaty Group v. Canada* submitted by the Hul'qumi'num' Treaty Group", Hearing summary, (October 17, 2011).

IACHR Hearing and Other Public Events "Session: 133 Period of Session; Date: Tuesday, October 28, 2008. Precautionary Measures and Petition 592.07 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.oas.org/Audiencias/133/B26HulquminumTreatyGroupCanada.mp3>>.

IACHR Hearing and Other Public Events "Session: 134 Period of Session; Date: Monday, March 23, 2009. Petition 592.07 and Precautionary Measures 110/07 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.org/Audiencias/134/20.%20P%20592%2007%20y%20MC%20110%2007%20Hul%20qumi%20num%20Treaty%20Group%20Canada.mp3>>.

IACHR Hearing and Other Public Events "Session: 143 Period of Session; Date: Friday, October 28, 2011. Case 12.734 – Hul'qumi'num Treaty Group, Canada" online: cidh <<http://www.cidh.org/audiencias/143/36.mp3>>

OAS, General Assembly, Charter of the Organisation of American States. A-41 (1948).

OAS, Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09 (2009).

OAS, Inter-American Commission on Human Rights, *Petition Admissibility: Hul'qumi'num Treaty Group Canada*, Petition 592-07, Report No 105/09 (October 30, 2009).

OAS, Inter-American Commission on Human Rights, *Case 12.761 Merits: Garifuna Community Of Punta Piedra And Its Members Honduras*, Report No 30.13 (March 21, 2013).

Mabo v Queensland, [1992] 5 C.N.L.R. 1, (1992) 107 A. L. R. 1 (H. Ct. Aust.).

United Kingdom, Home Office, *Manual of Guidance and MG Forms Version 8* (Home Office Asset Publishing April 14th 2015) OFFICIAL SENSITIVE. Online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/488512/Manual_of_Guidance_and_MG_Forms_V8.0_EXT_clean.pdf>.

Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71. Online: <<http://www.un.org/en/universal-declaration-human-rights/index.html>>.

SECONDARY MATERIAL: MONOGRAPHS

Barbour, Charles & George Pavlich. *After Sovereignty* (Abingdon, Oxon: Routledge, 2010).

Booth, Wane C.; Gregory G. Colomb & Joseph M. Williams. *The Craft of Research*, 3rd ed (Chicago: University of Chicago Press, 2008).

Cotterrell, Roger & Maksymilian Del Mar, eds. *Authority in Transnational Legal Theory* (Cheltenham, UK: Edward Elgar Publishing Inc., 2016).

Dorsett, Shaunnagh & Shaun McVeigh. *Jurisdiction* (New York: Routledge, 2012).

Douzinas, Costas; Ronnie Warrington & Shaun McVeigh. *Postmodern Jurisprudence: The Law of the Text in the Texts of Law* (Abingdon, Oxon: Routledge, 1993).

Dworkin, Ronald. *Justice For Hedgehogs* (United States: Harvard University Press,

2011).

——— *Law's Empire* (London: Fontana Press, 1986).

——— *Taking Rights Seriously* (London: Gerald Duckworth and Co. Ltd., 1977).

Henkin, Louis. *The Rights of Man Today* (Colorado, United States: Westview Press Inc., 1978).

Hart, H.L.A. *The Concept of Law 3rd ed.* (Oxford: Oxford University Press, 1961).

Hume, David. *A Treatise of Human Nature*, ed. by L.A. Selby–Bigge and P. H. Niddich (Oxford: Clarendon Press, 1978[1739]).

Isaac, Thomas. *Aboriginal Law* (Saskatoon, Saskatchewan, Canada: Purich Publishing Ltd. 2004).

Locke, John. *Two Treatises of Government*, ed. by Peter Laslett (Cambridge: 1960).

McVeigh, Shaun eds. *Jurisprudence of Jurisdiction* (Abingdon, Oxon: Routledge, 2007).

Oduntan, Gbenga. *Sovereignty and Jurisdiction in the Airspace and Outer Space: Legal Criteria for Spatial Delimitation* (Abingdon, Oxon: Routledge, 2012).

Pasqualucci, Jo M. *The practice and procedure of the Inter-American Court of Human Rights*. (London: Cambridge University Press, 2003).

