"WE DON'T NEED YOUR CONSTITUTION": PATRIATION AND INDIGENOUS SELF-DETERMINATION IN BRITISH COLUMBIA

by

Emma Feltes

B.A. (Hons.), University of King's College, 2008
M.A., Dalhousie University, 2011

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The following individuals certify that they have read, and recommend to the Faculty of Graduate and Postdoctoral Studies for acceptance, the dissertation entitled:

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Examining Committee:

Carole Blackburn, Associate Professor, Anthropology, UBC
Supervisor

Glen Coulthard, Associated Professor, Institute for Critical Indigenous Studies, UBC
Supervisory Committee Member

Michael Asch, Professor, Anthropology, University of Victoria
Supervisory Committee Member

Gordon Christie, Professor, Peter Allard School of Law, UBC
University Examiner

Patrick Moore, Associate Professor, Anthropology, UBC
University Examiner

Justin Richland, Professor, Anthropology, University of California, Irvine
External Examiner

Additional Supervisory Committee Members:

Bruce Miller, Professor, Anthropology, UBC
Supervisory Committee Member

Abstract

In November 1980, the Union of BC Indian Chiefs (UBCIC) chartered two trains from Vancouver to Ottawa, launching a movement dubbed the "Constitution Express." At the time, Prime Minister Pierre Trudeau promised to "patriate" the Constitution from the UK. It was a move touted as decolonial, yet it excluded any mention of Indigenous Peoples, their rights, or self-determination. So, they set out to thwart him. Over two years, the movement made many more journeys: to the United Nations; through Europe; and ultimately, to London. Each carried the same message: no patriation. At least not without the consent of the Indigenous nations on top of whose territories and terms the Canadian state tenuously sits. By the time of the *Constitution Act, 1982*, what they got was section 35, which "recognized and affirmed" existing Aboriginal and treaty rights, yet to be defined.

For a movement so significant in breath, scale, and consequence, it has received stunningly little academic attention. This dissertation follows the movement's journey. Each chapter is set in a new location where the movement made its case. It asks: In what ways did the movement confront Canada's claims of exclusive jurisdiction in the patriation period? And what did it propose instead? To answer these questions, I undertook more than 18 months of research in partnership with the movement's leaders, participants, and theoreticians. Their recollections and analyses drive the narrative, bolstered by archival material. As a settler anthropologist, they also taught me how bring my methods in line with the very topic at hand: Indigenous self-determination.

I learned from those involved that this was not just a movement for Constitutional rights recognition. This dissertation focuses on a different imperative at the heart of the movement: jurisdiction. The Constitution Express reasserted Indigenous Peoples' nationhood, territorial

authority, and self-determination. It also reconstituted the Canadian state, drawing on resurgent Indigenous legal traditions to imagine a federalism stripped of Imperial domination, based on consent. Taking inspiration from Third World anti-colonialism, it revamped international law to seek decolonization, not patriation. Ultimately, I conclude it was a simultaneously local and transnational movement with deep resonance today.

Lay Summary

In November 1980, the Union of BC Indian Chiefs chartered two trains from Vancouver to Ottawa, launching a movement called the "Constitution Express." At the time, Prime Minister Pierre Trudeau promised to "patriate" Canada's Constitution from the UK. But he left out any mention of Indigenous Peoples. So, the Constitution Express set out to stop him. The movement would make more journeys over the next two years, for example, to the UN and British Parliament. So, this dissertation follows the Constitution Express from Vancouver to London. As a settler anthropologist, I worked in partnership with its participants to better understand what it fought for, how, and the theory behind it. I learned that the Constitution Express did not just advocate to get Indigenous rights into the Constitution, but fought for nationhood, self-determination, and international decolonization. This dissertation focuses on these aims. It concludes with how they resonate in Canada today.

Preface

A version of Chapter 2 is in press: Feltes, Emma. In press 2022. “On Getting it Right the First Time: Researching the Constitution Express.” In *Indigenous Voice and Cultural Appropriation* (working title) edited by Kent McNeil and John Borrows. Toronto: University of Toronto Press. A version of Chapter 4 is also in press: Feltes, Emma and Sharon Venne. In press 2022. “Rolling Towards Self-Determination: The Constitution Express at the Russell Tribunal.” *BC Studies*, 211. This article is co-authored, with Emma Feltes as the lead author, responsible for all major areas of concept design, archival research, and the majority of manuscript composition. Sharon Venne provided extensive oral history, and contributed to manuscript edits. Analysis and concept development was shared equally between the authors. Each author’s contribution and their relationship to the work is explained in the text of the publication. The article has been adapted by Emma Feltes to formulate Chapter 4 of this dissertation. The rest of this dissertation is unpublished. It is an independent work by the author, Emma Feltes. Research was approved by the UBC Behavioral Research Ethics Board: Certificate H16-01441; Principal Investigator: Dr. Carole Blackburn.

Table of Contents

List of Abbreviations

AIM	American Indian Movement
BANAI	Belgium Association in Support of Endangered People
BCANSI	British Columbia Association of Non-Status Indians
BNA Act(s)	British North America Act(s)
CBC	Canadian Broadcasting Corporation
CN	Canadian National Railway
CUSO	Canadian University Service Overseas
DIA	Department of Indian Affairs
ECOSOC	UN Economic and Social Council
FCO	Foreign and Commonwealth Office
FSIN	Federation of Saskatchewan Indian Nations
HMG	Her Majesty's Government
IAA	Indian Association of Alberta
MP	Member of Parliament
NANAI	Netherlands Association in Support of Endangered People
NDP	New Democratic Party
NGO	Non-Governmental Organization
NIB	National Indian Brotherhood
RCMP	Royal Canadian Mounted Police
UBC	University of British Columbia
UBCIC	Union of British Columbia Indian Chiefs
UNN	United Native Nations
WCIP	World Council of Indigenous Peoples

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Those who were involved in the Constitution Express are at the centre of this project, and its aim is to honour them. I could never have so much as broached this work had participants and leaders of the movement not welcomed me into their communities, homes, and haunts, and shared certain of their knowledge, stories, memories, and archival materials with me. It is a privilege to work with you.

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For Arthur Manuel, who set me on this path.

Chapter 1: Introduction

"Does anyone remember all the words?" I recall someone asking, as we inched closer to each other, shuffling and shivering in the dry Kamloops cold. A few glances from person to person, and there seemed to be tacit agreement that enough of the verses could be pieced together to get the song going. The drums began.

"Canada is all Indian land!"

It was early February and it was cold. There was no shelter from the wind where we stood, at the wide, open base of the Thompson River valley, just west of the city. The river ran beside us, with the Trans Mountain Pipeline—the existing one from 1953, that is—passing underneath. Though biting, the cold was also kind of electrifying. Or maybe it just ramped up the voltage I already felt, standing there surrounded by land defenders and climate activists, hearing them sing the "Constitution Express song". Though there were maybe two dozen of us, we were a small pinpoint in that bright, exposed patch of sun, having traipsed across a field of dazzling, crunchy white snow to get down from the road to the riverside. Some of us had come from much further afield—as far as Standing Rock—while those from here, Secwepemcúl'ecw, led the song.

"We will fight until we win!"

Four weeks earlier, on January 11, 2017, Secwepemc leader and thinker Arthur Manuel had passed away suddenly from congestive heart failure. Doctors had wrongly assumed he was fighting a lingering cold he picked up on his own trip to Standing Rock some weeks prior, visiting the massive resistance movement led by Lakota and Dakota Oyate (Sioux) water protectors against the Dakota Access Pipeline. But here we were, without him, at a meeting that he had been organizing at the time of his passing, to collaborate on a strategy to stop the proposed expansion of a different pipeline—the one over which we now stood. Art was my

mentor, and as one of those flailing in the wake of his loss, I clung to this meeting fiercely, grateful for his direction, and for the chance to be with his community, allies, his kids and grandkids. We spent the day in a meeting room at Thomas Rivers University, before heading out to the spot we now were, where the pipeline and the river run side by side.

"We are one whole Indian nation!"

The original Trans Mountain Pipeline was built with a level of impunity, well before Indigenous consent, or even consultation, were so much as a glimmer in the eye of Canadian law. Its construction was approved by the Canadian government in 1951. As Art wrote in an open letter to Prime Minister Justin Trudeau in November of 2016, "It is important to point out that the first Kinder Morgan pipeline was not approved by the Secwepemc people because we were outlawed under the Indian Act from organizing around our land rights from 1926–1951. Canada appears to want to ignore us again" (Manuel 2016, 2).

Secwepemcúl'ecw (Secwepemc territory) is the largest Indigenous territory that the pipeline crosses. The pipeline bisects the territory diagonally, drawing a shaky, snaky 518km line from one corner of Secwepemcúl'ecw to the other. Its proposed expansion, which requires its twinning, would just about triple its capacity to transport diluted tar sands bitumen from Edmonton to the Burnaby Terminal on the BC coast. "We do not accept that the federal government can make this decision unilaterally and without the prior informed consent of the Secwepemc people as the rightful titleholders," Art wrote (Manuel 2016, 1). "The salmon and the rivers they inhabit have taken care of our people for centuries and we are obligated as Secwepemc people to protect the Thompson River System for future generations" (2).

Art had a plan for what fulfilling his obligation would look like: an assembly of Secwepemc people would convene in the spring of 2017 and listen to the land users—fishers,

hunters, trappers, berry pickers, and ceremonial leaders, whose rights and livelihoods are most at stake. Then, they would decide on the prospect of the pipeline's expansion according to Secwepemc law. Our little strategy session was just a precursor to this assembly.

"United we stand, divided we fall!"

More than 65 years since the original pipeline went through, the legal circumstances were undeniably different. Art wrote Trudeau "to remind" him that this time around, he had better get Indigenous consent. That is, the consent of the Secwepemc nation as a whole—the people whose rights, laws, and obligations touch every nook and corner of the territory, but nevertheless have to drive clean across Secwepemcúl'ecw, almost to Alberta, to find good berries these days.

The need to get Indigenous consent on things that impact their lands and rights is not yet established in Canadian law or policy. Instead, the federal government *consults* individual band councils, even though their jurisdiction is technically limited by the *Indian Act* to reserve lands. But Canadian law has been getting closer to consent, having trailed international law—and, as this dissertation will show, British Imperial law—by at least a few centuries. As Art's letter pointed out, Canadian jurisprudence is consistent with Secwepemc law, in that both understand Aboriginal rights and title to the land to be collectively held, determined on the basis of the respective laws of the whole Indigenous nation.[1] The right to consent to things that impact title, he argued, should follow suit. That is, consent is a collective right, territorially held—an expression of jurisdictional authority that spans ones' lands. At his proposed assembly, on the basis of their own laws and institutions, the Secwepemc nation would together decide whether to consent to having their territory bisected by this pipeline for a second time.

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[1] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 115.

When the assembly was convened that June, the answer was unequivocal: "We the Secwepemc have never provided and will never provide our collective consent to the Kinder Morgan Trans Mountain Pipeline Project. In fact, we hereby explicitly and irrevocably refuse its passage through our territory" ("Secwepemc Declaration," 2017). Less than a year later, having never consulted or sought the consent of the Secwepemc collectively, Trudeau would have Canada buy the existing pipeline and its expansion project from Kinder Morgan. For the proponent, the project was looking too risky. But Trudeau vowed to see it through (Tasker 2019).

The people I stood with just outside of Kamloops that February afternoon—Art's allies and family—continue to fulfill the mandate they were given at the assembly he planned. That is, they fight the pipeline. They fight it at the United Nations and at the headquarters of insurance companies. They fight it through assertions of their authority both quotidian and grand, by taking back their lands, and by going about their lives—their simply *being Secwepemc*, and in the way.[2]

"We don't need your Constitution!"

The first time I heard this song, years ago, this line had me slightly confused. As far as I knew it at the time, the Indigenous movement from which the song had sprung—a movement dubbed the "Constitution Express," so named for the train ride from which it began—was a major factor in getting section 35 added to the patriated Constitution in 1982. This section once and for all "recognized and affirmed" the "existing aboriginal and treaty rights of the aboriginal peoples of Canada." I had assumed that this meant the Constitution Express was a movement that

[2] At the time of writing, there are two Tiny House Warriors village sites which Art's daughters and other Secwepemc land defenders established on reclaimed lands in the path of the pipeline.

fought *for* constitutional recognition during patriation. But "we don't need your Constitution" was a different message. This was a refusal.

When I stood there in the Kamloops cold in 2017, listening to it sung again, I was just beginning to research the Constitution Express in earnest. I was doing a dissertation on it, at Art's request, and had a few (wrongheaded) theories to explain what seemed to be an incongruity between the movement's reputation for achieving Indigenous inclusion in Canada's Constitution and the song's outright refusal of it. Arguably the simplest one was that the movement's politics were made to change over time—what began in 1980 as a movement *against* the patriation of Canada's Constitution from the UK without Indigenous consent, by 1982 was channeled into a movement *for* the guarantee of Indigenous Peoples' rights. Basically, the stakes were high, the clock was winding down, and section 35 was a compromise for everyone—for Indigenous Peoples, who could see that the Constitution was almost certainly going to end up in Canada's hands, and for the Canadian government, who was sick of the damage and delays the Constitution Express and other Indigenous movements were causing its delivery. Ultimately the protection that section 35 offered, compromise though it may be, would eventually bring about the jurisprudence that made it possible for Art to remind Trudeau that this time around, he needed Indigenous sign-off on a pipeline.

As these things go, this explanation of the movement's trajectory would turn out to be wildly insufficient. It relied on cynical tropes of capitulation and cooptation, falling back on what anthropologist Akhil Gupta (1995, 393) calls "the collaboration/resistance dichotomy," which ascribes subaltern peoples just two narrative options vis-à-vis their relationship to the state. The narrative arc here—the inevitable turn from romantic resistance to pragmatic collaboration—was a tired one, which drastically underestimated the sophistication of the Constitution Express. But

it was also one that would be particularly problematic for me to tell, from my particular subject position as a white settler anthropologist.

It took hearing the Constitution Express song an umpteenth time, while standing over a pipeline, for my understanding to shift.

There were things we discussed in our strategy meeting that day that had little to do with the state—either its engagement or resistance. These were incredibly important things, like Secwepemc authority to decide what happens on Secwepemc lands. “The subversive goal is that we’re against the pipeline,” one participant said. “But it’s about sovereignty.” Of late, Nishnaabeg thinker Leanne Betasamosake Simpson (2011; 2017) and Mohawk scholar Audra Simpson (2014) have brought new nuance to such conversations and approaches, busting open the neat analytic of resistance with concomitant theories of resurgence and refusal, respectively. On this front, our strategy unfolded around developing the infrastructures needed to act upon a resurgence of Secwepemc law and territorial authority, refusing state jurisdiction by simply not bothering with it.

Meanwhile, another of our strategies would circumvent Canada in a different way, targeting financial institutions, who are ironically more likely to take Indigenous rights seriously—as a liability to their investment, that is—than governments themselves (see Manuel and Derrickson 2015, 135-166). Yet another strategy was to go the United Nations route.

But the state is like the Cheshire Cat, hard to circumvent. It appears, disappears, and reappears again, now in a different spot—grinning and beguiling, annoyingly abstract, impossible to behead. As Gupta writes, the collaboration/resistance binary is especially “unhelpful in thinking of strategies for political struggle” (393), precisely because the state is rarely experienced as a coherent thing. It appears before us in jurisdictional fragments: in

permits, regulations, "quotidian practices" (376), in toothy assertions, fits and starts. It is a moving target, repeatedly reconstituting itself (see Mitchell 1991). Justin Trudeau proved this upon buying the pipeline—now a three-headed cat, Canada is proponent, financer, and regulator all at once. Which is to say, the conversation we had been having that day reminded me that when it comes to challenging a pipeline, as with challenging patriation, there was probably no position strictly inside or outside state engagement.

And so, another of our strategies would be to confront the state, in each of its fragmented forms. From Edmonton to Burnaby, and every law, policy, permit, injunction, or regulation that touched the pipeline would come under our scrutiny. As another participant reminded us that day, "the beautiful thing about fighting a pipeline is it has to be a hundred percent complete in order to be to be one percent effective." There were many weak points on this particular pipeline—legal, environmental, economic, and political—but we only needed one to give out. We wouldn't need to behead the cat, only to apply the right kind of pressure in just the right spot.

The Constitution Express similarly deployed an interdisciplinary set of strategies and theories of change—it resisted, engaged, confronted, refused, ignored, and resurged, without following a neat narrative line. Really, this should come as no surprise. Canada's constitutional structure, Nishnaabeg legal scholar John Borrows points out, has long been a site where Indigenous Peoples challenge the "false horizons" (2016, 103) of engagement and dissent.

But the thing that really struck me that day was the realization that the Canadian state doesn't see itself this way, elusive like the Cheshire Cat. Rather, it understands itself more like a pipeline. It too thinks that in order to be one percent effective, it has to be one hundred percent complete. Which is to say, for the colonial state, sovereignty is zero-sum game, requiring

"perfection" (Ford 2010)—exclusive, certain, hermetic jurisdiction—in order to endure.[3] Patriation, then, was a project about getting to one hundred, soothing Canada's jurisdictional insecurity, by patching up its weak spots. It was intended to address one weak spot in particular: the fact that British Parliament retained paramount authority to amend the Constitution. Meanwhile, the more fundamental weak spot in Canada's claims to a "perfect" jurisdiction—the fact of the law-bearing, title-holding, self-determining Indigenous nations on top of which Crown sovereignty was superimposed in the first place—went quietly unacknowledged. That is, until Indigenous Peoples like those on the Constitution Express made it impossible to ignore.

The Constitution Express, like the movement against the Trans Mountain pipeline, would confront the moveable state—not engage or disengage with it, per se, but challenge it to justify its own legitimacy, and the source of its claims to wielding unilateral authority over the many Indigenous territories that comprise Canada. As I now understand it, patriation was an attempt to literally *constitute* the state—to consolidate jurisdiction and affect sovereign coherence in the face of a deep, chronic colonial anxiety. The Constitution Express was a movement not just to prevent this from happening (though this it was), nor to seek a place within a newfangled Canadian sovereignty, but a movement to *reconstitute* something else—something resurgent, and deeply decolonial.

What I found is that as a movement, the Constitution Express reconstituted Indigenous Peoples' self-determination by reasserting their nationhood and territorial jurisdiction. But not only that. It also reconstituted the Canadian state in relation to Indigenous self-determination,

[3] Though not necessarily uniform, as Carole Blackburn has pointed out to me. As demonstrated in provincial opposition to the Trans Mountain Pipeline. Though sovereignty is divided among the provincial and federal governments, between them, it is thought to be complete.

imagining a new, yet resurgent kind of federalism stripped of imperial domination. To do this, it drew on Indigenous legal traditions as well as their historic relationships with the British Crown, reviving the notion of consent. It also went international, where it took inspiration from Third World anti-colonialism and tried to open up decolonial process—a process from which Indigenous Peoples had traditionally been excluded. Instead of patriation, for the Constitution Express it was decolonization or bust.

1.1 The political and academic context

Patriation was a strange beast, even by Commonwealth standards. In order to understand the arguments made by the Constitution Express—and how it went about executing them—it helps to understand that patriation itself was a project born of Canada's deep jurisdictional angst. Until patriation, the Canadian Constitution was not its own entity, but an amalgamation of British North America (BNA) Acts, and a number of proclamations, statutes, and unwritten constitutional conventions. This cumulative, evolving foundation of Canadian constitutionalism is generally seen to be a boon—often referred to as a "living tree," and proudly following in the British (rather than American) constitutional tradition of growth, openness, and contestability (Borrows 2016). However, such "growth" has produced a particular and peculiar kind of colonialism in Canada. One not rooted in conquest (*The Indian Nations,* n.d., 1), but in brute accumulation nonetheless, consolidating authority in the Canadian state to the exclusion of Indigenous constitutional orders, bit by legislative bit. Which is to say, such openness and contestability has not been applied when it comes to the persistence of Indigenous legal and political authority. Instead, after Confederation, a series of statutes, amendments, and legislation amassed which both engulfed Indigenous jurisdiction and increased Canada's administrative

independence from the UK, intensifying the country's heartfelt sense of sovereignty. But, among these statues and amendments, none quite sealed the deal.

The 1931 *Statute of Westminster,* for example, was perhaps the most significant source of both sovereign confidence and anxiety. While making Canada essentially self-governing, and limiting British legislative authority in Canada, the statute did not do away with it entirely. Instead, due to a never-ending spat between the provinces and the federal government over the development of a constitutional amending formula—a spat that is, in its own awkward way, itself the story of Canada—British Parliament hung on to a fiduciary authority to amend the Constitution. (The "formula" here being how many provinces, representing what proportion of the population, would need to consent for the federal government to pass an amendment.[4]) This guardianship of the Constitution did not mean that the UK could make amendments willy-nilly; rather, in circuitous fashion, it would perform amendments at the request of Canadian Parliament. In any case, this half-in, half-out arrangement with the UK left Canadian sovereignty something of a liminal thing. If, as Lisa Ford characterizes it, settler sovereignty seeks perfection by "shoring up" exclusive jurisdiction (2010, 2) the retention of even a scrap of constitutional authority in the UK left Canadian sovereignty pointedly imperfect. For those hung up on the idea of a standalone Canadian sovereignty, those who had that *feeling* of exclusive, hermetic jurisdiction inherent to Western sovereignty—i.e. people like Prime Minister Pierre Trudeau—this was deeply embarrassing.

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[4] In the absence of a clear amending formula after 1931, it was generally accepted that amendments would require unanimous consent from the provincial and federal governments—a premise that Quebec took to be its "veto" over constitutional amendment. All of this would change in 1981, when the Supreme Court decided, unclearly, that only "a substantial degree of provincial consent" was necessary (*Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at 905), spurring a volatile debate that would end in Quebec opposing patriation outright.

By the time Trudeau took the role in 1968, this skirmish over an amending formula had proved insurmountable for three previous Prime Ministers. In fact, in this time, the issue had become more fundamental: "no longer centred on trying to find an acceptable amending formula; it was viewed more as a means of reopening the whole question of the division of powers between the federal and provincial governments" (Chrétien [1990] 1992, 327). But Trudeau was particular ornery about the Crown playing babysitter to Canadian federalism, and sick of going "cap in hand to a foreign government," any time he wanted to change the Constitution (quoted in Hillmer 2013). He became determined to be the one to finally do it.

Trudeau vowed to "bring home" the Constitution from the UK—a prospect that fueled his return to leadership in 1979 and on which he became, by all accounts, hellbent.[5] He touted the move a decolonial one, ostensibly meant to "break this last colonial link" between Canada and the British Crown (Trudeau 1982a). And yet, his proposal failed to mention the existence of Indigenous Peoples in Canada—their rights, title, and their persistent jurisdiction. For a decolonial project, it was a rather conspicuous exclusion. In fact, his package would do away with section 91(24)—the one stated mention of Indigenous Peoples in the BNA Act, which vested legislative authority relating to "Indians and Lands reserved for Indians" in the federal government, to the exclusion of the provinces. It would also erase the written and unwritten constitutional obligations owed to Indigenous Peoples by the Imperial Crown, for example, per the treaties and the Royal Proclamation of 1763. Needless to say, it would also ignore Indigenous Peoples' own constitutional orders. Snubbing Indigenous Peoples entirely, patriation promised to consolidate jurisdiction within the bounds of Canadian sovereignty once and for all.

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[5] Chapter Six will feature evidence of Trudeau's unyielding push for patriation, particularly in London.

Wise to the fact that their rights, jurisdiction, and the obligations owed to them were about to be extinguished by omission, the Union of British Columbia Indian Chiefs (UBCIC), with Grand Chief George Manuel at its helm, chartered two trains to carry almost a thousand Indigenous people[6] from BC to Ottawa. Thus began a movement that would come to be known as the Constitution Express.

Over the next eighteen months, under the auspices of this movement, more of these journeys would be made. Delegations would go to the United Nations in New York, to the Fourth Russell Tribunal in Rotterdam, to the British Parliament in London, and to cities and towns across Europe. All of these travelers, traversing Indigenous territories and state borders, carried with them the same message: no patriation. That is, that the Canadian government could not patriate the Constitution without the consenting authority of the Indigenous nations upon whose territories and terms the Canadian state very tenuously sits. Instead of patriation, they called for an internationally supervised "Imperial Conference" between Canada, the UK, and Indigenous Peoples, to determine the nature of their political relationship, responsibility for the treaties, and their respective jurisdiction. This proposal would effectively move the question of "decolonization" outside the parameters of Canadian federalism and into the international area. By the time of the *Constitution Act, 1982,* what they got was section 35—a recognition of domestic rights, yet to be defined.

Literature on this period tends to focus on this significant, if baffling, outcome of patriation. And this is not without good reason. The recognition of Aboriginal rights in section

[6] It is hard to get a precise estimate of the number of people on the trains. The lowest I've seen is five hundred (Sanders 1983, 313) while the highest is a thousand (McFarlane and Manuel [1993] 2020, 255).

35 did mark a turning point in Aboriginal law and policy. As Nishnaabeg legal scholar Darlene Johnson (1997, 132) has put it, it represented a "remarkable reversal of the group-destructive policy which the federal government had pursued for more than a century." Indeed, at the start, it looked as though Trudeau hoped patriation would fulfill the 'group-destructive' promise of his government's failed 1969 White Paper policy (UBCIC 1980a, 9), by dropping all existing protections for Indigenous rights, status, and the treaties, from the Constitution. But by the end of the patriation period, Indigenous lobbying made it impossible for the government to get the Constitution patriated without these protections. For this reason, Art Manuel has called the Constitution Express, "the most effective direct action in Canadian history, as it ultimately changed the Constitution" (as quoted in Hanson n.d.)

As political scientist Kiera Ladner (2015, 267) describes it:

> Indigenous leaders held fast to the constitutional moment an found creative ways to force the players to acknowledge their existence, address their issues, and offer them a seat at future constitutional tables. They found a way to insert themselves into the governing processes of the settler-state without the leaders of the state fully realizing what had been done.

But this is just the thing. With section 35 *nobody* fully realized what had been done. As John and Jean Comaroff (1992, 43) write, "Great social movements seem always to achieve both more and less than intended." Though Indigenous movements through the patriation period, including the Constitution Express, achieved a reversal of state policy, it was not actually clear whether it was a win for Indigenous Peoples. In what ways was section 35 more or less than they intended? After four failed First Ministers' Conferences on the matter—which I take up in the concluding chapter—no further clarity on this had been reached.

The recognition of a set of rights whose scope and content were and remain amorphous has spawned an academic fascination with section 35. Was it an "empty box," as the government contended, to be filled incrementally through negotiation and litigation? Or a "full box" already teaming with Indigenous self-determination (Walkem and Bruce 2003; Asch [1984] 1988)? Did it manifest Indigenous Peoples' legal orders, laws, and jurisdiction—if not explicitly, then implicitly (Henderson et al. 2000; Ladner and McCrossan 2009)? Or did it bury these under Canadian judicial interpretation (Turpel 1989-90; Borrows 1997)? Did it sneak Indigenous Peoples' historical contributions to Canadian constitutionalism into the "story" of the Constitution (Johnson 1997; Slattery 1984; Tully 1995)? Did it create the conditions for a "postcolonial" constitutional order in Canada (Henderson 2010)? Or did it freeze Indigenous rights in some essentialized, pre-colonial moment in time (Simpson 2014; Ladner 2015; Borrows 2016)? Did it imbue the Constitution with a "shared and layered sovereignty" (Henderson 2010, 24)? Or did it "remove Indigenous sovereignty from the Canadian legal and social landscape" altogether (Christie 2019)? And what did it mean when the courts contended that section 35 was a mechanism of reconciliation (Tully 2003; McNeil 2003a; Borrows 1999; Asch et al. 2018; Macklem and Sanderson 2016)? Did it simply solidify recognition as a method to shoehorn Indigenous assertions of self-determination into the existing colonial order of things (Coulthard 2014; Simpson 2014)?

Initially, I thought my dissertation would address some constellation of these questions, looking to literatures in Indigenous law as well as Canadian Aboriginal and constitutional law to answer them. However, I imagined I would change the direction of these questions slightly, by working with the leaders and participants of the Constitution Express in order to think about the possibility of filling it up—retrospectively, that is—with what it was they were actually fighting

for. This would be, I thought, my novel contribution. What would it take, I imagined myself asking people, for section 35 to reflect what you envisioned? This could go in a number of directions, I thought. It could lead to critique, certainly, of Canada's efforts to stifle or channel Indigenous aspirations. It could lead to a kind of counterfactual rendering of section 35, had their proposals prevailed. And it could lead to more optimistic revelations about the implicit or customary ways the movement's vision had made its way into constitutional practice, even against Canada's stifling. Yet, when I began to speak to people about the movement (and I did broach that question a handful of times), section 35 and its content faded further and further into the background. It practically didn't come up.

As it fell away from our conversations, I was struck by how tight a hold section 35 now has on law and scholarship, virtually eclipsing what had led up to it. As I reflect in Chapter Two, there is a rather astonishing scarcity of scholarship on the Constitution Express.[7] And not just the Constitution Express—across Canada, as a rule Indigenous Peoples' mobilizations during the patriation period have received stunningly little academic attention, particularly given their breadth, scale, and consequence. This dearth was the very reason, after all, that Art Manuel asked me to undertake this work.

In talking to people involved, instead of a theory of section 35, what I found in its place was a robust theory and assertion of Indigenous Peoples' self-determining authority—and a vision of decolonial constitutionalism (and federalism, and international law) revamped to feature that authority in the foreground. Any recognition of rights, were it to happen, would have

[7] Notable exceptions include works by those directly or tangentially involved (see George 2005-2006; Manuel and Derrickson 2015; Sanders 1983; Woodward and George 1983; Mandell 1984; Mandell and Pinder 2015), as well as a handful of secondary analyses (see Knickerbocker and Nickel 206; Borrows 2016; Thrush 2016)

be secondary to this revamping. In this way, the movement challenged the very premise of patriation—that is the consolidation of jurisdictional authority within Canadian sovereignty.

So, shaking off section 35, my research questions changed slightly. No longer interested in how we might make the existing rights framework fit what they were fighting for, I ask: in what ways did the Constitution Express, as a movement, confront Canada's claims of exclusive jurisdiction in the patriation period? If not patriation, and if not section 35, what did it aim to *constitute* in their place? What vision of constitutionalism, self-determination, and of decolonization did it put forth?

As Constitution Express organizer Mildred Poplar (2003) wrote, "We Were Fighting for Nationhood Not Section 35." As I grew to better understand the nuances of this statement, I was drawn to other literatures within international law, political theory, and settler colonial and critical Indigenous studies that helped to better follow the threads that the movement led me along. Specifically, its conceptions of nationhood, jurisdiction, and self-determination.

1.2 The determination of self-determination (some theoretical starting points)

In international law, I found that when it comes to self-determination, the 'self' part of it often hogs the attention (see Muehlebach 2003; Schulte-Tenckhoff 2012; Crawford 1988; McCorquodale 1994). That is, to whom does it apply? Who has the rightful claim to self-determination versus some other set of minority, individual, or cultural rights? Its linkage to the term "peoples" (Anaya 1996) seems only to have exacerbated this preoccupation. Who counts as

a people?[8] While important, what I see as a problematic side-effect of such a question, is its focus on political *identity* as the main thrust of analysis. This has a kind of subject-making inflection, inviting misplaced adjudication as to the characteristics of Indigeneity vis-à-vis other self-determining entities (see Gilbert and Castellino 2003). I knew that it was not my job, as I write about in Chapter Two, to qualify or compare the way participants on the Constitution Express self-identified as self-determining.

But the other thing that strikes me about this focus on the 'self' part of self-determination is its association with aspirations of nation-statehood. Though the "peoples approach" (as opposed to a "territorial approach") is meant to help detach self-determination from its conflation with the nation state (McCorquodale 1994, 867-868), it is still the "spectre of secession" (Hannum 1998) which gets states huffy about the idea of Indigenous Peoples having it. "What looms large," writes anthropologist Andrea Meuhlebach (2003, 247), "is the specter of the fragmentation of states and the dismemberment of their sovereign territorial integrity." This assumes the singular end-goal of self-determination to be sovereign statehood, in the Westphalian image, dividing the world into "mutually exclusive sovereign territorial communities" (Anaya 1996, 78). Which is to say, the 'self' is meant to be self-contained. As James Anaya, legal scholar and former UN Special Rapporteur on the Rights of Indigenous Peoples, has written, self-determination is caught in the "perceptual grip of statehood categories" (ibid.). He believes this grip to have tightened through decolonization—a process which offers

[8] The long fight undertaken by Indigenous Peoples at the UN to be referred to as peoples (and not "issues") and the staunch resistance they met from member states was essentially over this very thing—whether Indigenous Peoples counted among the global community of selves who wield self-determination (see Corntassel 2007, 155).

up self-determination as something "remedial" rather than substantive, and prescriptive of independent statehood (80).

On the completion of this work, I disagree with Anaya's framing of decolonization as something necessarily remedial and tied to aspirations of Western-style exclusive statehood. For example, the more recent work of political scientist Adom Getachew (2019) dispels the idea that Third World anti-colonialists simply appropriated self-determination as it was conceptualized by Western internationalists in their own formulations of decolonization at the UN. Instead, she argues, they untethered decolonization from the "Westphalian regime of sovereignty" (74), creating other substantive possibilities for the self-determining 'self,' including through building economic and political institutions and networks *between* peoples, not just exclusive to them. Indigenous Peoples, Muehlebach, Anaya, and Sheryl Lightfoot (2016) have written, have also worked to decouple self-determination from exclusive sovereign statehood at the United Nations (without decoupling it from territory), by rethinking and getting creative with its potential political manifestations. But in the Constitution Express' case, they did this in concert with Third World decolonization, not in contrast to it. I believe those involved in the Constitution Express to have picked up on these other substantive aspects of decolonization that Third World anti-colonialists were promoting, in order to think too about what exactly it was they wanted to determine. Though they did not take sovereign independence off the table entirely (see Smallface Marule 1981), they were more focused on what creative forms self-determination might take, in line with their own legal and political traditions, and the kinds of inter-jurisdictional relationships, models of federalism, and institutions it might beget.

And so, I found myself gravitating away from this question of the 'self' towards the other part of the conjunction, that is, what exactly is entailed in the 'determination' part of self-

determination. By this I mean the substantive aspect of self-determination—i.e., not just who is doing the determining and in what political capacity, but how and what is being determined, and by what source of authority. I came to refer to this broadly in my work as simply jurisdiction—a kind of catch-all, albeit not always a sufficient one, to portray the kind of self-determining authority that my interlocutors were talking to me about. Sometimes people spoke about this in terms of nationhood, Indian government, self-government, a third order of government, 'section 93' (standing next to sections 91 and 92, which divvy jurisdiction between federal and provincial governments), 'political life,' and sometimes just being able to decide what happens in their lands. But where their theorization of jurisdiction was rich and dynamic, I found jurisdiction to be relatively under-theorized in the literature—not just in the international legal literature mentioned above, but in political anthropology and settler colonial studies too.

Among those writing about jurisdiction of late, I found legal historian Lisa Ford (mentioned above), geographer Shiri Pasternak (2017; 2014) and legal anthropologist Justin Richland (2013; 2011), who helped me to better understand the legitimating facet of this slippery term.[9] Seemingly administrative and empirical in nature, jurisdiction (rather confusingly) refers to both the performance of political authority and the very legitimating claim which gives such authority teeth. Etymologically evoking "the power to speak the law," Pasternak (2014, 148) describes jurisdiction as not just the execution of authority, but the "the authority to have authority" in the first place. It is both the practical, technical deployment of authority—a characterization which has given jurisdiction "rather dry appeal" (Simmo and Müller 2012,

[9] Notably, this is a group of non-Indigenous scholars all contending—historically, legally, and practically—with what it is to live in accordance with Indigenous Peoples' authority in settler colonial contexts.

134)—and it is the having of authority to deploy. In anthropology speak, it is both functional and structural. As Richland (2011, 207) describes it, it combines the performative character and content of law. He writes: "it is in questions of jurisdiction where governmental institutions, in their lawmaking, -applying, and -executing capacities, pose the question of their own authority to themselves". If this is the case, then with constitutional patriation, Canada posed this question to itself at the very highest level. The answer, for Trudeau at least, was clear. Between the federal and provincial governments, Canada had on lock all the authority to deploy.

When the Constitution Express sought jurisdiction for Indigenous Peoples, it blew this question open, challenging the legitimacy of Canada's sovereign claims. That is, the movement was not just seeking administrative jurisdiction, dictated or delegated from within state policy programs (as modern self-government agreements tend to be structured). Nor was it simply about eking out jurisdictional space for Indigenous Peoples within Canadian federalism. It was about the having of authority to deploy, and the authority to determine (in the self-determination sense of the word) what political and institutional forms this might take.[10] As one of the Constitution Express bulletins[11] announced:

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[10] To be clear, it was not the only Indigenous entity that challenged the exclusivity of state sovereignty and asserted their own jurisdictional and law-making institutions through the patriation period. The Constitution Express' position resonates with that of other Indigenous organizations at the time, including the Indian Association of Alberta, the Dene Nation, etc., and they often collaborated. For example, as discussed in Chapter Three, early in the patriation period the National Indian Brotherhood adopted the movement's position paper as the national approach. By the time of the first Constitutional Conference in 1983, virtually all of the major Indigenous organizations at the table took the position that some measure of political rights—including the right to determine their own institutions, to make laws and to govern the affairs of their people—should be the starting place for section 35 (Asch [1984] 1988, 28). Exactly how the Constitution Express approached this question of jurisdiction—and the legal, historical, and decolonial arguments it made it get there—is precisely what unfolds over the course of this dissertation.

[11] About six of these poster-sized bulletins were produced by UBCIC and distributed to communities throughout British Columbia over the course of two years. They have become somewhat iconic in the archives of the movement, both beautifully designed as well as cheeky and hard hitting.

> Trudeau wants to run this country his way. He wants to run us. Run our fishing. Run our hunting. Run our education system. Run our people to destroy our nation. Pierre Trudeau's dream is to assimilate the Indian people into his society. To absorb the Indian nations into Pierre Trudeau's institutions, this is his dream for us. We have a different dream: to be free to govern ourselves on our lands and in our own way. (UBCIC 1981a)

In this way, the Constitution Express sought to take back both aspects of jurisdiction. It was a refusal to be managed, by asserting Indigenous authority over the running of things like education, fishing, and hunting (and these are not minor things, but things I understand to be foundational to many Indigenous Peoples' legal and political lifeways). But it would also assert a kind of structuring authority, that is, the freedom to run such things in the first place, as nations with their own legal and political institutions in their lands.

For Constitution Express organizer and Wet'suwet'en Hereditary Chief Ron George (Tsaskiy), developing this understanding of jurisdiction was a formidable achievement in itself:

> The self-government stuff took a while for us to wrap our heads around it, because that's a pretty lofty goal for a bunch of people who have been downtrodden and, you know, just got the vote in the '60s. Self-government was a pretty unwieldy issue to wrap our mind around. But if it meant that we were going to get our land back, yeah okay let's do it, man. Every one of us fought to get our land back because most of us had been displaced in some form another, whether we were on-reserve or off-reserve, so we all knew our land was ripped off. And so self-government is just part of the whole plan. We had no idea how it was all gonna unfold or anything, but it was the goal. We all believed it. (Ron George interview, Aug 1, 2017)

And here jurisdiction tied also, inextricably, to territory. Just as Art had argued that Secwepemc jurisdiction spanned Secwepemc territory in his letter to Justin Trudeau, so too did the Constitution Express make this argument before his father. As Eddie Gardner (Stó:lō) told me: "The key message that people needed to maintain, was that we needed our third order of

government. We needed jurisdiction over our territory… fundamentally, that's what was on everybody's mind during that time" (Eddie Gardner interview, Jul 19, 2017).

It is true that in the Western (Westphalian) model, jurisdiction has also always tied to territory. However, in this case, it has to be exclusive. For herein state sovereignty lies: sole jurisdiction over a bounded swath of land. But, in the case of "settler sovereignty," as Lisa Ford (2010, 1) characterizes it, this "legal trinity of nation statehood" (jurisdiction-territory-sovereignty) breeds a specific kind of dispossession. Through a study of the states of Georgia (USA) and New South Wales (Australia), Ford traces a common phenomenon whereby settler governments, who initially embrace a kind of jurisdictional "multiplicity" (2) with the Indigenous Peoples on whose lands they plunked themselves, at a certain point start to "shore up" the legitimacy of settlement (3) by breaching the parameters of pluralism and extending their jurisdiction to the whole territory. This correlates the "perfection" of settler sovereignty to the dispossession of Indigenous Peoples' territorial authority. She writes, "Such was the moment of settler sovereignty: the legal obliteration of indigenous customary law became the litmus test of settler statehood" (2).

Ford's is a different framing of dispossession[12] than I'm used to, that is, one more directly pertaining to land. If territoriality is, as Patrick Wolfe says, "settler colonialism's specific irreducible element" (2006, 388), I find jurisdiction sometimes treated more as a casualty to the bigger theft underway, that is, of land. Political scientist Robert Nichols (2020) writes about this theft as a "recursive dispossession"—one in which Indigenous Peoples' original

[12] Though it is true that "The concept of dispossession has enjoyed a renaissance of sorts" (Nichols 2020, 28), finding new analytic life in applications that are not just material, in the line of Marx and David Harvey, but discursive, representational, and even performative (see Butler & Athanasiou 2013; West 2016; etc.).

'possession' of the land is retroactively conceived (as property) at the very moment of its alienation. There is ample empirical evidence to support this theory in Canada, perhaps the most literal being the boggling notion in the jurisprudence that "Aboriginal title"—something conceived as both pre-existing, and a creation of the common law—"crystallized" at the moment the Crown asserted sovereignty,[13] thus becoming a burden on the newer, yet curiously underlying, title of the Crown. However, I don't think that this same recursive logic applies to the dispossession of jurisdiction, at least not in the way the Constitution Express laid it out.

By the movement's math, more than a century of the Imperial Crown recognizing and arranging itself relative to Indigenous Peoples' authority had to be willfully imagined away in order for the Dominion government, starting around Confederation in 1867, to retroactively deny Indigenous jurisdiction and try to perfect its own sovereignty. Across its many petitions, international submissions, legal briefs, and position papers, the movement chronicled a series of Imperial instruments and directives—the most prominent being the Royal Proclamation[14]—which corroborated that settlement on Indigenous lands could only occur with Indigenous consent. Any changes to this political arrangement, they argued, would also need their consent. As this dissertation will discuss, the movement treated this consent not as a marker of some qualified, lesser jurisdiction, but of their full, flourishing self-determination. In fact, the Crown's duty to obtain and protect Indigenous consent acted as a limit on the Dominion's local governments, situating the inter-jurisdictional relationship between the Crown and Indigenous

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[13] *Delgamuukw*, at para. 145.