Penikett, Tony. *Reconciliation: First Nations Treaty Making in British Columbia* (Vancouver, British Columbia, Canada: Douglas & Macintyre Ltd, 2006).

Rawlings, Richard; Peter Leland & Alison L Young, eds. *Sovereignty and the law: Domestic, European, and International Perspectives* (Oxford, UK: Oxford University Press, 2013).

Sai, Jen eds. *The Movement of Movements: Part 1: What Makes Us Move* (Oakland, CA, USA: PM Press, 2017).

Tidwell, Alan C. & Barry Scott Zellen. *Land, Indigenous Peoples, and Conflict*. (New York: Routledge, 2016).

Valverde, Mariana. *Chronotopes of Law: Jurisdiction, Scale and Governance* (New York, NY: Routledge, 2015).

SECONDARY MATERIAL: PERIODICALS

Asch, Michael. "From Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution" (2002) 17:2 Canadian journal of law and

society.

Berman Paul Schiff, 'The Globalization of Jurisdiction' (2002) 151 *University of Pennsylvania Law Review*.

Blomley, Nicholas. "The Ties That Bind: Making Fee Simple in the British Columbia Treaty Process"(April 2015) 40:2 *Transactions of the Institute of British Geographers*168 – 79.

——— "Performing Property: Making the World" (January, 2013) 27:1 *Canadian Journal of Law and Jurisprudence* 23 - 48.

——— "Making Space for Property" (2014) 104:1 *Annals of the Association of American Geographers* 1291 – 1306.

——— "What Sort of Legal Space is a City?" in A. M. Brighenti eds *Urban Interstices: The Aesthetics and the Politics of the In-between* (Burlington: Ashgate publishing group, 2013).

Borrows, John "The Durability of Terra Nullius: Tsilhqot'in Nation v. British Columbia" (2015) 48 *U.B.C. L. Rev.*

Corntassel, Jeff. "Cultural Restoration in International Law: Pathways to Indigenous Self-Determination" (2012) 93:1 *Canadian Journal of Human Rights*.

Corntassel, Jeff & Alfred Taiaiake "Being Indigenous: Resurgence against contemporary colonialism" in Jen Sai eds. *The Movement of Movements: Part 1: What Makes Us Move* (Oakland, CA, USA: PM Press, 2017).

Coulthard , Glen "Subjects of empire: indigenous peoples and the 'politics of recognition' in Canada". (2007) 6:4 *Contemporary Political Theory* 437 –60.

Curry, J., Donker, H. and Krehbiel, R. "Land claim and treaty negotiations in British Columbia, Canada: Implications for First Nations land and self-governance" (2014) 58. *Can. Geogr.*, 291-304.

Dorsett, Shaunnagh & Shaun McVeigh. "Jurisprudences of Jurisdiction: matters of public authority" (2014) 23:4 *Griffith Law Rev.*

——— "Conduct of Laws: Native Title, Responsibility, and Some Limits of Jurisdictional Thinking" (2012) 26:2 *Melbourne University Law Review*.

Douzinias, Costas. " Speaking law: on bare theological and cosmopolitan sovereignty" in Anne Orford. ed, *International Law and its Others* (New York: Cambridge University Press, 2006).

Drakopoulou, Maria "Of the founding of law's jurisdiction and the politics of sexual difference: the case of Roman law" in McVeigh (ed), *Jurisprudence of Jurisdiction* (Abingdon, Oxon: Routledge, 2007).