[14] The Royal Proclamation may seem consistent with Nichols' recursive logic—recognizing Indigenous jurisdiction (to consent to the alienation of their lands) at the same moment that the Crown's unilateral sovereignty is asserted on the basis of its pre-emptive rights of discovery (see Pasternak 2014, 156-160). Nevertheless, as Chapter Four discusses extensively, the movement did not take it this way, instead theorizing the Royal Proclamation as a limit on colonizing powers and their settler subjects and local governments.

Peoples as paramount to Canadian federalism. Here the movement further situated jurisdiction within international law, sending me even deeper down the rabbit hole of Imperial and international legal history, and turning to theorists like Antony Anghie (2005) and Kent McNeil (2018) in order to pinpoint exactly when and where it was decided that sovereignty had to be jurisdictionally exclusive. It also sent me to scholars of Indigenous law, like Sharon Venne (1997) and Val Napoleon (2010; 2015) who articulate a relational conception of consent, jurisdiction, and self-determination from within Indigenous international and treaty law.

But mostly I have relied on the theorizing that was done by Constitution Express' participants and strategists, including community members, lawyers, and leaders, who themselves diagnosed the problem of patriation and were the architects of the movement's alternative. (And it has been one of my life's greatest intellectual joys to work together with some of them to reflect on those alternatives now.) By reference to all bodies of law—Indigenous, international, and even British Common law—they made it clear that Indigenous jurisdiction was paramount in Canada, and that the Crown was legally bound to uphold it. They then exercised that jurisdiction by refusing to consent to patriation until they had a chance to sit down with the UK and Canada (at an Imperial Conference) and determine what they were to consenting *to*—that is, what constitutional arrangement would come out of it.

I learned from them that by approaching self-determination from the jurisdiction side of the equation, the form and function of governing institutions (i.e. the self side) can then take shape. And not just for Indigenous Peoples. By inviting Canada to meet them in an established decolonial forum—that is, an Imperial Conference, the common venue in which Commonwealth governments would introduce their plans to decolonize and develop new constitutional arrangements—the Constitution Express invited Trudeau to make good on his promise of

decolonization. This was a generous invitation, holding out jurisdictional relation, rather than a competition for jurisdiction exclusivity. This was an opportunity for Canada to think carefully about the kind of self-determination that it wanted to patriate, and its federalism too. Trudeau, of course, didn't see it as generous. He saw it as a threat. For if the patriation was a project about consolidating jurisdiction over territory to perfect Canadian sovereignty, any invocation of Indigenous Peoples' territorial authority—even a relational one—was a no-go.

In this way, my hope is that this dissertation contributes to political and legal anthropology too, by flipping it around a bit. It has long been an anthropological question how multiple, disparate polities, with their own legal orders, exist in the same state. But, to speak very generally, even in studies focused on pluralism, analysis tends to skew towards what happens to the Indigenous subject when it engages with the state—i.e. what is lost or gained (but mostly lost) for Indigenous peoples in the changes wrought in the colonial encounter (e.g. Gluckman 1940, Nader 1990, Falk Moore 1986). Instead, following people like Zacharia Keodirelang Matthews (1934), K.A. Busia ([1951] 2018), Eva Mackey (2002; 2016), Dara Culhane (1998), Johnny Mack (2009), and Michael Asch (2014), to name just a few, this dissertation offers some preliminary thoughts—throughout, but in the conclusion, especially—about what happens to the state in its encounter with Indigenous political and legal authority, and what *could* happen, were it to take that authority more seriously. The Constitution Express invited Canada to rethink its constitutional 'self' in relation to Indigenous Peoples' self-determination. And while I have only managed to begin such a discussion here, I tried to take up that invitation by taking seriously the generative vision that the movement put forth for how the colonial state might be reconstituted in the patriation moment—and not just the colonial state, in the domestic sense (i.e. Canada), but decolonization in the international sense too.

1.3 How the movement was organized (and how this dissertation is)

On November 24, 1980, hundreds of Indigenous People, including Elders, families, and Chiefs, gathered at the Pacific Central Railway Station in Vancouver. They piled into two trains—one heading north through Edmonton, the other along the southern route through Calgary, both bound for Ottawa. Along the way, they picked up more passengers. For example, a contingent of Tŝilhqot'in bussed over from Williams Lake to intercept the northern train in Jasper. At each stop in the prairies, the crowds who greeted them grew, with people bringing food and drums to send them on their way. The trains merged in Winnipeg, where they spent a rollicking night rallying, before carrying on to the capital. At the very same moment, a young Cree articling student was in Rotterdam, where she would present the movement's submission to the Fourth Russell Tribunal on the Rights of the Indians of the Americas. A week later, another journey would be made—this one by bus—to the United Nations in New York. And about a year after that, the "Constitution Express II" would be launched, sending about 200 people to the colonial metropoles of Western Europe, before landing in London to join a dynamic Indigenous lobby already underway.

There were actually a number of lobbies underway, both in the UK and in Ottawa, organized under the auspices of various Indigenous nations and organizations. This included local organizations and confederacies, such as the Association of Iroquois and Allied Indians and Grand Council of Treaty 9; regional organizations, such as the Indian Association of Alberta (IAA), Federation of Saskatchewan Indian Nations, and Four Nations Confederacy of Manitoba; Canada-wide organizations, such as the National Indian Brotherhood (NIB), which would reorganize as the Assembly of First Nations in this period; as well as international organizations

like the World Council of Indigenous Peoples. The Constitution Express, as movement led predominantly (though not exclusively) by Indigenous people from BC, would converge and diverge with each of these movements and organizations at various points along the way.[15] While I am not able to get into substantive detail as to the arguments of each one (as each would fill its own dissertation), I do touch on a few central facets of their collaboration throughout. (I am not able to nor interested, it will become clear, in creating any kind of comparative of their divergences.) The movement's reference to treaty (see UBCIC 1980a), the early adoption by the NIB of UBCIC's Aboriginal Rights Position Paper as the national response to Trudeau's patriation package, and the collaboration between the IAA, UBCIC, and Four Nations Confederacy of Manitoba on a joint memoranda of law for the British Attorney General are a couple of good examples of this convergence through the patriation period.

At the same time as being situated within this broader milieu of Indigenous political action, the Constitution Express at times responded very clearly to the particular colonial and anti-colonial histories within BC. It can be hard to parse which facets of the Constitution Express represented a broad-based grassroots Indigenous movement, and which portrayed the position of UBCIC as an organization, and I think this difficulty comes across in the dissertation. Generally, I have not tried to spell this out, letting it be as it was—a movement coordinated by UBCIC, though directed and largely executed by community members from Indigenous nations and territories throughout the province. "They asked who wanted to go and we stood up," Gabriel Williams (St'át'imc) told me, at her home in Mount Currie, where we sat and chatted together

[15] Furthermore, there were certainly a few participants from elsewhere, such as Dene leader Stephen Kakfi who went to New York, Cree Elder Albert Lightning who went to Europe, and strategists Sharon Venne and Marie Smallface Marule, who were vital in particular in the development of the movement's international thought.

with her mother, organizer Mary Louise Williams (Mary Louise Williams and Gabriel Williams interview, Oct 6, 2018). I clarified: *who did?* "We were at a Union thing," she responded. "But we were always closely involved with a lot of the things going on from the grassroots of this thing. We were never… part of the organization… we weren't involved with the Union as a leader or anything. We were just involved as people." This, you might say, was a defining feature of the Express. As Poplar writes, it was "a Peoples' struggle" (2003, 25).

This is another thing about the "Constitution Express," and my use of this term to refer to the struggle a whole, as well as the train ride itself. What began as a train ride, from which its name sprung, grew into a movement that spanned almost two years and encompassed various legal, political, international, and public mobilizations. Some parts of it very clearly fall under the Constitution Express heading, for example the delegation to the UN, which, though it was comprised of a much smaller contingent travelling by bus, was treated very much as an extension of the initial journey. Or the delegation of about 200 community members who went to Europe a full year later, on a sequel journey they dubbed the "Constitution Express II." But I see other actions—namely legal, rather than direct, actions—such as the court cases launched in Canada and the UK, or the submission before the Russell Tribunal, which were executed by those affiliated with the Constitution Express, to be just as much components of this same movement. This was often hammered home when Mildred Poplar would often tell me, "the backbone of the movement was the legal argument." As a result, I use "Constitution Express" as a kind of umbrella to refer to the train ride and the broader movement it spurred.

In keeping with the story, the way this dissertation is organized follows quiet closely the way the movement itself was. In this, it is structured more geographically than chronologically, with each chapter examining the way the movement's thought and strategy developed in each

new context where it found itself. First, however, Chapter Two addresses and reflects on my approach to this work, as a white settler anthropologist working to put into my research practice the very diffuse jurisdictional structure that the movement advocated. I call this a methods chapter "of sorts," though really my positionality and relational approach to working with the movement's participants drives the narrative. Then, I get into the journey itself.

Chapter Three delves into the 'domestic' leg of the movement—the train ride, and the particular colonial context in BC which drove people to get on it. It is here, on the trains, though informed by a decade of organizing leading up to their departure, that the movement conceptualizes Indigenous Peoples' nationhood and territorial authority. It is also here that the movement drops rights from its aspirations, opting instead to fight for self-determining jurisdiction. In so doing, I argue that the movement reconceptualizes Canadian federalism to better align with Indigenous political traditions and the historic obligations of the Crown, which foregrounded Indigenous jurisdiction both in principle and in practice. The federal government, the chapter will show, does not take this up.

In Chapter Four, the movement goes international. Done with the domestic scene, delegations head to the Fourth Russell Tribunal and the UN. In both places it recontextualizes the Crown's historic obligations to uphold Indigenous jurisdiction within the history of international law. In so doing, I argue that the movement challenges conventional narratives of international law as beginning with the "sovereignty doctrine," by foregrounding instead the "doctrine of consent" as foundational to Indigenous, international, and Canadian constitutional law. This shifts what Jean-Paul Sartre conceptualizes as the legal "limits" of imperialism in his model for the Russell Tribunal, from something immanent to Western legal convention to something equally rooted in Indigenous legal principles. Here the movement pushes against modern

international law in another way, arguing that decolonization—as yet available only to so-called Third World peoples—should be open to Indigenous Peoples too. It does this by turning the international legal concept of 'trust'—i.e. that paternalistic idea that colonizers would hold colonized territories in trust the colonizers proved ready for independence—on its head. Ultimately the chapter argues that the movement, taking inspiration from the Third World, sought to reshape international law along radically anti-colonial lines, and to reinstitutionalize Indigenous self-determination—a self-determination not necessarily statist in nature—as central to it.

In Chapter Five, the movement then takes to Europe, promoting this notion of Indigenous self-determination on a tour of former empires, while denouncing Canada's humanitarian reputation. This tour would be known as the "Constitution Express II"—a massive popular education campaign resulting in a number of fruitful and sometimes unlikely alliances. Flowing from this, in Chapter Six, the Constitution Express II lands in London, where it holds a potlatch in Westminster Abbey. Here the movement also launches a court case calling on the Crown to make good on its obligation to uphold Indigenous consent. But, I argue, it also deepens this theory of consent that began in Chapter Four, framing it neither as something purely contractual nor some lesser form of jurisdiction, but as something substantive, relational, and generative. Ultimately, it advocates a consent clause be included in the Constitution, not a rights one. Though this is not achieved, its impacts in London are profound.

Finally, in Chapter Seven, I return with the movement to the domestic scene, where, following patriation and the entrenchment of section 35, Canada and the provinces prepare to figure out what it is they have 'recognized and affirmed.' After four failed First Ministers Conferences—a domesticated version of the Imperial Conference the movement was fighting

for—two options remain, from the purview of the Canadian government: negotiate, or litigate. Some land rights and even a version of self-government begin to be handed down to Indigenous communities, but in ad hoc, modified, fragmented form. Dispossession turns to disconnection, as territory and jurisdiction are kept apart, treated separately both in policy and in law. And yet, Indigenous Peoples—like the Secwepemc people fighting the Trans Mountain pipeline—continue to suture them back together, asserting their authority in their lands. Today, the spectre of Indigenous territorial jurisdiction continues to loom.

The Constitution Express did not leave the station in search of incorporation into Trudeau's version of the Constitution. Instead, its participants realized that "without guarantees by the British Government and the International community that bands will retain their lands and resources, the continuing right of self-government and self-determination," then they would find themselves "Living without Indians lands" and "assimilated under the authority of the provincial governments and the Canadian Federal Government" (UBCIC 1980a, ii). In response, it challenged state sovereignty, moved the issue into international fora, and expanded the focus from rights to nationhood. Its shrewd interplay of domestic and international action was not just a tactic to apply global pressure to Canada to accommodate Indigenous Peoples in the constitutional process (though this it did). Rather, the interplay was the objective: to establish Indigenous jurisdiction on a local and international basis. In this line of thinking, this dissertation, undertaken in partnership with its leaders and participants, looks at how the movement's assertions of Indigenous nationhood and jurisdiction belie the narrative of Canadian sovereignty at the heart of the patriation project, proposing decolonization in its place.

Chapter 2: On Getting it Right the First Time (A Methods Chapter of Sorts)

One fall morning in 2015, I got on my bike and rode to Commercial Drive. Gwitchin Elder Mildred Poplar was visiting Vancouver, and we had a plan to meet for coffee. This was not our first meeting, though it was pretty close. We had spent the last few days together, kindly ferried around by Secwépemc leader Arthur Manuel, mostly to and from the Union of British Columbia Indian Chiefs' Annual General Assembly, which was taking place in Musqueam. Manuel was deliberate in throwing us together this way, in his truck, where for about eight years most of my political education had taken place. This coffee date would be our first time spent just the two of us, and I was excited, if a bit antsy. I locked up my bike, attempted to smooth out my helmet hair, and found us a table inside.

Upon her arrival, Poplar pulled out of her purse a small, stapled booklet, clearly of the typewriter era, titled, "Indian Profile of George Manuel (Shuswap Nation) Neskainlith." Sliding it across the table to me, she explained: it was 1984, and George Manuel had just survived his third heart attack; Arthur's brother, Chief Robert Manuel, asked her to compose a profile of their father and the work he did "on behalf of Indian people in British Columbia, across Canada and throughout the world" (Poplar 1984, 25) The result, this 25-page booklet, narrates the extraordinary career of the Secwépemc leader with a tenderness and grit that only a close friend can achieve.

I was grateful that she would begin our meeting with this gesture, though I wasn't sure of its meaning. At the time, I was just three weeks into my PhD, hoping to write about the Constitution Express. Poplar, one of the masterminds behind the movement, was weighing whether she wanted to engage with my potential research. And I was eager—probably overeager, if I'm being honest—to have her suss me out.

I would like to think that my motivation for the meeting was not just to win her over; rather, that I was relationship building with an honesty and respect that accounted for the possibility of building no research relationship at all. In theory, I am entirely committed to this possibility. I can think of many reasons she might choose not to engage in academic research, be they systemic, historical, or personal. But even so, there is a part of me that questions whether I am ever truly able to remove my ego—wound up tightly in my research—so thoroughly from the equation. In any case, unsure whether the booklet marked the start of our exchange or the end, I was glad for it—the material itself and the gesture, whatever it was.

With the booklet, Poplar gave me something else. It was a small sheet of paper—a note, smartly handwritten—with the heading, "For Emma."[16] A subheading, "Work on Aboriginal Peoples," was followed by a short, numbered list:

1. You have to get it right the first time. The public will depend on your work for reference.
2. Whose original thought is it?
3. Never give credit to one person—the politics are the people in their communities.

Poplar barely remembers giving me this note, of course. But for me at the time, it felt imperative. (Maybe I was eager for something to feel imperative.) But there is also something about being handed a written page—it makes sense that, in the Western tradition of revering documents, I would give it a certain weight. Either way, in three short lines she had articulated some of the most pressing concerns that shoot through the fraught relationship between Indigenous Peoples—their knowledges, stories, political lives and lifeways—and settler scholarship.

[16] Shared with Poplar's permission.

I am a settler[17] academic. A white one, and an anthropologist to boot. Sitting there in a necessary awkwardness, she and I chatted tentatively, though honestly, about the problematic fact that mine would be one of few academic voices to write about the Constitution Express. Tucking her note into the booklet, I knew they were meant to be a pair: research material brings accountability with it. I hadn't won her over per se, but something more important had happened. Together, these documents inaugurated a more nuanced relationality between us that would consist of both engagement and refusal, blurring their binary and my thinking about voice in settler scholarship. More, they marked a kind of material culpability for me, beginning an archive of our exchange.

2.1 You have to get it right the first time

A few years earlier, Arthur Manuel—my mentor and dear friend—asked me to write about the Constitution Express and gather stories of those involved. I had been working with Arthur since about 2010, first as an MA student, and later as a helper of sorts, conducting economic and policy analysis under the auspices of his organization, the Indigenous Network on Economies and Trade. I travelled back and forth to his territory, Secwepemcúl'ecw, in BC's south interior plateau, a lot over the course of five years, as ours was always a project-to-project operation. As

[17] A note on terminology: I use "settler" in a few ways. Rarely in reference to the state, though more often as a subject position to refer to people who were subjects of imperial governments and came here with the intention of staying, and their descendants, like myself. I use "settler scholarship," to refer to a certain tradition of research *on* Indigenous Peoples. But, I do not mean to marginalize those that fall outside of the now prevalent Indigenous-settler binary, nor do I want to gloss the specificities of colonialism across Canada, i.e. the arrangements or guises under which "settlers" came to assume their own permanence in different contexts. I am reminded by Sharon Venne that "people are in our territories at the request of the Crown as per the Royal Proclamation of 1763. They are subjects of the Crown… Where no treaty exists, then they are squatters" (personal communication, November 27, 2020). So, when I use the term, it is with this qualification. I descend from Irish and British subjects who made treaty territories and non-treaty territories their home. In Vancouver, where I am at the time of writing, I am a squatter.

I contemplated the Constitution Express project, dedicating a PhD to it started to look like my most feasible option if I wanted to dedicate the kind of depth, breadth, and resources it deserved. After starting my doctorate, however, I found that both the content of this project and the methodological practice of it posed novel challenges that I had not grappled with in the decade I have been working with Arthur and in Secwepemcúl'ecw (Secwepemc territory).

During this time, I thought I had figured out the kinds of academic work I was comfortable taking on from my particular subject position as a white settler. This work is different from the non-scholarly work I do that directly supports Indigenous infrastructures of resistance and resurgence (i.e. solidarity activism) in a few key ways. While both share decolonization[18] as the objective of work, and while they may even involve the same kinds of labour,[19] scholarship is uniquely discursive work in which I set out to confront the structure and operation of the colonial state—namely, its claims to exclusive jurisdiction. In it, my voice is more often positioned in the foreground, and I use it to address settlers and talk about colonialism. I see this as a kind of companion to decentering "the settler gaze" (Tuck and Yang 2014, 224) by recentering the settler gaze upon ourselves. Which is to say, I try not to take on work that hinges on the telling of Indigenous stories, instead framing my work around stories about Indigenous-settler relations. This means telling stories about settler political, economic, and legal traditions that are deployed to dispossess Indigenous Peoples of their territories and territorial authority. But it also means telling stories about the refusal of that dispossession, and its alternatives, i.e. decolonial jurisdictional arrangements offered to settlers from within

[18] In the literal, and not the metaphorical, sense (see Tuck and Yang 2012).
[19] This may include policy and statutory analysis, oral history, archival research, grant-writing, logistical support for frontline organizing, etc. However, in scholarship, most of this is not considered labour but *methods*, and only a fraction of its products are recognized as productive at all. Yet, I rely on this to finance the non-scholarly work.

Indigenous political and legal traditions.[20] I approach these particular stories relationally, judiciously, and sparingly: only when initiated by their protagonists and keepers; in accordance with the Indigenous laws that sustain them (see Borrows 2010; Napoleon and Friedland 2016); and ever conscious of the political stakes (see Goodyear-Kaʻōpua 2016).

The Constitution Express, an unequivocally Indigenous story, messes with these criteria, no matter my framing. More, it revealed to me their fault lines. I guess I had thought that by focusing reflexively on *relations*, I might avoid or even redress some of the more colonial genealogies of settler research, which most overtly appropriate Indigenous story. But in so doing, I found myself drawing mostly arbitrary moralistic lines—for my own comfort, more than anything else—between two types of stories that cannot be so neatly separated. What the Constitution Express makes obvious, is that confronting the jurisdictional structures of the settler state and telling stories about its acts of dispossession necessarily means telling stories about the real experiences and consequences of that dispossession for Indigenous Peoples. Further, telling stories about jurisdictional alternatives to dispossession means engaging with Indigenous Peoples' legal and political traditions in a way that cannot, and should not, focus solely on their relationship to settler peoples and polities.

When Arthur asked me to look into the movement, I was stunned to learn how little has been written about it. Outside of a vital project by Vicki George—a superb collection of filmed

[20] While I learned this approach predominantly directly from Indigenous people I have worked with, I have also been informed by others in the discipline. Which is to say that within the history anthropology, I am certainly not alone in this unabashedly anti-colonial approach (that is, both within the modern history since its so-called 'reflexive turn,' and within a lesser known genealogy of the discipline that came before it before it; see Asch 2015). A few particular inspirations include folks like Sol Tax (see Tax 1968; Smith 2015); Shannon Speed (2006); Dawn Martin-Hill (2007); Elizabeth Povinelli (2002); Michael Asch (2014; 2015); Eva Mackey (2002; 2016); Zoe Todd (2016; 2018); Anne Spice (2018); and, as this chapter makes obvious, Audra Simpson (2015).

interviews with leaders of the Express (see George 2005-2006)—its dearth of coverage is troubling. Its archive and its canon are predominantly oral, retained by those involved. *People are getting older,* Arthur told me. He worried about the stories not yet recorded and criticized the lack of analytic engagement with them. I thought of his father, his brother Bobby, his sister Vera—all critical to the movement, all had passed away. I thought about how to build on Vicki George's critically important work. *There should be a book,* he said.

Yet, I felt a tension between the imperative to document the movement with the urgency and the rigour that Arthur conveyed, and my previous criteria for academic work—particularly my refusal of the kind of the "thick description" (Geertz 1973) that characterizes a certain ethnographic tradition of white people writing Indigenous histories. Later, a fellow anthropologist would hit on my unease when she scribbled cheekily in margins of my dissertation proposal: "the inevitable lure of salvage ethnography…" I cringed at this incisive nod to "salvage"—a term invented to lambast any ethnographic enterprise that fashions the presumed disappearance of Indigenous knowledge as its raison d'être (Gruber 1970). There is a regulatory effect of this kind of ethnographic writing, fixing Indigenous life in the past, against which their present realities and claims are then measured (Simpson 2014). For all their thick description, there is something audaciously archival about them.

In fact, these accounts often come to stand in for archives in-and-of themselves, taken up as primary sources by courts and academics alike. For example, Antonia Mills' (1996) account of giving expert testimony in *Delgamuukw* is a compelling reflection on this phenomenon. Both her written testimony and Wet'suwet'en claimants' oral evidence were assessed against early ethnography of Dakelh (or Carrier) life, taken as historical fact (particularly Julian Steward's claim—in his 1940s work on the neighbouring Stuart Lake Carrier—that the matrilineal descent

system was no longer in working order, and thus no basis for title[21]). Certainly Poplar anticipated such pitfalls when she wrote, "You have to get it right the first time. The public will depend on your work for reference." A hefty prospect, as I considered uneasily whether I too was venturing into this tenuous business of writing the archive.

While hefty, it is also a prospect that puts me in tension with anthropology's nervous postmodern 'turn'—that "crisis of representation" (Marcus and Fischer 1986) which left many wondering whether it is possible, or ethical, to get anything 'right' at all. Along these lines, James Clifford (1986, 7) famously asserted that ethnographic truths can only ever be partial, even and especially when creating a "written archive" of "oral lore" (8). This wasn't a lament, however. To the contrary, it was seen to be a good thing, finding within "rigorous partiality" a "source of representational tact" (7) contrary to the positivist, authoritative "realism" (Marcus and Fischer) of the salvage tradition. And yet, responses to this crisis have (rightly, I think) taken issue with its retreat into a bourgeois and often self-indulgent form of contingent cultural critique (see Comaroff and Comaroff 1992). To proudly *not* get it right, does another disservice to the people with whom we work. At best, it produces work that is "utterly irrelevant (or even counterproductive) to the immediate struggle at hand" (Hale 2009, 113), displaying a different kind of indifference to the political stakes for our interlocutors. This was the tension, I realized, in which I stood.

I stared at the note in the margins of my proposal for a long time. *There is truth to this,* I thought. In a way, I am lured. At the same time, the "salvage" impulse at play here is a slightly

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[21] Steward himself applied his theory of 'levels of sociocultural integration' to deny Indigenous Peoples' claims to land in the American context, for example, in his testimony before the U.S. Indian Claims Commission (see Pinkoski 2008). In *Delgamuukw*, this evolutionary theory was similarly applied to deny Indigenous title claims in British Columbia.

different one. Rather than presuming to capture *cultural* knowledge, before its assumed obliteration by the onslaught of modernity (while doing little to explicitly avert that onslaught), this project is about a different kind of narrative erasure. That is, the erasure of Indigenous Peoples' *political* and *legal* traditions, contestations, and refusals, in the constitution (and the Constitution) of this country. (This erasure, I might add, actively brings about the disappearance which the original salvage tradition assumes inevitable.) *So,* I also thought, *I will figure this out*. And I set out to do just that: to find a way to honour Arthur's request and rethink my criteria; to address Poplar's list; to be lured and to push back against this "inevitable" luring.

I quickly encountered two responses to the lure of writing the archive that align more closely with the kind of decolonial jurisdictional arrangements called for by the Constitution Express: Audra Simpson's ethnographic refusal and Saidiya Hartman's narrative restraint.[22]

To start, Simpson's ethnographic refusal resists grand narratives which fetishize tradition and suspend Indigenous stories in some fixed cultural past. It does this by advocating that we refuse the ethnographic drive to divulge "everything" (Simpson 2014, 105) Rather than compromise our rigour, this thinning of thick descriptions strengthens it by encouraging a deep engagement with our research that is attentive to our positionality vis-à-vis the aims, stakes, and jurisdiction of those with whom we work. In this, it is a "positive refusal," prefiguring Indigenous authority (128). I never planned to write a grand narrative of the Constitution Express, of course. (These days, few anthropologists could get away with such hubris.) Nevertheless, ethnographic refusal provides a kind of 'how not to' guide, helping to fend off any such proclivities which might creep up and keep one's hubris in check. For settler academics, I

[22] Thank you to Phanuel Antwi for pointing me in this direction.

take it as a call to determine—together with our Indigenous interlocutors—which parts of the story are for us to tell, i.e. separating that which we have a responsibility to tell our settler peers and governments from that which we have a responsibility not to, for example, that which appropriates or "disinherits" Indigenous Peoples of their stories (Maracle 2017, 99), or crisis-based narratives which simply chronicle Indigenous pain (Simpson 2017, 22). Refusal helps to keep a laser focus on the parts of the story that settlers and settler polities need to know in order to dismantle colonialism and forge a pathway out of it, while restorying the accepted narratives of Canadian political history.

In a way, figuring out which parts of the story of the Constitution Express might be open to my telling seemed like the easy part. I started by reading through the movement's submissions, petitions, and position papers, where I began to understand its innovative analysis of patriation—one it carried Ottawa, which would strike at the heart of Canada's colonial origins. Here, the story of the Constitution Express offered a counternarrative of Canadian constitutionalism which overhauls our federalism, foregrounds Indigenous jurisdiction, and refutes the assertion of state sovereignty in the first place. It questions the legitimacy with which Trudeau might "patriate" the Constitution whatsoever. In this I found a focus that aligns clearly with my old criteria for scholarly work. It is an archive I am keen to write: the movement's novel takedown of Canadian colonialism and its directives for revamping our constitutional architecture today. In close conversation with its leaders, I look to the Constitution Express for instruction as to how we settlers dismantle the current, colonial constitutional order. But I also look to it for blueprints for jurisdictional arrangements rooted in Indigenous Peoples' legal and political formulations.

Which brings me to the harder part: how to contend with the resurgent narratives of Indigenous nationhood that the movement put forth. More than anything, the story of the

Constitution Express is a story about the flourishing of Indigenous nationhood in the face of empire. The movement did not just refuse a colonial constitutional future (and past, and present), but put forth a generative alternative. Here the narrative shifts to positive refusal, a "desire-based" narrative, an antidote to the barrage of damage-centred scholarship on Indigenous life (Tuck and Yang 2014, 231). The movement gave rise to a set of conversations amongst Indigenous Peoples in BC, not just about their relationship to Canadian federalism, but about their own political institutions, and the kinds of confederation they sought to establish (or re-establish) with each other.

As I began to build relationships with participants in the Constitution Express and interview them, these conversations came forth. Methodologically, I figured I would essentially trace the movement's path across Canada and to New York and Europe. Fittingly, I started just outside of Vancouver, meeting Eddie Gardner for lunch at a sushi restaurant in Chilliwack before interviewing him at the sweat lodge he helps to run on Stó:lō Nation territory—only to learn he had started his Constitution Express journey not in Vancouver but in Ottawa, where he was a member of the "advance team." As I kept going, things did not unfurl so linearly for me either. I went west, not east, travelling to Victoria, where what was supposed to be a lunchtime chat turned into a sprawling seven-hour interview with the inimitable Ron George (Wet'suwet'en Hereditary Chief, Tsaskiy), a young Constitution Express organizer who would go on to become President of the Native Council of Canada, among many other accomplishments. As these things go, I ended up kind of zigzagging up and down the country depending on when people were available, when archives were available, and when funding was available, ultimately speaking to about 30 people. In Yellowknife I interviewed former Dene Nation President and Northwest Territories Premier Stephen Kakfwi. He, along with his wife Marie Wilson (who I interviewed

separately by phone), found themselves on the Constitution Express' delegation to New York, knocking at the door of Tanzania's Permanent Mission to the UN. I spent hours at the Williams Lake Denny's, chatting over coffee with northern Secwépemc Elder Mary Thomas, who had spent the better part of 1981 and 1982 living out of UBCIC's office in London, where its UK lobby was run.

I tracked down some of the folks on the other side of that lobby, including Richard Drabble, who as a young barrister assisted the famous Louis Blom-Cooper in the Indian Association of Alberta's legal challenged to the Patriation Bill before the British courts. I interviewed supporters of the Constitution Express II through Europe—members of solidarity groups in Germany and Belgium. In Canada too, I interviewed settler supporters and political figures—UBCIC's lawyers, of course, as well as Thomas Berger, who lost his bench position for taking a principled stand on Indigenous exclusion from the Constitution, and former NDP MP Ian Waddell who had a strong hand in securing and drafting the final version of section 35.

I ended off back in Secwepemcúl'ecw, working with Poplar on an event to honour the Constitution Express during UBCIC's jubilant 50th Annual General Assembly in Kamloops. Here I was able to nab a number of leaders for interviews, before swinging through Stat'imc territory for more interviews on the way home.

As I got to know and got to talking with people, a multitude of nuanced, considered descriptions of Indigenous nationhood began to accrue, as it was contemplated in community, on the trains, in the UBCIC offices, in court, and in ceremony. Some are specific, involving a set of pillars on which "Indian government" would be built (Poplar 2020). Some go on to describe precise areas of Indigenous jurisdiction (UBCIC's 1979 *Aboriginal Rights Position Paper* laid out 24 of them). Some align with the language of self-determination as it is invoked in

international law (Poplar 2003, 25). Some with the kind of self-reliance promoted by African anti-colonial nationals, such as Tanzania's Julius Nyerere, with whom George Manuel had fraternized in 1971 (Coulthard 2019). Without mimicking its statist institutional form, some nevertheless conjure the kind of autonomous "home rule" that drives Quebecois nationhood (Manuel and Posluns [1974] 2019, 217), or that of Scotland and Wales (UBCIC 1979, 3). Some invoke a bush economy, seeking to "design an economy for ourselves, a social, a cultural, a political life" based in "Indian ideology" (Manuel 1981a). Many gesture to a land-based relationality, specific to their respective territorial obligations. Some speak of sovereignty. Some categorically do not. Many speak of revival.

Stories of Indigenous nationhood pour from the archive of the Constitution Express, in a "gorgeous generative refusal of colonial recognition" (to borrow Leanne Simpson's [2017, 9] terms). And yet, in this most important part of the story, my criteria started to get in the way. For settler scholars, theorizing the shape of and pathway to Indigenous nationhood is politically dubious business, to say the least. Generally, these stories are not for us to tell. On the other hand, I certainly would not be getting it right the first time, if *these* were the descriptions thinned as a result of my ethnographic refusals, particularly when positioned next to a thick description of settler decolonial futures. Rather, I realized, the refusal lies in declining to theorize their coherence.

According to Audra Simpson, ethnographic narratives of Indigenous life risk being deployed as the authoritative benchmark against which Indigenous Peoples' present realities, goals, and claims are assessed (2014, 93). Such "smooth narrative curves," to use Jodi Byrd's (2011, xxvi) phrase, feed state recognition, by codifying one version of the story as the authentic one, setting its limits. This is the very pitfall of section 35, after all—a section which, in

Canada's treatment of it, seeks certainty by putting definitive bounds around Indigenous rights. Refusing certainty, Simpson splinters her accounts of Mohawk nationhood into a variety of narratives which foreground the authority of the collective and "expand the limits of sovereign knowledge" (Tuck and Yang 2014, 243). Following her method, it is not a thin description of Indigenous nationhood which fends off its containment. Rather, it is the tidying up of disparate descriptions into a neat, bounded container that must be resisted—a container which could be used, say, to assign section 35 rights to certain peoples, while denying them to those whose presentations of nationhood fall outside of it, rendering them unrecognizable.

Of course, this means heeding the jurisdiction of my partners in this work to narrate their own nationhood, filling the gaps of the colonial archive—in which I found the Constitution Express to exist only in fragments—with their own dynamic counternarratives.

In fact, I ended up going to way more archives that I had ever intended through this work (eight!). I started, of course, with UBCIC's fantastic resource centre, where I spent a week flipping through hard copies of meeting minutes and newspaper microfiche. Then, when I went to Maskwacis, Alberta to meet a group of strategists and negotiators who had worked with the National Indian Brotherhood and Indian Association of Alberta—a group which included Sharon Venne, Elder Gordon Lee, Victor Buffalo, Regena Crowchild, Charlie Woods, and Catherine Twinn[23]—I was invited to visit the Samson Museum and Archives.[24] Here I looked through yellowed copies of their old community newspaper, *Bear Hills Native Voice*, full of brilliant editorial analysis of the patriation fight. I later ended up in the Neskonlith Band Office, looking

[23] An enormous thank you Bruce Miller for connecting me with Twinn, and to Twinn for her incredible generosity hosting me and helping to set up this meeting.
[24] Thank you to Beverly L. Crier from the History section of the Samson Cree Nation's Inter Governmental Office for generously inviting me to and hosting me at the archives that day, and for discussing the Constitution with me.

through probably the best collection of mainstream media's coverage of Indigenous opposition to patriation I have seen, carefully photocopied, with the dates and outlets scribbled in the margins. These community archives helped to fill the many gaps I encountered within Library and Archives Canada, which was notably less willing to let me paw around.

I found everything about Canada's archives to be convoluted—the organization of material was unintuitive to me, my search terms garnered few results, and there were restrictions on much of what I did find.[25] At first I blamed my own shortcomings as a researcher. Each time I was in the building I felt the tingling sensation that some box of treasures must be in there somewhere, in mocking proximity to where I sat, while my flailing search terms failed to pinpoint its exact location. But, as Crystal Fraser and Zoe Todd (2016) write, this is how colonial archives work: "the structure and function of archives remain bound to National imaginaries and histories." What's most telling is what's missing from the record. I came away with materials I would consider tangential at best, hoping that I could somehow read relevance into them by reading "along the archival grain," as Ann Stoler (2009) advocates we do when faced with fractured colonial archives. But really, there was little to be done. I redirected my sleuthing towards finding Ottawa's best bowl of pho (stuck as I was in -35°C weather while pregnant).

The United Nations' archives in New York were even less successful. Here I found a lot of information about George Manuel's efforts to get the National Indian Brotherhood and World Council of Indigenous Peoples accredited with observer status to the UN, but almost no trace of

[25] It was frustrating, but not as frustrating as if I were one of the many Indigenous scholars, activists, and family members, like Fraser, trying to recover sequestered residential school files (Fraser and Todd 2016).

the Constitution Express's delegation there or meetings with the Under-Secretary General for Human Rights or Under-Secretary for Political Affairs.

Luckily, Europe was much more forthcoming. I made appointments at the Parliamentary Archives and the National Archives in London, as well as the Internationaal Instituut voor Sociale Geschiedenis (International Institute for Social History) in Amsterdam, where the archives of the Fourth Russell Tribunal on the Rights of the Indians of the Americas are housed. In London, I requested dozens of folders whose titles sounded vaguely relevant. I started with the fonds of the Foreign Commonwealth Office and Prime Minister's Office, before moving on to the personal fonds of particular MPs and Lords I knew to have supported the "Indian lobby" there. I invited Vicki George to come with me to see what they contained, hoping we might find items useful to her to build on the documentation she began back in 2006. As the daughter of Ron George, it felt especially important that we go to Europe together. Ron had been central to the organization and leadership of the "Constitution Express II," which traveled through Europe in the fall of 1981, ending in London for a potlatch at Westminster Abbey. It proved an invaluable and deeply meaningful experience to be in London with Vicki, sitting across the street from the site of the potlatch, pouring over archives at the Palace of Westminster.

The Parliamentary Archives especially gave us nearly unfettered access to its files. Not one item I requested was held back or redacted, and instead restrictions were lifted. I chalked this up to the fact that these archivists probably weren't so familiar with Canada's sensitivities, and the kinds of information it parsimoniously keeps away from Indigenous and academic eyes. Instead, they seemed intrigued by us, poking their heads into the small yet regal visiting room to offer help to these visitors from Canada who had requested a strange swath of files. I wondered whether anyone had ever looked through these particular documents, in all this time.

Confidential telexes between Thatcher and Trudeau were handed over without hesitation, as well as those between bureaucrats, gossiping about the politicians (Trudeau's bullheadedness made a particular impact on the Brits). By reading backwards through these communications, filling in the other side of the conversation, we could piece together Canada's stance—its shifts and maneuvers—which sought to take back the Constitution from the UK, with no room for 'meddling' from British MPs nor the Indigenous groups who had their ear. It was exciting when we would see the conversation shift, mapping Canada's anxieties onto the ground gained by Indigenous Peoples in London. We followed along, as the UK defended itself against charges of 'colonial' interference—a ridiculous charge, given they were interfering in alliance with the very Indigenous Peoples whose rights Canada was trying to extinguish. We then saw a change in tone, as Canada issued liberal assurances that it could be trusted with Indigenous Peoples' wellbeing, and its eventual concession to recognize their rights. Now here we had some 'grain' to read along! I wondered if this was the kind of fodder that Stoler talked about, when she wrote about the anxious ontologies of colonial archives, as "records of uncertainty and doubt in how people imagined they could and might make rubrics of rule correspond to a changing imperial world" (2009, 4).

Vicki's vast knowledge of the legal system, the movement, and time period—a period when she was but a kid—helped immeasurably to fill in the archive's gaps. Really, it was an incredible experience to witness and discuss her responses and reflections, as part of the next generation carrying the movement's legacy, when we would assess our haul at the end of each long day in the archives. For two and a half weeks of intensive research we were totally immersed—together—in the stories these archives told, those it didn't, and those it only hinted at. Over meals, on the tube, on walks, and on train rides, we processed these materials in step, as

we journeyed together in and around the places her dad and his cohorts had been, and the conversations they had been on the other side of. It was a completely novel experience of reading along the archival grain, and I got to do it with an expert and a friend.

When I later started writing and began to put all of these archives next to one another—written ("formal") state archives, community archives, and the much bigger oral archive of the people I spoke to, I began to better understand how to treat them relative to one another. As Jean and John Comaroff write, "For historiography, as for ethnography, it is the relations between fragments and fields that pose the greatest analytic challenge," interrogating "the constructs through which silences and spaces between events are filled, through which disjointed stories are cast into master narratives" (17). The task, it seemed to me, was not to plug one set of fragmented archives into the gaps of the other. While I set about scrutinizing the gaps of the colonial archive, together with Vicki and with my other interlocutors, when it came to their own archives—largely oral ones—the analytic task was a different one. It instead meant working carefully with them to respect the gaps they create, their silences and deviations, taking care not to trespass the boundaries they set. Their narrative didn't need splintering, nor was it the time to read along their grain. Instead, I learned to refuse an academic impulse to reconcile a set of narratives that are already richly diffuse, theorizing along, through, and against their gaps.

Here I began to wonder, what does it look like to engage in a scholarship that refuses to write coherence in the face of uncertainty?[26] And yet, one that still 'gets it right.'

[26] My friend Kendra Jewell (2019) recently posed such a question at a meeting of the American Anthropological Association.

Here, Hartman's narrative restraint became a guiding light. If refusal creates gaps in our descriptions, narrative restraint dissuades our closing the gaps already present (2008, 8). It strives to redress the violences that produce fragmented archives in the first place (3) without committing further violence in our own acts of narration (9), even those borne of an aspiration for justice. In my case, this would include the aspiration to disprove Trudeau's favoured argument that the Constitution Express was fractured or disorganized in its aims—an argument that motivated UBCIC to spell out its demands with ever increasing precision, right down to the kinds of committees it wanted struck (UBCIC 1979). Indeed, the Constitution Express was singly clear in terms of the kind of decolonial process it demanded of Canada. But it was equally clear that the results would be plural—that on the other end, Indigenous nationhood would take many forms. The task, then, for me, would be to the strike the same balance. To fend off tired old, racist charges of disunity, without capitulating to them. To honour the story without making it "useful or instructive" (Hartman, 14) to the state's desire to contain it. And to resist consoling the discursive discomfort this creates.

In her stunning writing on enslaved Black women—women who are emblematic in the archive of Atlantic slavery, yet silent, found only in traces—Hartman leans into discomfort, weaving divergent and incommensurate accounts in an effort "to topple the hierarchy of discourse, and to engulf authorized speech in the clash of voices" (12) She engulfs and yet holds back. She engulfs *by* holding back. She writes: "Narrative restraint, the refusal to fill in the gaps and provide closure, is a requirement of this method, as is the imperative to respect black noise—the shrieks, the moans, the nonsense, and the opacity, which are always in excess of legibility

and of the law" (12). In the context of my work,[27] restraint means refusing to sate a settler scholarship—and a settler law—hungry for useful, legible Indigenous nationhood. I came to learn that while getting it right the first time could never mean thinning descriptions of nationhood, it would require resisting my own urge to thicken the threads between them. To respect what we cannot know (2) doesn't mean we can never say anything for certain. Rather, it means engaging with the archive of the Constitution Express in all of its rich cacophony, while letting its silences be.