- Duhaime, Bernard. "Canada and the Inter-American Human Rights System: Time to Become a Full Player" (2012) 67:3 *International Journal* 639 -59.
- Egan, Brian. "Sharing the Colonial Burden: Treaty Making and Reconciliation in Hul'qumi'num territory" (2012) 56:4 *The Canadian Geographer* 398 – 418.
- Gunn, Brenda L. "More Than Money: Using International Law of Reparations to Determine Fair Compensation for Infringements of Aboriginal Title" (2013) 46 *U.B.C. L. Rev.*
- Hunter, David B. "An Ecological Perspective on Property: a call for judicial protection of the public's interest in environmentally critical resources" (1988) 12 *Harvard Environmental Law Review*.
- Karp, James P. "A Private Property Duty of Stewardship: changing our land ethic" (1993) 23: 3 *Environmental Law*.
- Kaushal, Asha "The Politics of Jurisdiction" (2015) 78(5) *MLR* 759–792
- Little Bear, Leroy "Aboriginal Relationships to the Land and Resources." *Sacred Lands*. Ed. Jill Oaks, et al. Winnipeg: University of Manitoba: Department of Native Studies, 1998. 15-21.
- McKee, Alan. "A beginners guide to textual analysis" (2001) *Metro Magazine*.
- McVeigh, Shaun. "Law as (More of Less) Itself: On Some Not Very Reflective Elements of Law" (2014) 4:1 *UC Irvine Law Review*.
- Menkel-Meadow, Carrie. "Feminist Legal Theory, Critical Legal Studies and Legal Education or 'The Fem-Crits go to Law School'". (1988) 38 *Journal of Legal Education*.
- Morgan, Vanessa Sloan "Moving from rights to responsibilities: extending Hannah Arendt's critique of collective responsibility to the settler colonial context of Canada" (2017) *Settler Colonial Studies*.
- Mussawir, E. "The Activity of Judgment: Deleuze, Jurisdiction and the Procedural Genre of Jurisprudence" (2010) 7 *Law, Culture and the Humanities*.
- Nadasty, Paul. "Property and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations" (2002) 104:1 *American Anthropological Association*.
- Nozick, Robert. *Anarchy, State, and Utopia* (United States of America: Basic Books Inc., 1978).
- Pangle, Thomas L. "The Philosophical Understandings of Human Nature informing the Constitution" in Allan Bloom & Steven Kautz, eds., *Confronting the Constitution: The challenge to Locke, Montesquieu, Jefferson, and the federalists from utilitarianism, historicism, Marxism, Freudianism,*

Pragmatism, Existentialism .(Washington, D.C.: The AEI Press, 1990).

Pahuja, Sundhya “Laws of Encounter: a jurisdictional account of international law” (2013) 1:1 London Review of International Law, 63–98.

Price, Richard T. “The British Columbia Treaty Process: An Evolving Institution” (2009). 18:1 Native Studies Rev 159 – 67, online: <<http://search.ebscohost.com.chain.kent.ac.uk/login.aspx?direct=true&db=a9h&AN=39259750&site=ehost-live>>.

Richland, Justin B. “Jurisdiction: Grounding Law in Language” (2013) 42 Annual Review of Anthropology 209 – 26.

Rush, Peter “An Altered Jurisdiction: Corporeal Traces of Law” (1997) 6 Griff Law Rev.

Samson, Colin. “Canada’s Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims” (2016) 31:1 Canadian Journal of Law and Society / Revue Canadienne Droit et Société.

Sandel, Michael. “The Procedural Republic and the Unencumbered Self” (Feb, 1984) 12:1 Political Philosophy 81 – 96 online: <<http://www.jstor.org/stable/191382>>.

Taiaiake, Alfred. “Deconstructing the British Columbia Treaty Process [Paper in: Indigenous Peoples and the International Sphere” (2001) Balayi: Culture, Law, and Colonialism].

Taiaiake, Alfred. “Rethinking self-determination: Lessons from the Indigenous-Rights discourse” in Jen Sai eds. *The Movement of Movements: Part 1: What Makes Us Move* (Oakland, CA, USA: PM Press, 2017).

Thom, Brian “Reframing Indigenous Territories: Private Property, Human Rights and Overlapping Claims” (2014) 38:4 American Indian Culture and Research Journal 3-28.

Tushnet, Mark. “Critical Legal Studies: A Political History” (March, 1991) 100: 5 The Yale Law Journal 1515 – 44.

Woolford, Andrew. “Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process” (Winter, 2004) 29 The Canadian Journal of Sociology.

SECONDARY MATERIAL: OTHER

BC Treaty Commission “Hul’qumi’num Treaty Group” (2017) Online:

<<http://www.bctreaty.ca/hulquminum-treaty-group>>.