2.2 Whose original thought is it?

With her second question, Poplar asks who claims such a narrative: whose original thought is it? As one of the movement's key strategists, Poplar knows well that the Constitution Express presents not just an archival project, but a theoretically novel one. Alongside the historiographic urgency Arthur conveyed, there is its out-and-out rebuttal of settler sovereignty, and the ever-piling baggage of section 35 to contend with. These pose an important opportunity to think further about the aims of the Express, and its implications today. It is a chance to "restory" (Hallenbeck 2019) section 35 as a clause about jurisdiction more than rights, swapping its imperial undertones for Indigenous stories that give it a different meaning. For all of these reasons I find myself both rapporteur and analyst, occupying a space common to most anthropological work, though not always made explicit. Also like much anthropological work, I

[27] This is an application and not a comparison. I do not want to gloss the vitally important subject of Hartman's work—the lives of enslaved women found in traces in the archive of Atlantic slavery, "extrapolated from an analysis of the ledger or borrowed from the world of her captors and masters and applied to her" (2008, 2). I hope my own extrapolation of Hartman's theory of narrative restraint into the context of Canadian colonialism (a different, though structurally related context) pays credit to her breathtaking work and does not in any way trivialize it. As analytic practice, I only hope to demonstrate the kind of care she shows the archive and the lives that exceed it.

am not alone in this space. Rather, I am a newcomer, joining a league of Indigenous thinkers whose stories of the movement are already thick with theory.

I was struck by this thought, as I sat in a packed conference room at the annual meeting of the American Anthropological Association in San Jose in 2018. It was a legacy panel on the work of Sherry Ortner, and Sylvia Yanagisako used her presentation to address the strange heroism of the lone ethnographer, calling for collaboration between anthropologists. This was collaboration in a different sense than I was used to (the methodological one). Pinning analysis as the moment we become lonely—when we return from the field and turn away from our otherwise relational research methods—she called for collaborative theory.

On one hand, I found this refreshing. I have long felt uncomfortable with the institutional relegation of collaboration to methods and methods alone. This goes for all relational considerations, really, including our obligations to lands, stories, and to each other, tidily allocated to the demarcated stage of "data collection." (And to "ethics," which in the Western legal tradition is effectively a liability assessment of methods.)

As a result, on the topic of method in settler scholarship, there is ample social science—decades of anxious anthropology, even—from which to draw. Particularly vital interventions made by Indigenous scholars and those formerly deemed "subjects" of research have changed the game, offering shrewd analyses of the asymmetric structures of academic research and generous proposals for its transformation (see Kovach 2009; Hunt 2014; Smith 1999; Wilson 2008). While every project will be grounded in its own place-based context, this work means that we settlers need not be so arrogant as to stumble around reinventing the wheel each time we contemplate research that pertains to our relationship to Indigenous Peoples or colonialism. Evidence of the institutional effects of such hard-fought interventions can be found in the

reformation of methods syllabi, funding requirements (for example, see the Social Sciences and Humanities Research Council's statement on Indigenous research), and within ever-evolving ethical standards (for example, Chapter 9 of the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*) for how we conduct ourselves, interpersonally and inter-politically, in "the field."

Which is to say, methods are important, and engaging in Indigenous methodologies that are anchored in their theoretical, political, and epistemological context—i.e. that are centred "in the theoretical home of Indigenous intelligence" (Simpson 2017, 35)—would change "the nature of the academy itself" (Kovach, 12). What is worrisome, then, is the tendency to seek salvation in collaborative methods within an otherwise colonial structure of academic production. Perhaps if we understood method as a "theoretical intervention" (Simpson 2017, 19) this wouldn't be so stifling. But, as things are, the methodological containment[28] of Indigenous interlocutors has a number of consequences. For one, it does not apply equally across disciplines, letting the theory-oriented (and the archive-based!) off the hook. It is staggering that there are no formal accountability structures—within the institutions where I have done work, at least—for scholars whose historical, sociological, political, literary, and even scientific research pertains to Indigenous Peoples but whose disciplinary methods nonetheless do not engage living individuals from those peoples.[29] Even for those whose methods do involve the participation of others, intellectual accountability is reconstituted as an issue of personal conduct, obscuring its systemic

[28] A play on Audra Simpson's "discursive containment" (2014, 105).
[29] Here I refer specifically to the lack of institutionalized accountability structures within universities. Of course, scholars may already be made accountable through community-based structures. By the same token, formalizing such structures within universities may not necessarily function to make scholars accountable to Indigenous communities. Nevertheless, the general lack of attention to this issue is staggering.

nature. On this point, Eve Tuck and K. Wayne Yang shoot down the misconception that the mere participation of Indigenous Peoples will resolve structural issues related to "representation, voice, consumption and voyeurism" (Tuck and Yang 2014, 230).

At its very worst, methodological containment smacks of consultation, the much-bedevilled legal process by which the Canadian state demarcates space—with near-impossible restrictions on time and the scope of discussion—into which Indigenous communities might voice opinion on decisions that impact their lands, rights, and heritage. Consultation retains the terms of participation within a settler legal milieu, circumventing Indigenous authority. Like consultation, methods skew towards reforms in "data collection" alone, skirting larger questions about what a knowledge generation process grounded in Indigenous law and jurisdiction might look like. For those of us whose research pertains to colonialism, these are the very questions provoked by our subject. If jurisdiction is the question, are methods the answer? Sitting across from Poplar, scanning and re-scanning her list, the methodological reforms I had to offer felt measly, stingy even.

Like Yanagisako, I also find it strange that anthropology continues to treat theory as a romantically lonesome enterprise. We are meant to have moved on from the days of Malinowski, who saw theory as sourced exclusively in European social science, understanding fieldwork and theoretical work to be mutually exclusive: "in actual research they have to be separated both in time and conditions of work" (1979, 7). The idea then was that upon returning to the university from "the field," we turn to a predominantly white, Western, hetero-patriarchal canon to ascribe meaning to the otherwise methodological experiences we've just had. Nowadays, anthropology professes a "desire to foster ethnographically based theory" (West 2018), that is, to draw theoretical conclusions from the research experience itself, and from within the political, social,

and intellectual and context of the communities in and with which we work. If our methods are meant to be increasingly collaborative, and our theory is meant to flow from the community-based knowledge these methods garner, it would follow that theory-making itself should be seen as a relational endeavour. And yet, the imperial custom of solitary theory-making persists. It is maintained, in part, by funding and publication structures, which valorize the roles of principal investigator and sole author, respectively, individualizing intellectual labour. Loneliness, it seems, is a tenacious institutional habit, and one that's hard to shake.

So, by calling for collaborative theory, I could see that Yanagisako was making a radical point. And yet, by focusing this call on collaboration between anthropologists, I also realized I can't relate. Whether taking stock of archive finds with Vicki, or sitting with her dad to talk through his recollections of the movement, when it comes to the Constitution Express, analysis is never lonely.

"It is through telling stories that the histories of the peoples, as well as important political, legal, and social values are transmitted," writes Sharon Venne (1997, 174). After the patriation fight—and during it—Venne became one of the world's leading experts in treaty law and one of the premier lobbyists for Indigenous Peoples internationally, working on the development of the *UN Declaration on the Rights of Indigenous Peoples* and the ground-breaking *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations*, completed in 1999. Though I followed Venne's work long before I began this research, I only met her in person in Maskwacis, when she joined the conversation circle I convened there. From there we embarked on a series of interviews, but also a series of collaborations. This included a trip to Sápmi (Sámi territory) in Norway, where we spoke at a symposium on Indigenous Internationalism about the Constitution Express' submission to the

Russell Tribunal (a submission she wrote and delivered). This then turned into a co-authored article (and the basis of my Chapter 4). In addition to these formal collaborations, Venne is the kind of co-conspirator you can email with a question about the BNA Act late at night, and wake up to find a pointed, piercing analysis in your inbox. I was not surprised to find that when Venne tells stories about the Constitution Express, they are dense with theory. Duly, her silences also speak volumes.

All this to say, the accounts that Venne and others relay in our interviews and conversations are those of community leaders and intellectuals who produced the original analysis—of Canada's sovereignty claims, of the legal obligations of the Crown, of decolonization and Indigenous nationhood—which drove the movement's legal and political proposals in the first place. But what is more, with four decades of hindsight, our conversations take on a new dimension, restorying section 35 through a rigorous counterfactual accounting of what could have been had their proposals prevailed. Their archives both remember and theorize the movement at once.

While anthropology was figuring out how to root theory in research material, the recent proliferation of Indigenous legal theory knit the threads of method and theory—and of story and theory—densely together. Through this literature (for example, see Borrows 2010; Napoleon 2007; and the entire catalogue of the Indigenous Law Research Unit at the University of Victoria) and through the embodied experience of working with leaders of the Constitution Express, I have learned to hear stories differently. Which is to say, when Poplar, Venne, George, and others share stories of the movement with me, and when we work together to contextualize and understand them, its not that we make a concerted effort to avoid the old academic detachment of story and theory. Rather, it doesn't come up. That story is an analytic experience

is obvious; that it is more than a methodological move need not be discussed. As Julie Cruikshank (1998, 41) often noted in her work with Tagish and Tlingit Elders, story is better understood as social activity than reified, static text to be collected and from which data can be extracted. As a social activity, it is a method of both instruction and production. Ours is a dynamic, relational, story-based theory-making. And I am the only one for whom this social, process-based mode of generating intelligence (see Simpson 2017, 22-37) is relatively new.

Our interviews reflect an engagement in narrating and theorizing together what transpired during the movement and what should happen today as a result. The terms of this engagement are my interlocutors to determine, as are the limits demarcated by their silences and refusals. To be clear, not everyone has the time nor the desire to join researchers like me in an epic, collaborative analytic journey. For some, one short, conventional interview is enough. For some, like Venne, our dialogue has extended far beyond the bounds of traditional fieldwork and deep into analysis. For those like Poplar, there has been no formal interview, but a different relational engagement has developed through time spent together and through collaborating on projects which honour the Express in other than academic ways. And yet for others, I may provide a bit of infrastructure, in the form of funding or fora, and then get out of the way. In each of these engagements, the story of the Constitution Express takes shape, and so too does our analysis of its politics and proposals. It is not, as a consent form or consultation table would have it, an all-or-nothing situation. In intellectual relations such as these, engagement and disengagement (be it pointed or benign) ebb and flow over time. I am constantly learning how to honour both, for while it is one thing to be trusted with someone's stories, it is quite another to be trusted with their silences and refusals.

The suite of materials that emerge from this work—our recorded interviews, transcripts, speeches, and writings—are the outgrowth of these relationships, and are credited as such through scrupulous citational practice, co-authorship, and through editing and supporting each others' work. They are just now starting to be dispersed—in presentations, gatherings, in publications of both scholarly and non-scholarly types, and by depositing materials back in community archives[30]—ready to be taken up in new ways. One example is a forthcoming special issue of *BC Studies* which will mark the 40th anniversary of the Constitution Express, featuring academic and non-academic writing by its participants, which I am co-editing with Glen Coulthard.

As I watch our dialogues and stories multiply, I think about the ongoing "bias in the discipline that urges us to present our ethnographic work as data that happened in the past… and that is over, now ready for interpretation and analysis" (West 2005, 273). In contrast, our work and analysis are still unfolding. And with it, the story of the Constitution Express—its constitutionalism, its internationalism, and its proposals for Indigenous jurisdiction, still searingly relevant today. In this, it exceeds a salvage project. As anthropologist Arjun Appadurai (2003, 16) suggests, archives are not simply the "tomb of the trace," salvaging a fragmented past. Rather, they are "more frequently the product of the anticipation of collective memory… an aspiration rather than a recollection." The archives that we're creating are both retrospective and aspirational, moving across time, looking forward as much as back.

[30] I have given every interviewee the option to share their audio and transcript with UBCIC's Resource Centre, where I am also depositing the materials that Vicki and I photographed at the Parliamentary and National Archives in London, comprised of hundreds of documents.

In so doing, my hope is we evade the pitfalls of the grand narrative—that singular authoritative voice which serves the settler state by fixing Indigenous stories in the past. Rather than supplant the existing archive of the Constitution Express with one such narrative, the aim is to thicken the archive already there—not with thick description, but with a clamour of stories and voices, among which mine is one. As Nuu-chah-nulth legal scholar Johnny Mack (2011, 301) suggests, the best hope of resisting imperialism comes from thickening connections to stories, not from getting the narrative of section 35 right or "plugging our claims into its proof tests." Rather than delimit the possibility of analysis by theorizing in isolation from each other or by claiming the singly right, most authentic version of the story, I only hope we might build a kind of "storied foundation" (ibid.) of the movement, thickening the possibilities of connection and of analysis. In this we might create, I hope, more than one "first time" for getting it right.

2.3 The politics are the people in their communities

One of the stories that will soon populate the archive is Poplar's. At the Annual General Meeting of UBCIC where we first met, she was implored—to great fanfare by Grand Chief Stewart Phillip—to write a memoir. Originally from the Gwitchin community of Old Crow, she and her siblings were raised on the land before being sent to residential school in the southern Yukon. In 1978, George Manuel offered Poplar the Indian Education Portfolio at UBCIC, initiating a prolific career at the Union that spanned 22 years and four UBCIC presidents. In this time, her imprint on Indigenous resistance in BC, in Canada, and transnationally was profound. In retrospect, it is quite astounding that the Constitution Express was one of her first undertakings with the Union. Her memoir is now complete, as she embarks on a collective editing process with others involved in that period.

I have learned from Poplar's process, just as I have learned from her presentations and written works on the movement, and equally in intimate conversation, where Poplar is scrupulously careful to disperse credit for its innovations amongst the communities and members who participated in it. The Express is a part of her story. But, as she indicated in her note to me, it is a story that belongs to many Indigenous people, and the politics that ground it are rooted in their communities. Indeed, in the five short weeks leading up to the train ride, UBCIC staff, organized by Poplar, visited nearly every reserve in British Columbia—in what must have been one of the most extensive and rapidly organized community engagement campaigns in the history of BC—to discuss the Constitution and what was to be done about it. The delegations that those communities then sent on the trains (and to New York, London, and other parts of Europe) were not comprised of band leadership and administration, but mostly of families, Elders, women, and kids. It is no wonder that the movement's archives are equally dispersed, in stories, oral histories, and anecdotes, as well as in basements, filing cabinets, and photo albums, in homes and band offices across British Columbia.

As a story that belongs to so many polities, the Constitution Express poses a different set of responsibilities than my previous work. When I began to do research in Secwepemcúl'ecw ten years ago, I entered into the legal milieu of the Interior Salish world. I was researching the Laurier Memorial—a 1910 letter written by the Chiefs of the Secwépemc, Syilx, and Nlaka'pamux Nations and presented to Prime Minister Wilfrid Laurier as he was passing through Kamloops on a campaign tour. A first-hand treatise, it traces the history of colonialism in their territories, which amplified with each wave of newcomers—French-speaking fur traders, American gold miners next, and then British settlers. The first group, however, largely respected Indigenous title and jurisdiction. As with any visitor from another nation, the fur traders were

offered security, friendship, the use of certain resources, and trade, so long as they respected the economic, legal, and political jurisdiction of the nations who hosted them. Which they were known to do. They would trade or buy salmon from the Secwépemc, knowing that fishing for themselves would violate Secwépemc laws of harvest and resource tenure, and that their weirs would be cut or torn down (Ignace and Ignace 2017, 430). If they took up land to use it, they would pay a percentage of what they produced off that land back to the Secwépemc (Kukpi7 Ronald Ignace, personal communication, Aug 24 2010). For these reasons, in the Laurier Memorial fur traders are referred to as "the real whites"—a translation of the Secwepemctsin term, *seme7úw'i*—to distinguish them from subsequent waves of colonizers and settlers (*seme7*). The Laurier Memorial goes on to advocate the resurgence of this mode of relationship—one in which their laws, jurisdiction, and knowledge of how to live together on their lands would serve as the basis of their political arrangements with Canada today (Feltes 2015).

As a white scholar who works in Secwepemcúl'ecw, I have been treated like a seme7úw'i and expected to act like one. Working under the direction of Secwépemc legal, political, and intellectual jurisdiction has brought a rather wonderful synchronicity to my work and life: at the same time that Indigenous-settler (specifically Secwépemc-seme7úw'i) jurisdictional relations are the subject of my work, I get to be guided by those very jurisdictional relations in my own intellectual practice. They appear in all moments of interpersonal and inter-political encounter—moments both quotidian and grand—which produce that work. I made it a goal to become a kind of practitioner of seme7úw'i intelligence,[31] and to promote this

[31] Inspired by Leanne Betasamasoke Simpson's call for "*practitioners* of Nishnaabeg intelligence" (2017, 159).

intelligence among other settlers through my scholarship, my activism, and all of the frontlines where decolonial knowledge production takes place.

However, while the Laurier Memorial belongs to three nations, the Constitution Express belongs to many. Whose laws apply? Whose jurisdiction guides the telling of this story?

Before I began the project, I went to UBCIC in search of such guidance. I came away with a couple of posters, a lot of leads, and a request that I help to annotate some of the photos in their archive. I also came away with the understanding that they would not be *signing off* on my work; rather, that I would find the proper authority for this story by seeking out its tellers.

The ubiquitous Chapter Nine of the 2018 *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* would call this a "complex authority structure." No kidding. When I interviewed for a large scholarship to fund the project, one of the interviewers—a top-tier, non-Indigenous lawyer for a major Indigenous organization—warned me off it, deeming it too complex, too fractured, and too fraught to be feasible. At first, I worried she was right: that the patriation fight had become a kind of sore spot, and that without a distinct authority structure to govern the research, I risked becoming the white arbiter of a now conflictual story. On further thought, I took her warning to be a distressing sign that the tactics of Pierre Trudeau's government to sew factionalism—or the perception of factionalism—in and around Indigenous resistance to patriation had been working to bury stories of the Constitution Express these last 40 years. I resolved that I wouldn't let this be the reason I not take it on (though I didn't get that funding).

Strengthening my resolve, I wondered: in colonial Canada, are there any authority structures that *aren't* complex? To shirk complexity is to deny the nested sovereignties (Simpson 2014, 11) within which we already live, relate, and operate. As Shiri Pasternak (2014, 148)

writes, “jurisdictions are masked when a plurality of legal systems are mapped as a single sovereign space.” By looking for exclusive, hermetic models of Indigenous jurisdiction—as I had sought in UBCIC—we risk denying the many nuanced, layered expressions of jurisdiction which do not mimic the state’s institutional form. Unfortunately, in hopes of honouring Indigenous authority, research tends to privilege more state-like structures, seeking comfort in their singularity and relative certainty, in order that we might report back to ethics boards with clear documentation of our permissions.

I worried too, though, that without such a structure I was in danger of falling back on the paucity of the consent form. Squarely in the Western legal milieu, I understand consent forms to collapse ethics into “litigation-proof” (Tuck and Yang 2014, 234) bilateral relationships which mitigate the rights of the individual against the liability of the research institution. In so doing, they individualize discourse, isolating it from the textured fabric of plural, collective, and relational jurisdictions.

In not giving “credit to one person,” as Poplar asked, I was similarly challenged to not individualize authority, for example, by falling back on my relationship with the late Arthur Manuel as the source of my permissions. While my accountability to Manuel may drive this work, I heed the warnings of Lee Maracle (2017, 99) that one Elder’s request “to write our stories down” does not mean “that it was okay with the rest of us.”

With the Constitution Express, I encountered a non-hierarchical jurisdictional structure which can neither be consolidated in a single, aggrandized, permission-granting body, nor whittled down to individual consent. This issue, of course, exceeds research ethics. It hits on the very phenomena that the Constitution Express was trying to prevent, that is: the swapping of complex jurisdictional structures for individual rights; the blanketing of those rights according to

a single narrative of Indigenous life; and the arbitration of that narrative by settler state institutions. But, as follows, the alternative also lies with the Express. The movement held within it a structure of Indigenous federalism which dispersed authority across autonomous nations and communities, yet bound those communities in loose yet meaningful political collectives. It interrupted Canadian federalism by prefiguring an alternative: a relational jurisdiction stripped of domination, rooted in the resurgence of Indigenous institutions. In *The Fourth World*, published six years before the moment began, George Manuel repeatedly advocated this kind of cooperative federalism to guide in policy making on everything from education (Manuel and Posluns, 248-252) to economic development (247). He cites the National Indian Brotherhood as an example of such a structure—albeit not a perfect one, but a federation of regional bodies that serve autonomous local lifeways. He writes: "we share that dream with non-Indian North Americans as the one way in which such vast territories can fairly serve their collective and common needs" (211). Such non-authoritative jurisdictional cooperation would make space for the movement's richly diffuse, multiple permutations of Indigenous nationhood, and without collapsing them, link them together in mutually supportive political networks.