Blankinship, Jennie L. *Alternatives to the British Columbia Treaty Process:*

Community Perspectives on Aboriginal Title and Rights (MA Thesis, University of Victoria Faculty of Human and Social Development, 2006)

Online:<https://dspace.library.uvic.ca/bitstream/handle/1828/8235/Blankinship_Jennie_MA_2006.pdf?sequence=3>

Canada, Department of Justice, *Principles Respecting the Government of Canada’s Relationship with Indigenous People*, (February 2018)

Online:<<https://www.justice.gc.ca/eng/cs-jc/principles.pdf>>

Canada, Parliamentary Research Branch, *Aboriginal Title: The Supreme Court of Canada Decision in Delgamuukw v. British Columbia*, BP- 459E (Law and Government Division, Mary C. Hurley, 1998 – Revised 2000) Online:

<[http://publications.gc.ca/Collection-R/LoPBdP/BP/bp459-e.htm#\(6\)](http://publications.gc.ca/Collection-R/LoPBdP/BP/bp459-e.htm#(6))>.

Canada, Parliamentary Research Branch, *The Crown’s Fiduciary Relationship with Aboriginal Peoples*, PRB 00-09E (Law and Government Division, Mary C. Hurley, 2000 - revised 2002).

Canada, Parliamentary Research Branch, *The Rodriguez Case: A review of the Supreme Court of Canada Decision on Assisted Suicide*, BP – 349E (Law and Government Division, Margaret Smith, October 1993).

Canada, Parliamentary Research Branch, *Property Rights and the Constitution*, BP- 268E (Law and Government Division, David Johansen, 1991) Online:

<<http://publications.gc.ca/Collection-R/LoPBdP/BP/bp268-e.htm>>.

Canada, Standing Senate Committee on Aboriginal Peoples *Honouring the Spirit of Modern Treaties: Closing the Loopholes: Special Study on the Implementation of Comprehensive land claims agreements in Canada*. (May 2008).

Canada, *The Report of the British Columbia Claims Task Force* (June 28 1991)

Online:<http://www.bctreaty.ca/sites/default/files/BC_Claims_Task_Force_Report_1991.pdf>.

First Nations Summit “Submission to the Federal Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples Re: Status of First Nations-Crown Treaty Negotiations in British Columbia” (March 16th, 2017).

- Indigenous and Northern Affairs Canada “Introduction to the BC Treaty Process” (2010) Online: <<http://www.aadncaandc.gc.ca/eng/1100100022815/1100100022816>>.
- Lawyers Rights Watch Canada, “Robert Morales: Seeking Justice Elsewhere” February 23rd 2012, online: Irwc <<http://www.lrwc.org/video-seeking-justice-elsewhere/>>.
- Morales, Robert. “New Treaty, Same Old Problems” *Cultural Survival Quarterly Magazine* 30:1 (March, 2006)
Online:<<https://www.culturalsurvival.org/publications/cultural-survival-quarterly/new-treaty-same-old-problems>>.
- Morales, Sarah Noel. *Snuw’uyulh: Fostering an Understanding of the Hul’qumi’num Legal Tradition* (PhD Thesis, University of Victoria Faculty of law, 2014) [unpublished].
- Murdith McLean, “Robert Morales: Can International Law Move Canada Towards Reconciliation?” 19th May 2013, online: youtube <<https://www.youtube.com/watch?v=Ak1y6K68vFs>>.
- Organisation of American States “Inter-American Commission on Human Rights” (2011) Online: <<http://www.oas.org/en/iachr/mandate/what.asp>>.
- Organisation of American States “Organisation of American States: More Rights for More People” (2017) Online:<http://www.oas.org/en/about/who_we_are.asp>.
- Pasternak, Shiri. On Jurisdiction and Settler Colonialism: The Algonquins of Barriere Lake Against the Federal Land Claims Policy (PhD, Department of Geography, University of Toronto, 2013) [Unpublished].
- Stauffer, Jill. “Can Law Be Fair to Delgamuukw? A Panel on Legal Violence and Temporal Resistance in Law Process.” *University of Ontario Institute of Technology: Technologies of Justice Conference* (January 26 2018) Online :<<http://socialscienceandhumanities.uoit.ca/legalstudies/media-hub1/technologies-of-justice-conference---2018/jill-stauffer-can-law-be-fair-to-delgamuukw-on-legal-violence-and-temporal-resistance.php>>.