When the Express advocated such a jurisdictional framework as an alternative to Trudeau's patriation proposal, it mirrored that framework in its own decision-making structure. Decisions transpired in formal networked settings—UBCIC's general assemblies, community ceremonies, and at least seven "Constitution Express potlatches"—and in intimate, grassroots conversation on the trains, in billets, and in band halls. Accountability, as Poplar's note reminds me, was equally spread out. And here, as with the Laurier Memorial, I found synchronicity again. Decisions around my research transpire in similarly dispersed settings, both formal and quotidian. As I follow the path of the movement across the globe, decisions take shape over time

spent with participants in the movement on their territories, in their communities, and in coffee shops on Commercial Drive. Of course, they also arrive carrying with them their own networks of accountability, aspects of which I may or may not see.

Ultimately, without a single body of law or jurisdictional authority to which to defer, I am guided by the Constitution Express itself—its plurality of nationhoods and its nested accountability structures. I interface with multiple legal systems: Canadian, British, and many Indigenous ones. The individualizing effect of the consent form loses its potency. By interfacing (on a very small scale) with the world of Indigenous federalism that the movement held within it, I too am situated in this archive, and led to resist the gloss of rights in both theory and method. The archive that materializes is generated of and through the very politics the movement deployed.

2.4 Conclusion

Poplar and I have shared many coffees since that first one on Commercial Drive. Sometimes, she engages with my research, and some of the time she does not. When she does, I have learned, this does not indicate her sign off on the whole story, as a consent form might have it. She shares pieces with me—like the booklet—and I know they are a sample of a much bigger archive, only some of which I'm privy to. I have heard her tell the stories of the Constitution Express to Indigenous leadership, to community, and to students in a class I taught. I have learned from both the openness with which she tells these stories, as well as from her moments of restraint.

I am guided to the parts of the story that are and are not for my telling, almost daily, by Poplar, Venne, and many others. I have learned that getting right the first time means working

together to tell it the way that's right for us. And it also means working diligently to open up the possibility of there being many more times—and ways—to get it right.

As the project unfolds, multiple archives amass at once. First, there is the ever growing pile of historical materials, dug out of boxes and basements. There are the oral histories, stories, memories, and anecdotes—rich with theory—that, once provoked, proliferate. There are also subtler archives of the relationships built through this process, made up of things like Poplar's note. And finally, there are the new archives now being written, told, and added to the pile, by Poplar, myself, and others, each clamouring with story.

And now, to begin my contribution to that story.

Chapter 3: "We Were Fighting for Nationhood Not Section 35"

When Arthur Manuel begins the story of the Constitution Express—which he tells in his first book, *Unsettling Canada: A National Wake-up Call*—he starts the story in the middle of it, at Ottawa Central Station on November 28, 1980, just as the train pulls in (Manuel and Derrickson 2015, 65). It is an affecting moment. The station is abuzz, jammed with people waiting to greet the now famous train travelers. Many have popped over from the Skyline Hotel, a mid-century modern high-rise which at the time boasts the largest conference room in Ottawa. Here the National Indian Brotherhood is hosting its All Chiefs Meeting on the Constitution. The meeting has already drawn over a thousand Indigenous people to Ottawa from all over the country, and by Art's count it seems like most of them are at the station. It is full to bursting even before the train begins to disembark. As people pour off the train, Art scans for four in particular: his then-wife Beverly (Bev), their four-year-old twins, Kanahus and Mayuk, and their infant son, Neskie.

When Bev[32] begins the story of the Constitution Express, as she did with me one September morning in Kamloops, she starts a little further back. It is the previous spring. Art is just finishing up his last term of law school in Toronto and has been offered contract work in Ottawa. Dejected at the thought of spending another summer in a muggy Ontario city (especially pregnant) Bev opts to return to their community of Neskonlith, where she can work for the band. There, Neskie is born among relative calm. But when politics start to heat up over the summer and fall, Bev gets involved. Art's older brother, Robert (Bobby) Manuel is Chief at the time. "There was lot of organizing in the community," Bev tells me. "Bobby would call meetings; a lot of people would show up at the meetings, and it was a real community orientated thing" (Beverly

[32] I have opted to use first names in this chapter, for clarity. There are simply too many Manuels to do otherwise.

Manuel interview, September 8, 2018). By October Bev is right in the thick of it, helping to organize a community contingent for the Indian Child Caravan—a movement organized by a young Kukpi7 (Chief) Wayne Christian to gain control of child welfare in Splatsin, another Secwepemc community just southwest of Neskonlith. Gaining incredible traction, this movement would become the precursor for the Constitution Express. After travelling to Vancouver with the caravan, Bev finds herself one evening at a meeting at the Union of British Columbia Indian Chiefs offices on West Hastings St. A handful of people are there: Chief Bobby, his wife Joyce Willard, Neskonlith band manager Eddie Gardner, Grand Chief George Manuel, and UBCIC staff Rosalee Tizya. "That's when we planned what to do: to go in this Constitution Express."

"So you were at the meeting where that was actually planned out?" I asked.

"Yeah," she answered. "I thought that was pretty neat part of history."

They bring the idea before the UBCIC Annual General Assembly, where the theme of discussion is Prime Minister Trudeau's suddenly imminent plans to "patriate" the Constitution from the UK. Declaring patriation a "state of emergency" for Indigenous Peoples, the idea for Constitution Express is accepted unanimously. How UBCIC will get their hands on these trains is yet to be determined. If they want to make it Ottawa in time for the NIB's All Chiefs Assembly, this gives them just five weeks plan, fundraise, and execute the whole operation.

When Art finally finds Bev and the kids at the Ottawa train station five weeks later, she is "exhausted but joyful" (Manuel and Derrickson 2015, 69). But for Art this is a "family reunion" (68) of grander proportions. His brother Bobby steps off the train and gets straight to work. Avoiding the eyeline of Indian Affairs Minister John Munro, who has joined the throngs at the station, Bobby steps up to a microphone and decries the Trudeau government's patriation plans as a "direct attack," aimed at stealing "Indian people's homelands" (69).

After a short section describing the lead up to patriation, the bulk of this chapter will look at what happened in the five whirlwind weeks between the assembly where the Constitution Express was decided on, and the day the train pulled into Ottawa. Foregrounding participants' stories, it will look at the "emergency" of patriation as the Constitution Express diagnosed it, and the solutions the movement put forth. It will also explore the way that coming up with such solutions fueled a resurgence of Indigenous nationhood in BC, drawing on groundwork laid decades before. Millie Poplar (2003, 25) put it this way: "Trudeau didn't know it, but Canada's plans to patriate the *Constitution* caused us to re-think our ideas of Nationhood and our relationship with Canada… We started to see ourselves as Nations, once again clearly as Nations, and began to demand that Canada see us in this way."

It is this demand they put before the Governor General. As people start to disperse from the train station—to hotels or to billets solicited by Ottawa Mayor Marion Dewar—Bobby and a smaller contingent head to Rideau Hall with a petition for Ed Schreyer. There is some confusion as to what happens next. The plan is to occupy Rideau Hall and stage their own constitutional hearings for the next few days. But after arriving, Bobby changes course. Some say it was due to collective exhaustion. Others suspected military were hiding in the basement. While others, like Ron George, say it was due to a surprise encounter with another Indigenous delegation from BC, "who weren't too keen on Bobby's idea of occupying" (Ron George interview; see also McFarlane and Manuel [1993] 2020, 259). Rather than kick off the week with a show of factionalism, Bobby calls it off.

By some accounts this gets him in hot water—not only with others in the movement, but with his dad. Grand Chief George Manuel had spent weeks conspiring to pull off the Rideau Hall occupation with the help of former public servant Walter Rudnicki. He was supposed to have

been there, leading the charge. He was supposed to be on the train in the first place, but in the days leading up to the journey a heart attack would thwart his plans. Refusing to stay put in Vancouver to recover, he flies to Ottawa ahead of the train. After a couple of strategy sessions with the advance team there, feeling ill, he asks to be taken to hospital. The renowned leader does what he can from his hospital room, while four up-and-comers—Bobby, Wayne Christian, Nuxalk Chief Archie Pootlass, and Xwísten Chief Saul Terry—take the helm on the ground.

George's consternation with Bobby doesn't seem last long. For many, the forsaken occupation of Rideau Hall seems a mere blip in the story. More than any conflict it might have caused, the thing that stuck out most for Ron George, was the orange juice:

> We all showed up at Rideau Hall… and Governor General's doing his whole routine welcoming us… and then he invited us for some refreshments. And that's when all these ravenous carnivores from BC just ran those poor bloody waiters off their feet. They were coming in with jugs and jugs of freshly squeezed orange juice, and fancy hors d'oeuvres were disappearing as fast as they could bring them in. Because we'd hardly had time to eat.

Replenished, the crew leave Rideau Hall. The momentum of the Constitution Express carries on.

When Ron George starts the story of the Constitution Express he starts in 1976, when he is the founding Vice President of the United Native Nations (UNN), an organization that evolved out of the British Columbia Association of Non-Status Indians (BCANSI). Though BCANSI and the UNN have representation at UBCIC meetings (Nickel 2019, 177 n2), their relationship throughout the 1970s is often a fraught one, particularly over the issue of land claims (McFarlane and Manuel [1993] 2020; Tennant 1990). And so, when George Manuel reaches out to Ron in 1979, inviting him for a meal to talk constitutional matters, it comes as a surprise. "He was explaining the whole thing to me, what his vision was on the Constitution, etc. And I'd already read his material that… their lawyers were pumping out and loved what I was reading," Ron told

me. “And he asked me if I wanted to become involved.” Ron is no longer with the UNN at this stage, having returned to his work as a glazier. Nevertheless, this is a significant gesture to the non-status, off-reserve leader. Without missing a beat, he takes Manuel up on his offer and starts volunteering with UBCIC.

When Gabriel Williams begins the story, she begins even further back. In 1911. “Our people never consented for them to be here,” she tells me, one fall afternoon in Mount Currie.[33] By “them” she means British Columbia. “Since 1911, we have said they have no right to be in our country and do what they’re doing to us” (Mary Louise Williams and Gabriel Williams interview, October 6, 2018). She is talking about the 1911 Lillooet Declaration, a statement of St'át'imc authority which condemns the dispossession of their lands by the Province (see Drake-Terry 1989): “We are aware the BC government claims our country, like all other Indian territories in BC; but we deny their right to it… They certainly never got the title to the country from us, neither by agreement nor conquest, and none other than us could have any right to give them title” (“Declaration of the Lillooet Tribe” 1911). The Express would revive this argument almost 70 years later, questioning the legality of BC’s claims to any land or jurisdiction, if not through Indigenous consent. But the way Williams tells it, it is more than just a revival; these movements are entirely continuous. The Lillooet Declaration came on the crest of a period of incredible organizing by Indigenous Peoples in BC. The Constitution Express would build upon the arguments they had laid. If there was a resurgence, it was of their method of pursuit, as delegations they made to Ottawa and London in the early twentieth century (see Nickel 2019; Feltes 2015; Galois 1992; Foster 2007) would be repeated in the fight over patriation.

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[33] As both Gabriel and her mother, Mary Louise Williams, were movement organizers, I interviewed them together.

The Constitution Express would demand a different kind of resurgence from Canada—one that would revive an older model of political relationality based on Indigenous jurisdiction and consent. It would dig out from under the BNA Act a different basis for constitutionalism and federalism, rooted in Indigenous law. So, the latter part of this chapter will examine that—the resurgent, decolonial constitutional arrangement it proposed Canada 'patriate' in place of the violent, dispossessive one Trudeau hoped to "bring home."

This chapter focuses on the 'domestic' side of the movement—i.e. what transpired in geographic space between Vancouver and Ottawa, the movement's theorization of Indigenous nationhood, its critiques of Canadian federalism, and the model of constitutionalism it put forth. But, foreshadowing the chapters to follow, it will also begin to make clear why domestic recognition was not the end game, why it is significant that Bobby snubbed John Munro and went instead to drink all the orange juice at Rideau Hall, and why the movement also snubbed the parliamentary committee hearings on patriation, even after space was made for Indigenous presentations. It will hint at why its petitions were sent not just to Canada, but to the UN and the Queen, looking toward the next chapters, which describe what happened when they got there.

3.1 The lead up to patriation: a case study in colonial consistency

The organizers of the Constitution Express saw patriation coming for a long, long time. Trudeau first made murmurs of constitutional reform more than ten years previous—murmurs which happened to coincide with a particularly egregious attempt to legislate Indigenous assimilation, in the form of the 1969 White Paper. Though, in the grander scheme of things, they had seen the sentiments of patriation foment over much longer, tracking their jurisdictional dispossession over more than a century of colonial legislation and constitutional practice in Canada. Within this

history, the post-war period, leading up to the White Paper and then to patriation, exhibited a very particularly kind of dispossession—one cloaked in liberal egalitarianism.

Breaking from the confinement, apathy, and outright oppression that had been the theme of federal policy towards Indigenous Peoples for some six or seven decades, in the period after the Second World war, Canada was compelled to make tentative moves to end its "formal" discrimination against Indigenous Peoples (Sanders 1983, 301). A new interest was taken in the disparities between Indigenous and non-Indigenous welfare, starkly evident across virtually all of the indices by which modern governments measures such things, and with it a new tack in pursuit of "equality." The government strayed little from this tack for almost four decades, save for repackaging it a number of times. In contrast, Indigenous organizing flourished and grew.

Peter Kulchyski describes this "critically important period" as one "when the State shifted from using primarily coercive methods to achieve its objective of assimilating Native people, to relying primarily on an ideological apparatus" (1993, 23). This ideology, he argues in the line of Louis Althusser (1981), would create a new subject position for Indigenous people as economically-depressed, under-served members of the Canadian body politic. Rather than confine them as wards of the state, the government set out to serve Indigenous populations as its subjects, with markedly Foucauldian flair. The plan was laid in 1947, when evolutionist anthropologist and bureaucratic heavyweight (Hancock 2006) Diamond Jenness presented "A Plan for Liquidating Canada's Indian Problem in 25 Years," to the Joint Committee of the Senate and House of Commons on Indian Affairs. Its technique was to "abolish, gradually but rapidly, the separate political and social status of the Indians (and Eskimos); to enfranchise them and merge them into the rest of the population on equal footing" (as quoted in *The Indian Nations,*

6). This meant extending to them "normal" social services (Sanders 1983, 301). Normal, of course, meant provincial.

More than just passing the buck, the move to transfer responsibility to the provinces—typically even more hostile to Indigenous Peoples—only tightened the state's stranglehold on jurisdiction. This method was deployed though the 1950s, as certain services were quietly made provincial (Smallface Marule 1978, 107). It was a subtler means of dispossessing jurisdiction, by subsuming Indigenous social welfare—indeed the very sociality of Indigenous citizens—under the sweeping authority of the provincial governments. In the 1960s—a decade in which, Manuel and Posluns joke, "we were rediscovered" (156)—data was amassed to validate this approach, not to change it. For example, the federal government commissioned Canadian anthropologist Harry Hawthorn to undertake a sweeping survey of Indigenous welfare (known as the Hawthorn Report), only to cherry pick from its stunning stack of statistics in order to rationalise the kinds of social service reform it was prepared to foist upon Indigenous Peoples (Weaver 1993). Low rates of life expectancy, and high rates of poverty and incarceration were mobilized to fuel the state's pursuit of egalitarian governmentality.

Meanwhile, when communities tried to take advantage of this nominal change in attitude, they were only met with ire. For example, when the *Indian Act* was amended in 1951, lifting some of its most repressive restrictions on Indigenous advocacy, communities in BC resumed pursuits of title to their lands, as the Nisga'a did filing the *Calder* case in 1967. Canada repudiated such actions as counter to the aims of its benevolent reforms. By painting Indigenous marginalization as a socio-economic and socio-cultural issue, rather than a juro-political one, the government could claim to promote Indigenous equality in policy, while at the same time fighting Indigenous territorial claims in court, without feeling inconsistent about it. As George

Manuel would say in his "President's Report" before a 1981 emergency assembly, "the political aspirations of our people were not taken into consideration in the hope that improving our social and economic base would satisfy our desire for self-determination" (Manuel 1981b, 7-8).

When the White Paper was introduced in June of 1969 by a newly minted Prime Minister Pierre Trudeau and his ambitious Indian Affairs Minister, Jean Chrétien, it would be the most flagrant expression of this approach—an astoundingly colonial miscalculation of the issue and its solutions. Completely disregarding a year and a half's consultation leading up to the policy—in which many Indigenous leaders had cautiously and generously participated—it was a particularly bewildering betrayal. As Harold Cardinal (1969, 128) put it, "all the pious Ottawa utterances of the so-called consultation period" were exposed as "utter, barefaced hypocrisy."

But not only were Indigenous Peoples procedurally erased in the unilateral drafting process, the resulting policy robbed Indigenous authority of substantive content too. The federal government "dismissed aboriginal title claims" and "trivialized treaty rights" (Sanders 1983, 302). If the source of Indigenous woes was their legal and political "difference" (Turner 2006, 19), the government figured, then legislating sameness would solve it. This meant: ending Indian status; amending the Constitution to eliminate all reference to them; and dispossessing what little land and governance communities clung to on reserve (UBCIC 1980a, 9-10). "Equality of opportunity," Manuel and Posluns wrote of the policy, "was defined so that it was indistinguishable from assimilation" ([1974] 2019, 169). If legislated, the White Paper would be the last piece of the pie, folding the Indigenous population into the purview of the provinces once and for all, along with everybody else.

Just five months after the White Paper's release, the Union of British Columbia Indian Chiefs was established. Approximately 150 delegates from across the province convened in

Kamloops in November of 1969, called there by Cowichan leader Dennis Alphonse, South Vancouver Island Tribal Federation President Philip Paul, North American Indian Brotherhood President Don Moses, and British Columbia Indian Homemakers Association President Rose Charlie. It was a conglomerate significant not just for bringing coastal and interior peoples together, but also women's organizations with those dominated by men (Nickel 2019).

Though UBCIC coalesced in the wake of the White Paper, to suggest this was the catalyst for the modern Indigenous movement in BC—as many histories of this period tend to—is to give too much credit to the Canadian state. Tk'emlúpsemc historian Sarah A. Nickel (2019) cautions against the lure of such "myopic moments" which "collapse Indigenous politics" (8) with colonial plot points. Instead, she tracks the rise of UBCIC over a century of pan-Indigenous organizing, and a much longer history of diplomacy and treaty making between Indigenous nations in BC. Which is to say, neither the White Paper, nor its coordinated opposition, were isolated phenomena. UBCIC understood the White Paper to be entirely consistent with post-war policy approach to dealing with Indigenous Peoples, unique only for the lucidity of its arrogance.

The Union released its retaliation, *A Declaration of Indian Rights: The B.C. Indian Position Paper* (often referred to as the "Brown Paper," in complement to the Indian Association of Alberta's "Red Paper") less than a year after its founding. "That Indians have survived the first one hundred years of Canada's history is miraculous indeed," it began:

> This struggle has been hindered by an apathetic, intolerant, and now intolerable Federal government and by totally incapable and ruthless Provincial governments… and now the Federal government proposes to absolve themselves of any responsibility for our people with one stroke of the pen: the final stroke to cover all sins of omission and commission. (UBCIC 1970, 1)

The Brown Paper refused the very premise of Canada's having jurisdiction over Indigenous Peoples at all, answering Trudeau's assimilatory vision for a "just society," with a meticulously articulated alternative—a just relationship rooted in Indigenous self-determination. It was generous, offering tangible "principles and policies" on which to develop legislation, "at a pace consistent with our own plans" (2), that is, "without prejudice" (1) to broader political and territorial aims (1). In parallel to the White Paper, it detailed reforms to social services and economic programs, and methodical plans for communities to take over their administration.

But the paper went deeper than just programs and services, and the delegation of authority to administer them. To ensure that a second attempt could not legally be made to extinguish their title and jurisdiction, UBCIC instead advocated that, "Constitutional guarantees must be provided in terms of identity, land, education, economic development, political representation, hunting, fishing, trapping, health and welfare services" (14). (You might say this was even a "full box" of rights, had this list been treated as the starting place for constitutional negotiation.) Yet, it made clear that such guarantees would safeguard Indigenous jurisdiction, not bestow it. For this was not a gift to be given, like some kind-hearted social service reform. Rather, constitutional entrenchment would renew the federal "commitment for our people and for our lands" (5) without conceding to federal control:

> There is no need for us to be deprived of self-determination merely because we receive federal monetary support, nor should we lose federal support because we reject federal control. We now want to make decisions, in the administration of our affairs, to select and control programs in a voluntary manner with the right of retrocession. (5)

The "right of retrocession" would be formalized as a right to consent—a jurisdictional stopgap against the kind of paternalistic governmentality that had characterized post-war policy.

Indeed, UBCIC reminded the government that its historic relationship with Indigenous Peoples, "cannot be abridged without our consent" (1). To get to consent, it proposed a constitutional conference be held between "Indians and the two senior governments" (14). (Notably, 12 years before the federal government itself would suggest such a thing.) As for the agenda, services, programs, and funding would not be on it. Rather, it would focus on the very structure of Canadian federalism: "the important position that Indians should occupy in our method of government" (14).

By the time Trudeau began pushing patriation in earnest almost ten years later, the federal government's approach had little changed. Though the White Paper was shelved, there was no response to the Brown Paper's proposals. Needless to say, no conference was convened. As the 1970s sustained a resurgence in Indigenous governance in BC, alongside a series of wins for Indigenous rights and title in the courts, this made the government's stasis all the more stark.

For example, when the Supreme Court of Canada rendered its decision in *Calder*[34] in 1973, this should have been a turning point. Though the Court split on whether Aboriginal title was extinguished when the Crown asserted sovereignty, the majority agreed it did exist at the time of the Royal Proclamation of 1763, sourcing Nisga'a title in their own, pre-existing legal orders, not Crown recognition (McNeil 2019, 149). In this, the case confirmed the link between their title and their jurisdiction. The federal government, for its part, immediately set about pulling them apart again.

Though *Calder* moved the government towards a softer, "post-colonial mode of liberal imperialism" (Mack 2011, 299) achieved through recognition rather than termination (Coulthard

[34] *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313 [*Calder*].

2014, 5-6), on questions of jurisdiction, the terms of extinguishment remained explicit. In fear that future jurisprudence might recognize the persistence of Aboriginal title in BC—and worse, their self-determination—*Calder* "perversely played a hand in expediting policies and legislation to resolve the problem of overlapping jurisdiction" (Pasternak 2014, 160). So, in the slipstream of *Calder*'s win and the White Paper's demise, the comprehensive land claims policy was dreamed up, designed expressly to mitigate that risk. In it, small tracts of land, cultural rights, and program delivery are on the negotiating block, while territorial jurisdiction is to be extinguished at the door. Any transfer of authority must be "consistent with non-Indian political institutions, i.e. municipal-type administrations which can be tied later into provincial laws and institutions" (as quoted in Union of BC Indian Chiefs 1980a, 13) and not into their own legal orders. Title derives not from Indigenous law, but from something less jurisdictional—traditional use and occupancy.[35]

Meanwhile, Indigenous nations in BC were suturing their title and law back together. While the '70s are known to have been a hotbed for political action, the resurgence of jurisdiction at the community level in BC is a lesser known part of the story. As with Audra Simpson's (2014) analytic of refusal, assertions of authority were made in ways both quotidian and grand. There was a string of roadblocks in the summer of 1975, including the six-week St'uxwtews blockade in Cache Creek, armed and backed by the American Indian Movement. Fishing became a "lightning rod" (McFarlane and Manuel, 230), spurring more blockades as well as an astounding legal winning streak, as UBCIC lawyer Louise Mandell won 64 fishing

[35] Meanwhile in the north, with no province in contend with, as I understand it some level of Indigenous governance is often part of the negotiation; the sticking point is the institutional form it takes.

rights cases in 1977 alone (ibid.). But, as George Manuel reflected "the real signs of the renaissance" could also be seen "in the resurgence of our languages, in the growth of political institutions both old and new… in the growing number of young people seeking out the wisdom of the grandfathers and finding ways to apply it in their own lives" (Manuel and Posluns, 69).

A new Aboriginal Rights Position Paper was drafted in the context of this renaissance: "We are the original people of this land and have the absolute right to self-determination through our own unique forms of Indian Governments" (UBCIC 1979, 2).[36] As for the Constitution, it proposed getting out from under section 91(24) of the BNA Act, which was wrongly treated as band councils' "source of authority" (4). Instead it proposed a distinct order of government for Indigenous Peoples within Canadian federalism, citing "models of self-determination" from Greenland to Scotland to Catalonia (3). With meticulous precision, it laid out 24 "jurisdictional areas," forming the basis of "home rule" (ibid.).[37] Each detail was deliberate, so "Trudeau couldn't say those people don't know what they want" (Poplar 2020).

However, what was most impactful, for Millie Poplar at least, was its effect in the communities: "it did something to our people" (ibid.). At the time, Poplar was head of UBCIC's education portfolio, with Bobby in charge of Indian government. To accompany the position paper, they designed a new flag, and sent posters of the flag to communities, with a statement of

[36] Though endorsed in principle in 1977, subsequent revisions of the paper received endorsement in 1978 and 1979.
[37] These included: 1) the development of constitutions; 2) citizenship; 3) management of reserve lands and resource areas; 4) waterways and water rights; 5) air space above reserves, waterways, and resource areas; 6) forestry; 7) mineral resources; 8) oil and gas resources; 9) conservation management of migratory birds; 10) wildlife resources; 11) fish resources; 12) conservation; 13) environmental management; 14) economic management and trade regulation; 15) education; 16) the maintenance of social order; 17) health, welfare, and care; 18) marriage; 19) safeguarding of sacred spaces; 20) communications systems; 21) revenues; 22) justice, including courts; 23) the imposition of penalties for violations of law; and 24) matters of local or private nature on reserve lands, waters, and resource areas to be establishing within Indian Government jurisdictional boundaries.

Indian government printed in its white centre, representing the integrity of the land. “It built the loyalty of our people back to our own Indian governments, away from Indian Affairs” (ibid.).

Against this backdrop, Trudeau initiated the patriation process, thus beginning his “constitutional offensive” against Indigenous Peoples (McFarlane and Manuel, 236). His 1978 package, “A Time for Action,” retrenched the idea of the two founding nations, relegating Indigenous Peoples to a substance-less sentence in the preamble. Designed “to bring about the White Paper’s objectives” (UBCIC 1980a, 9), patriation would erase Indigenous Peoples from the Constitution while consolidating all of the jurisdiction to be had within the existing federalist structure.

In a move to enshrine within the Constitution “a recognition of values and ideals shared by Canadians wherever they live” (Chrétien, 353), Trudeau also promised to tack on a *Charter of Rights and Freedoms*. This process of adding, yet holding apart, the *Charter* from the Constitution made the delineation of rights-bearers and jurisdiction-bearers plain: rights were for individuals and minorities, and jurisdiction for provinces and the federal government. Chrétien explained, “The federal government was determined to look at rights as a package on its own—apart from negotiations over the federal-provincial power split” (336). Neither the *Charter* nor Constitution held space for Indigenous polities, with their own jurisdictional orders, as well as their own “values and ideals.” Instead, the *Charter* solidified the courts as the arbiters of rights, upon which various ethnic, religious, linguistic, and gendered subjectivities would be conferred. As has been widely theorized (following Foucault), the way in which subjects are made—and made justiciable—through the granting of rights is itself an act of consolidating jurisdictional power (Spivak 2004). This was not lost on Indigenous Peoples, who read the *Charter* as a resurgence of White Paper politics, weaponizing “equality” against their nationhood. As UBCIC

would put, “Traditional rights and freedoms in this context become cultural rights of a minority populations—the right to perform Indian songs and dances and make bannock” (UBCIC 1980a, 6). Insofar as jurisdiction was concerned, it was clear: “Canada will not recognize a place for Indian Nations in its federation” (6). In more than 20 years, the only thing changed in the government’s position were the stakes.

3.2 Reconstituting nationhood

When UBCIC convened at its Annual General Assembly in October of 1980, a whole lot had transpired in the year since its last one. For one, the federal government turned over. For the nine-month period he was in charge, Progressive Conservative Prime Minister Joe Clark supported Indigenous involvement in patriation—partially, at least. After much lobbying by the National Indian Brotherhood—including a trip to the UK by more than 200 Chiefs and Elders in July of 1979—by September Clark agreed to grant the NIB a seat at the First Ministers’ table on “matters that have clear legal impact on Native People” (as quoted in Sanders 1983, 306). Though NIB President Noel Starblanket rejected this “arbitrary” segregation of “Indian issues” from the rest of the constitutional package (306), Clark’s promise of an “equal and on-going role in the federal-provincial discussions on that agenda item” (UBCIC 1979, 3) was still better than what his successor would guarantee. Nobody expected this successor would be Pierre Trudeau, who had recently resigned from Liberal leadership after 16 years in office. But, after the fall of Clark’s short-lived minority government in early 1980, to his shock (and most everyone else’s), Trudeau rescinded his resignation and set out to make comeback in the imminent election.

This was not the only trick Trudeau had up his sleeve. In keeping with his personal tradition of unceremoniously dropping Indigenous Peoples from the conversation, Trudeau

shunted Indigenous issues to a "second stage" of constitutional renewal, effectively reneging their substantive participation in the patriation process (Sanders 1983, 309). Though Trudeau had been the one to get the patriation ball rolling in 1978, it was on his return to office that it took on an urgency for him. He initiated an aggressive new timeline, calling for the enactment of a new Constitution by the end of 1981. Where this nebulous "second stage" fit into the accelerated timeline was not clear. The NIB, now led by Del Riley,[38] lobbied for a seat at the main table—the Continuing Committee of Ministers on the Constitution—rather than a second stage or a sequestered subcommittee on Indigenous issues. For the government, this was a non-starter. Chrétien delivered the news, rejecting the notion that Indigenous groups act as a "third order of government" on the constitution question (310). As NIB negotiator Sykes Powderface (1984, 164) would later reflect, this confirmed Canada's institutional incapacity to genuinely accommodate Indigenous Peoples: "The constitutional process provided a good example of how the Canadian political and legal system functions to frustrate the aspirations of Indian people".

So, the NIB began their own tradition of holding constitutional talks in parallel to the committee meetings from which they were excluded (or, at best given observer status). There was talk of convening a Canadian Indian Constitutional Commission to hold hearings and develop their own patriation package (Sanders 1983, 308). Though such a commission never fully materialized, when they held their first All Chiefs Constitutional Conference in April of 1980, it was a massive event. Close to 2,500 Indigenous attendees filled Ottawa's Skyline Hotel for the four-day meeting. George Manuel arrived with UBCIC's Aboriginal Rights Position

[38] Riley beat Bobby Manuel for the presidency in August 1980, by just two votes. That it was so close was taken as a sign of broad support for a radical stance on the constitutional issue, and the Manuels, through UBCIC, prepared to work together with the NIB to pursue it (McFarlane and Manuel, 250-251).

Paper in hand. With his and Bobby's lobbying, it was adopted as the national response to the patriation package, and a "Provisional Indian Government"[39] was formed to advocate for it. In an article titled, "Indian leaders hold talks on self-rule plan," *The Columbian* (1980) reported that the conference affirmed the "long-term goal of enshrining an Indian Government in the Canadian Constitution."

For its part, the federal government entirely missed the mark on what Indigenous Peoples meant when they said they would develop their own policies to implement their jurisdiction. Hosting a banquet on the second night, Trudeau tried to assure the audience that they would be involved on issues that directly affect them. As UBCIC's newspaper, *Indian World* (1980a, 6), reported "His speech was essentially eloquent fluff," confirming that "the present inadequate observer status we have will be continued." When Indian Affairs Minister John Munro arrived the next morning to announce a new initiative to review the *Indian Act*, the reaction was perhaps less jubilant than he expected. Spurring White Paper flashbacks, no one had been consulted on the plan. And anyway, tinkering with the *Indian Act* at yet more federal-led hearings was not what they had in mind. Manuel was incensed, accusing Munro of distracting and diluting Indigenous involvement in patriation, before leading a walk out to Parliament Hill (McFarlane and Manuel, 248). Many followed him, including a delegation of Dene and Inuit whose drumming thundered through downtown. After speeches on the steps of Parliament by George

[39] I have little information about how this Provisional Indian Government was formed, who it was comprised of, or how long it was in operation for. What I do know is that a Chiefs' council was established at the All Chiefs' Conference to oversee it, working towards its eventual formalization and ratification. I don't know if ratification ever took place. As I understand it, reference was made to this provisional government by the delegation that went on to the United Nations, as a way to emphasise the mandate and authority behind their presentations there.

and Bobby Manuel, as well as Noel Starblanket, a round dance was started on the front lawn. The drummers switched to a victory song (*Indian World* 1980a, 4).

The tone was set. Over the coming months, UBCIC would continue to hone the walk out approach, rather than clamour for a seat at the table. When Trudeau revealed twelve points he was prepared to deal with before patriation—i.e. "first stage" issues—and Indigenous rights were not on the list, this only strengthened the Union's resolve. It was clear that "second stage" actually meant after the fact, pushing the discussion of Indigenous rights to a post-patriation climate, "where Indian nations faced ten Provincial governments and a Federal government jealously guarding their newly divided jurisdiction" (*The Indian Nations,* 4-5). It was decided: the Union would take its walk out all the way to the courts, to the Governor General, to the Canadian public, to the UN and to London. At the same time, they would take it to the communities.

On September 25, 1980, George Manuel and nine band chiefs from BC initiated a legal challenge in the Federal Court, seeking a judicial declaration that patriation could not occur without Indigenous consent. In parallel, Mary Lou Andrew, head of UBCIC's legal portfolio, deployed its lawyers to communities across BC to talk about the threat of patriation. These meetings were spent debunking misconceptions about the BNA Act—namely, that it retained for Canada exclusive jurisdiction, blotting out Indigenous law. They then laid out the legal argument that Indigenous Peoples continue to hold consenting authority on constitutional matters per the Royal Proclamation. Finally, they became directive, asking what UBCIC should do about it.

"This was before the Constitution Express was in anybody's mind," says Louise Mandell (interview, Oct 25 2017). For Mandell, these meetings were some of her first experiences of the operation of Indigenous law:

> We would go to communities, and as we went, Elders would come forward and say, 'we want to go with you,' because they wanted the message to go forward even where there were divisions... The Elder peacemakers and peacekeepers came forward and they would say, 'you listen to these girls'… a pedigree of importance was put to the message, which I didn't appreciate at the time because I was just beginning.

Elders sat with the lawyers, calling others into the room. Multiple legal orders were at play, as talk of the court case gave way to Indigenous legal principles. The meetings became more than a space for colonial critique, turning to discussions and expressions of nationhood. Continuing, they had a snowball effect, drawing crowds: "as we moved across the province, the number of people who knew about what we were talking about before we got there increased, and the rooms were full of people. It wasn't small little meetings; the rooms got bigger and bigger."

Perhaps emboldened by the Elders who wanted to 'go with' the lawyers, or maybe taking his marching orders directly from them, George Manuel started to conceptualize a march on Ottawa (McFarlane and Manuel, 251). He relayed this idea to a group of UBCIC staff, including Sharon Venne, Millie Poplar, Wayne Haimila, Rosalee Tizya, and Louise Mandell. No sooner had the discussion got off its feet than Kukpi7 Wayne Christian initiated a movement that would model such a plan. This march, however, would be on Shaughnessy.[40]

After a staggering number of children were apprehended from Christian's community of Splatsin, the band council passed a bylaw vowing to keep children on the reserve (UBCIC, n.d.). To enact it, they would need to take jurisdiction over child welfare back from the Province. This initiative would advance at least one of the 24 areas of the Aboriginal Rights Position Paper. Without hesitation, Manuel backed the plan. As ever, he applied a dually legal and political

[40] A superelite area of Vancouver, designed as such, ironically, by the Canadian Pacific Railway in the early 1900s.

approach, sending in UBCIC's lawyers to work out the rightful transfer of authority, while supporting the community with plans for a caravan from Prince George to Vancouver. Enlisting the help of Jacob Marule—a South African exile and former member of the African National Congress now living in Chase, BC[41]—the caravan was planned with "military precision" (McFarlane and Manuel, 251).

Yet, it was also deeply grassroots.[42] Communities from the top to bottom of BC joined the caravan as it snaked towards Vancouver. This included hundreds of residential school survivors. "I didn't know that at the time, because nobody talked about the residential school. But that's what it became… all the Elders that were engaged with us were survivors," Christian reflected (Wayne Christian interview, Sept 4, 2018). "Their purpose was to look after the children because they, as children, weren't looked after. So that translated into this groundswell of people getting involved and getting their voice heard." It is not just that the caravan politicized people; it gave them a new platform, oriented around family and community, to speak about their authority.

"No sooner had we finished the Indian Child Caravan and then the whole issue of the Constitution was just right there. And George, I think, watching the momentum we built throughout the people just kept it moving" Christian continued. "I think the transition really was one of giving voice to people." And so, on the tail of the Indian Child Caravan, a comprehensive strategy for the Constitution Express was formally hatched. Conditions were right: hundreds of Indigenous Peoples had arrived in Vancouver, riled up and riding high on the success of the

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[41] The radical circumstances by which Marule found his way to the small, settler town of Chase, making an indelible imprint on Indigenous politics in interior BC is a story for Chapter 4.
[42] I try to use "grassroots" sparingly, only when lost for a better term. As Kukpi7 Christian told me, "what people call 'grassroots,' that's bullshit. No, they're just our people, they're the ones that stood up."

caravan. In a carefully planned move, they had marched to the Shaughnessy home of Human Resources Minister and beloved Social Credit politician Grace McCarthy, to great effect. Together with Indian Affairs Minister John Munro, she transferred to Splatsin the jurisdiction for child welfare and the funds to administer it. And she did it quickly, proving that jurisdictional change was not so complicated as it had long been construed. However, it was only one community, and there were many more areas of the Aboriginal Rights Position Paper to be dealt with. Manuel would not settle for accruing jurisdiction bit by bit, as Canada had spent a century doing. Nor was he prepared to negotiate for it from an even weaker position after the Constitution was patriated (*Indian World* 1980b, 4). If Canada was going to consolidate its jurisdiction in one final, swooping move, the Union would have to take commensurate action.

The caravan arrived in time for UBCIC's Annual General Assembly, and Manuel used this opportunity to declare a state of emergency. "As I see it," he announced, "our rights that we presently hold and the governing authority which we hope to increase to generate self-determination will go out the window" (as quoted in Nickel 2019, 151). As reported in *Indian World*, patriation would achieve the goals of the White Paper and of the 1947 plan to "terminate" the "Indian Problem," though without their verbosity (*Indian World* 1980b, 4). It was a soundless emergency, borne not of stated policy but of omission, "so subtly hidden within Trudeau's proposal that only under close scrutiny can the threat be seen" (UBCIC 1980a, ii).

Manuel would ring the alarm. To support his announcement came the release of a new UBCIC report, "Indian Nations: Self-Determination or Termination." This one took a markedly different tone, making clear the complexity of Indigenous Peoples' constitutional politics in BC. No longer interested in participating in Canada's domestic constitutional talks, UBCIC would be satisfied with no less than a full review "of relations between Indian Nations and Britain and

Canada" (UBCIC 1980a, 22). "Until this is done," it vowed, "Indian Nations reject the proposed independence of Canada in total as a hostile and aggressive act and are prepared to employ all means to resist its fulfilment" (ibid.). This paper also made clear the robust research UBCIC's legal team had been doing to unearth evidence of a different relationship between Indigenous Peoples and settlers which predated the BNA Act and Canada's steady jurisdictional dispossession.

It is not that UBCIC abandoned entirely its earlier vision for the recognition and expansion of Indian government within Confederation (UBCIC 1979, 2). It is only that the BNA Act was scrapped as the venue in which this could take place. The new paper continued to emphasize re-establishing Indigenous jurisdiction as fundamental to any new Constitution—but a Constitution whose substantive principles would be drawn from jurisdictional arrangements antecedent to the BNA Act, and whose development would likewise take place outside of its domesticated milieu.

Where the Aboriginal Rights Position Paper had advocated for the implementation of Indigenous governance within Canada, after Indigenous Peoples were ping-ponged in and out of the patriation tables multiple times, it was clear the federal government could not trusted to host such a process. Instead, the new paper proposed "a much more positive approach… one that would elevate constitutional patriation and amendment to an exercise in statesmanship and true nation-building" (UBCIC 1980a, 21). This approach would take place outside of Canada, in direct discussions with the UK to ensure "the political integrity of our association with Britain and the security of our various Nations from absorption into Canada" (4). Though the movement did not yet name the venue, it foreshadowed the idea for an "Imperial Conference" which would

feature in the petition presented to the Governor General and the Russell Tribunal five weeks later.

Proving my initial assumption about the trajectory of the movement to be so wrong as to be reversed, UBCIC's previous advocacy for constitutional recognition gave way to more explicit constitutional refusal (Nickel 2019, 164). But really, it only confirmed the paucity of my previous framing. What the 1980 assembly made clear is that UBCIC sought to transcend the stranglehold of Canadian constitutional law, while at the same time cementing Indigenous jurisdiction within it. First, they would restyle it—Indigenous self-determination would be established beyond Canada, and then a new constitutional order would be developed. Only then could various rights protections be inserted into it. Proving the compatibility of these positions, the two resolutions passed at the assembly called for ensuring "that Indian Governments, Indian Lands, Aboriginal and Treaty Rights are entrenched in the Canadian Constitution," while at the same time urging all BC bands to join the legal action to thwart patriation without Indigenous consent (*Indian World*, 1980c, 19). They would not give consent until they had a chance to sit down with the UK and Canada to hash out what the Constitution would look like.

And so, UBCIC ran with this mandate, deciding to take it to Ottawa. By now the government had established a Special Joint Committee on the Constitution, whose next set of hearings was slated for the end of November. True to form, the NIB was planning another All Chiefs Conference to coincide with it. So, this was the goal: to make it to the conference five weeks later. A train ride it would be.

By this time, George Manuel was well known for his two-pronged approach, often launching political and legal strategies simultaneously and playing them off one another. He was known for a similar duality in his international work, moving seamlessly between local and

transnational contexts, strategies, and theories. The Constitution Express, however, would do everything at once: UBCIC's legal team would lead the legal strategy, a national team would run the political strategy, an advance team would lead the Ottawa strategy, field teams would be sent to work with communities, and another team would be sent to New York and Europe to begin working on the international strategy (Nickel forthcoming).

Of these, it is the community 'fieldwork' that really seems to stand out in memories of the movement. Field teams of Union staff were once again deployed across the province to mobilize people for the train ride. This time, they would try to go to every Indigenous community in BC, "to tell them what we're doing and why we're doing it" (George interview). Ron George took part in these field teams before being redeployed to Ottawa on the advance team. As he recalls, it was tireless, but joyful, work:

> We all went out to communities and slept on couches and we were nobody special, we're just another skin. And that's how we were received. If we went in there with our suits and all that kind of stuff, they wouldn't listen. But we're just a bunch of grassroots skins going out there, sleeping on couches and bringing the messages. Doing it with drums and spirituality and Elders… And that's the way it worked.

Many I spoke to shared similar stories. "The organization at the community level was amazing," Venne remembers. "I was sent to central British Columbia, and we were doing workshops in the morning, afternoon, evening, three different communities" (Sharon Venne interview, Jul 24, 2018). This time the goal was not just to inform people of what Canada was trying to pull. This time it really was an invitation to 'go with' them to Ottawa. "That's what the purpose of that process was," says Venne. "Asking if they could support one person from their community [to go on the train]. Some communities were able to support more than one, but [we asked for] at least one representative to go so they could bring the information back to the people."

It was no small ask, and feats of fundraising were performed to support each $200 train ticket, in addition to the cost of food and supplies. There were art auctions and bingo nights. There were "Indian theme weeks" at local shopping malls. A group of women organized a "moccathon" walk—a reminiscent of the "Moccasin Miles" walks that the BC Indian Homemakers Association had organized to hold the All Chiefs' Conference in 1969 (Nickel forthcoming). For some people, "mushrooms paid their way," former Lhoosk'uz Dené Chief Roger Jimmie told me, referring to the lucrative pine mushroom foraging that happens in Dakelh territory in the late summer and fall. For bands like Jimmie's, who rejected government money from 1980 to 1986, there was no cache to rely on for anything Constitution Express related. "We just basically told DIA we don't want your money," Jimmie told me. "So we had to depend on trapping money and things to go to a lot of Chiefs meetings" (Roger Jimmie interview, Oct 4 2018).

Some communities, like the Nuxalk community of Bella Coola and St'át'imc community of Mount Currie managed to send many more than one representative. "We sent a hundred people from here, eh?" Mary Louise Williams told me. "They were running bingos and a lot of us from the village were not wealthy. I mean… day-to-day, we had to try and make a living. Yet they just went all out." Many St'át'imc communities had been galvanized by the fishing fights of 1970s. But the salmon weren't the only thing being dispossessed from their territory. She added, "we were suffering all kind of stuff from getting everything taken—our minerals, our logs… So, when the Constitution Express came up, we were right up there with George and them."

Meanwhile, UBCIC staff were going all out to raise the funds to secure the trains up front. While not unthinkable, it was not exactly commonplace to charter a train at that time. "You couldn't do it these days, I don't think, but at that time you could get a number of

coaches," Venne explains. Chartering two whole trains was ambitious but not impossible. Then, something suspicious happened. "I think Canada sort of realized there was a problem, or going to be a problem," recalls Venne, because suddenly, the Canadian National Railway (CN) came knocking. They demanded a $90,000 deposit to set aside the train cars. "That almost sunk the whole project." Communities were still fundraising individual tickets. Thankfully, the heroic feats of the UBCIC staff and a raft of last-minute donors, saved the day.

As Eddie Gardner tells it, CN representatives arrived at the Union offices to finalize the contract, which would require the deposit. By this time, UBCIC still had about $25,000 to fundraise. As Ron George tells it, after offering them coffee and tea, each of the staff took turns "holding off these VIA Rail types, going over every word [of the contract] and as soon as somebody finished and the money wasn't in yet, somebody else would come in and go over the same thing, over and over again… they must have done that four or five times." Meanwhile, as Eddie Gardner tells it, there was a fundraising frenzy going in the back rooms, with staff "on the phone just burning the lines." Money was trickling in, when Rosalee Tizya recalled a favour. As Venne remembers, "she knew somebody who had offered to help if they needed anything—Indians needed anything—and she called him up and asked." Amazingly, he obliged. "He gave it to them—he advanced the money to Rosa." As the story goes, Debra Hoggan ran off to the bank, just making it before the end of the banking day. Back at the UBCIC offices, "just as these guys were saying, 'look, we're kind of tired of waiting around here'" (Gardner interview), Hoggan came running back up the stairs waving the cheque overhead. "And so they signed the agreement right there" (Gardner interview), and "let the poor buggers go" (George interview).

When Gardner relayed this story to me, his point was to hammer home the sheer energy and support behind the movement: "the spirit of the of the Constitution Express was so powerful

at that time, that people just used dogged determination to get the job done." Bolstering this was not just a legal argument from the purview of the common law. Indigenous law was at work as well, which came "wrapped in prayer" (Crompton interview, Jan 8 2018). For Ron George, "spiritual guidance from Elders and medicine people" was one of the most remarkable things about the movement. Everything that happened on the train, he told me, connected back to the people on the land: "it manifested so successfully because the spiritual people in the community supporting us were fasting in the mountains and sweating and praying for us."

By the time of their departure from Vancouver on November 24th, the trains already had incredible momentum. From there, they would head off to Kamloops (stopping in Mission, Matsqui, Chilliwack, Boston Bar, Lytton, Ashcroft, and other communities to pick people up along the way), where they would split. The northern train would head up to Clearwater, Vavenby, Avola, and Jasper, Alberta. There, it would collect others who had traveled from northern communities, including from Prince Rupert, Fort St. John, and a large group of Tŝilhqot'in who had chartered a bus from Williams Lake. From Jasper, this train would travel through Edmonton and Saskatoon. Meanwhile the Southern train would stop in Salmon Arm, Sicamous, Revelstoke, Golden, Field, Banff, Calgary and Regina. In Winnipeg they would join up before heading straight to Ottawa for their arrival date of November 29th. There were Chiefs on the train to be certain. But the vast majority of travelers were community members—Elders, women, and kids of all ages. With the exception of a few sleeper cars, which went to a few lucky Elders and children, everyone else slept in their seats.

On the trains the spiritual side of the movement was safeguarded by the security team—a group of young men from nations across BC, who spent the weeks leading up to the journey in the bush by Neskonlith lake, training. Though charged with physical security and safety, I more

often heard them referred to as the "spiritual security team" (Crompton interview). The Express had a strict code of ethics, driven by Elders, which prohibited alcohol and drugs, but also set a standard in terms of conducting oneself with dignity and respect, and relating to others in kind. The security team were there to take care of any individual issues that might crop up, but also of the collective—bringing calm when needed to crowd dynamics. Their training period, as I understand it, was itself a practice of law: "they got themselves in really good condition, mentally and physically and spiritually. They had the sweat lodges going, they had their morning water swims, and they ran. They talked amongst one another, they cultivated all this language around what needed to be in the Constitution, all of those things" (Gardner interview). It was here, at the training camp, that they wrote the Constitution Express song—at least the bones of it.

Just in case of any more intense clash, particularly with the state or settlers, George Manuel installed other safeguards on the train. Gardner believes this was partly due to what had happened in 1974, when the Native Peoples' Caravan (in which he took part), was confronted by riot police on Parliament Hill, inciting violence. So, as a backstop a select number of media personalities were invited on the train, as well as a seasoned defense lawyer. "If anyone got into trouble or there was a racist incident, he wanted me there because I was a courtroom criminal lawyer" Lyn Crompton explained to me. She was the only non-Indigenous person on the train.

The train itself, however, was intended to provide a certain protection against such incidents. Trains were practical. When the respective merits of going by foot, bus, or car were debated amongst UBCIC staff, the realities of the Canadian landscape and November climate were mitigating factors. Further, the advantage of having two train routes meant it would be easier for northern communities to join (Venne interview). But, as Millie Poplar would tell a group of students during a visit to an Indigenous Studies course I taught in the winter of 2020,

the main reason they decided on trains, as opposed to vehicles, was to "avoid public abuse" (Poplar presentation).[43] After the Indian Child Caravan, this had become a priority. But not even a train could stop the RCMP, who raided the Constitution Express just outside of Winnipeg.

Winnipeg was a landmark for the Constitution Express. For one, it was the city where the northern and southern trains united, merging into one raucous ride. But Winnipeg itself was raucous, drawing a huge crowd of supporters, who came out to send them off. On the train, however, there was little access to the outside world—people didn't know what kind of resonance they were having among the public and the other organizations who were organizing around and against patriation. "Only when we stopped at the different stops, that's when we got a viewpoint… And we could see that it was building momentum across the country," Christian explained. Even at the small, rural stops, people would show up with food, foisting it into the hands of the travelers. In the prairies, the crowds who met them started to build into the hundreds and then thousands. By Winnipeg, the Four Nations Confederacy of Manitoba organized a "night of rallies" (Manuel and Derrickson, 65). The turnout was massive. As Christian recalls, "We got out drumming and singing, and it was just that groundswell of sort of support." It was especially telling, then, that the RCMP would choose Winnipeg for its raid.

As McFarlane and Manuel ([1993] 2020, 256) report, pulling out of Winnipeg the night of November 26th, "a couple of the new porters looked suspiciously like RCMP officers." When the train slowed to a standstill just after midnight, news started to spread that police were on board, claiming to investigate a bomb threat. However, not one person I spoke to has a shred of

[43] Poplar visits my class in January of 2020, when many of the students have been rallying in solidarity with Wet'suwet'en hereditary leadership against the Coastal GasLink pipeline. In the weeks following, the RCMP raid the Unist'ot'en and Gidemt'en camps. Her comments come up repeatedly in our discussions about the legality of colonial violence, and of building security and care into political action through witnessing, alliance, and mutual aid.

doubt that this was anything but a ruse to search the train. As Gabriel Williams told me, “there was a lot of stuff that was peculiar about our bomb scare, and they sure in hell weren’t worried about us getting exploded.” For one, choosing to stop the train at a moment when it was sandwiched between two rockfaces seemed an odd choice if a bomb was the fear. The RCMP then began to search every bag, but when they came to a suspicious-looking box, they asked Poplar to open it. “If there was a bomb in there, I could have been blow to bits!” She told my class (Poplar 2020). “I’ve never seen such nonsense in my life.” The security team went car to car, calmly telling people what was going on. When they got to John L. George, a Tsleil-Waututh Elder and veteran of the Second World War, Roger Jimmie recalls with a smile, “he said, you mean you woke me up just to tell me there’s a bomb on this train?” Most everyone knew it was a stunt. What the RCMP were really looking for, were weapons. Finding none, everyone went back to sleep. The train forged on.

Though the idea to take trains may have been borne of caution, it had other upshots, including, of course, a good dose of dramatic flair. It was not lost on the organizers that this was a rather cheeky use of Canada’s own infrastructure against it—infrastructure which had been instrumental in the settlement of the western colonies, and which, like today’s pipelines, plowed through Indigenous territories without their consent. In this context, watching their territories unfurl from train windows, “stirred up emotion” (Christian interview). But trains also provided space and time for conversation. Many generations spent time together, visiting and storytelling, as children ran the aisles, passed out food, and were cared for collectively (Manuel interview).

However, in among these stories of kin, collectivity, and care, are also stories of infidelity and harassment. I had heard rumours of the philandering that took place on the journey even before I began this research, often told with a wink and a nudge. But as I began to speak to

women about the train ride, it sometimes became less tittery and more serious. More insidious forms of misogyny, harassment, and worse were alluded to. These experiences were not shared with me, a white woman, but for hints and implication. I do not have the consent to share them, nor do I know their extent.[44] (And it certainly isn't my place to assess the extent of them.) All I can say, is that not all of the women I spoke to felt safe and secure on the train, nor supported.

This is significant, of course for the individuals it impacted, but also for the political tenor and substance of the movement. As I understand from Lee Maracle's astounding volume of work (e.g. [1988] 2006; 1990; 2015), which shines a fierce light on the sexism endemic to Indigenous political action in this period, men's mistreatment of women cannot be held apart from the movement itself. Sarah A. Nickel (2019) addresses this issue within UBCIC specifically, describing the way masculinist socio-political structures of the colonial state would reproduce themselves at the Union, from watershed moments of women's exclusion to casual misogyny and harassment.

Indeed, many people spoke to me about the intellectual leadership of women in the Constitution Express, while noting that all of its spokesmen were men. I want to acknowledge this gendered vision of labour, honouring the masterminds behind the movement—people like Millie Poplar, Rosalee Tizya, Debra Hoggan, Marie Smallface Marule, Lorna Williams, Mary

[44] I have thought a great deal about how to say even this—a decision inflected by my subject position as a feminist, a cis white woman, and the daughter of an abusive alcoholic father who was also an activist. I had initially resolved to ethnographic refusal the infidelity out of the story—i.e. leave it out—but as I grew to learn more, I worried about the complicity such refusals might beget, weighed against the responsibility I feel to "name" such things (Holmes et al. 2015). I thought about whether and how to continue to write about the movement at all. If it wasn't already clear, our refusals are personal, intellectual, and political, at once. So, in the paucity of this footnote I turn from my own positionality to the incredible work of Indigenous women, queer, and non-binary thinkers. In addition to Maracle and Nickel, who I have named in the text, Sarah Hunt's vital work, though not necessarily about this period of organizing, situates gendered violence in the colonial milieu, and what we feel we can say about it (2013; 2014; 2015). I support anyone who makes the hard decision to say more about what they experienced on the Express.

Louise Williams, Winona Wheeler, Sharon Venne, Vera Manuel, Janice Antoine, and many more—without retreating into some regressive trope (i.e. the women behind the men) or cultural cliché ("mothers of the nation," see Nickel 2019, 155-156). In addition to running the operation of it, these women were key theorists and architects of the movement's political and legal arguments.

But women also launched their own actions, separate from those helmed by men (and perhaps protected from their harassment). A group called the "Concerned Aboriginal Women" coalesced in 1981, leaving straight from one of the Constitution Express potlatches (a series of which sustained the movement through 1981) to occupy the Department of Indian Affairs regional headquarters in Vancouver. The occupation would last for seven days, calling for the resignation of Regional Director Fred Walchli, and raising concerns over the impacts of residential school, economic dependency, and inadequate housing on reserve. These kinds of issues were often gendered in Indigenous organizing at the time, painted as social or family issues, rather than highfalutin constitutional ones. Fortunately, the Constitution Express, including George Manuel, saw them as one and the same (Nickel forthcoming). The women's occupation struck the heart of what the movement was fighting for—Indigenous authority and political cohesion. And yet, when Indigenous women across Canada took hold of the patriation period to fight for status and citizenship equality (see Barker 2008; Fiske 1996; Monture-Angus 1995; Turpel 1993) UBCIC took an ambivalent stance (Nickel 2019).

The hints of harassment bring another layer to such cognitive dissonance. What this hammers home, is that both things can be (and usually are) true—Indigenous women can have been the drivers of the movement, and there can have been repugnant hostility towards them. I

take inspiration from Nickel on this front, who boasts an honesty that brings nuance to these seemingly countervailing facts, without foreclosing them to each other.

What did become clear, however, over my many interviews with women, is that they took care of each other. And each others' kids. There were lots of children on the train, thanks in part to the policy that kids under five would travel free. Older kids, in turn, took care of Elders. Though a group of Elders flew to Ottawa, accompanied by Mount Currie's Lorna Williams and her five-year-old daughter, still others took the train. For example, a then 15-year-old Cameron MacGregor from the Tŝilhqot'in community of Tl'etinqox escorted his 77-year-old grandmother, Madeline Hance. At a stop in the prairies, the two were photographed for *Indian World*—MacGregor, in his leather jacket and long hair, and his grandma, in her kokum scarf and skirt.

For some of the elected chiefs, the presence of Elders, spiritual leaders, and hereditary chiefs had a profound impact. As Kukpi7 Christian described it, it was a learning curve for elected band leadership to step back a bit: "We were just sort of helping and the catalysts." It was also indicative of a shift away from reserve-based governance. The work UBCIC had done through the 1970s to redirect peoples' political energy back to their own governance structures was playing out, as the focus fell on jurisdiction at the territorial level. "When we were travelling, it was really interesting, because it was kind of like we evolved from talking about reserves to talking about nationhood," Christian recalled. Each day, the spokesmen and staff would hold workshops in different train cars discussing the aims of the patriation fight. "We'd [choose] a car," and whoever wanted to get in on it would "scrunch in there" (Crompton interview). And then, Christian recalls, Elders and hereditary leadership started to speak up, changing the timbre of these conversations: "the oral history came forward." It was a resurgence

of their law, and one that presaged the alternative to patriation they would go on to advocate. That is, a decolonial constitutionalism rooted in Indigenous nations' lawmaking authority.

For non-Indigenous lawyers like Louise Mandell, who had become an expert at jerry rigging the common law in Indigenous peoples' favour, this was remarkable in a different way:

> I finally understood something about Indigenous law—about how embodied it is. It's not about law in the books, it's about how you act and how you deliberate, and how you live and write relations… and the law all arising from the land, stewarding the land, protecting the land. There was a moment right then and there, where people were prepared to put their bodies on the line… and come out and be on the train. And so, the people that were on the train, there was there was this spirit of doing the right thing, spirit of living their law.

While fighting to keep their law from being wiped off the constitutional map, they were also practicing it—abiding Elders' instructions to physically 'go with' the common law lawyers to Ottawa. In this, the movement embodied what Glen Coulthard calls a "*prefigurative* politics"—a resurgent method that enacts its very political commitments, prefiguring its aims (2014, 159).

By the end of the Constitution Express's journey to Ottawa, the movement would make fewer and fewer references to the first of the two mandates it had received at UBCIC's General Assembly, that is, to fight for the constitutional entrenchment of their governments and rights. According to lawyer Douglas Sanders (1983, 314), there were concerns it had become too risky to their "national status." They worried that Constitutional recognition without the second mandate—i.e. without first revamping Canadian federalism at its base—would only serve the existing jurisdictional arrangement, and that the federal and provincial governments couldn't be trusted with it.

That these positions now seemed incompatible is more a reflection on Canada's refusal to accept plurality, openness, and complexity within its purportedly open and complex Constitution

than any change of heart on UBCIC's part. As John Borrows has argued (2016, 123), fearing for its "territorial integrity," Aboriginal law is the one area where Canada consistently eschews its open, "living" Constitution. Though Borrows' analysis applies mainly to the post-1982 milieu, it was during the fight over patriation that the grip of this fear really became clear. Staunchly unwilling to participate in the kind of open, decolonial discussions UBCIC called for, the Trudeau government stifled *any* opportunity for Indigenous Peoples to express complexity or nuance in their relationship to patriation. Circumscribing both the procedural and substantive terms of their recognition, the government created for Indigenous Peoples a zero-sum game, sowing conditions of engagement that many found too dangerous to their nationhood to pursue. And it did this at the exact moment that Indigenous nationhood, in all of its jurisdictional glory, was having a renaissance. As the song goes, "we don't need your Constitution."

Nevertheless, rather than entirely "turn away" (Coulthard 2014, 48) from the state and its Constitution, the Express demanded that Canada undergo a renaissance of its own. Just as the oral history was coming forward on the practice of Indigenous law, Christian reports, "we were hearing things [from the Elders about] the Royal Proclamation and the honour of the Crown." The movement would demand a reckoning for the state, though not just with its colonial past—a reckoning with its 'honour' too. It offered a resurgence of another way of relating to Indigenous jurisdiction, and another basis for sovereignty all together. At the very moment Canada was claiming all the sovereignty for itself, this was reckoning even harder for it to fathom.

3.3 Reconstituting federalism

When the movement imagined revamping Canadian federalism to foreground Indigenous legal orders, it meant to fundamentally shake up the normative order of things. As Bobby was quoted

as saying, “what it involves will be entirely different from anything that now exists” (UBCIC 1980b, 48). His father had made a similarly affecting statement in the *Fourth World* a few years before, clarifying what he meant when he called for recognition:

> Such recognition necessitates the re-evaluation of assumptions, both about Canada and its history and about Indian people and our culture—assumptions with which people have lived for centuries. Real recognition of our presence and humanity would require a genuine reconsideration of so many people’s role in North American society that it would amount to a genuine leap of imagination. (Manuel and Posluns, 224)

Real recognition—not the liberal rights kind—would demand a leap into the future. And yet, they made it clear that it would not foreclose itself to the past, demanding engagement with tradition. But where Canada essentializes tradition to constrain Indigenous claims (Povinelli 2002; A Simpson 2014), the Express would draw upon resurgent political and legal traditions without freezing them in some ethnographic moment in time. Anticipating current thinking on Indigenous futurity (Harjo 2019; Tuck and Gaztambide-Fernández 2013; Estes 2019; Goodyear-Ka‘ōpua 2017), the movement would move through time, looking forward as much as back.

The Constitution Express would provoke Canada to undertake a similar engagement with its past in the design of its constitutional future—but a different past than the one usually drawn on in normative discussions of Canadian constitutionalism and Aboriginal law. For it was not always the case that the Crown felt the need to deny the jurisdiction of Indigenous Peoples in order to feel confident in itself.

The petition the movement transmitted to the Governor General on behalf of the “Indian People of Canada” begins on this basis: “When the early settlers arrived in our Indian territory we welcomed those who respected our Sovereignty and treated them with peace and friendship. Those who disrespected our Sovereignty were at war with us” (“Petition” [1980] 2003, 29-30).

Here it echoes closely early twentieth century documents like the Lillooet Declaration, the one Gabriel Williams cited at the beginning of this chapter. The 1910 Laurier Memorial was another such document, reminding Prime Minister Wilfrid Laurier that when settlers first came to BC, "They found the people of each tribe supreme in their own territory, and having tribal boundaries known and recognized by all" (quoted in Feltes 2011, 95). This first wave of settlers, referred to as the "real whites," abided the jurisdiction of the peoples on whose territories and resources they depended (Feltes 2015). As Duane Thomson and Marianne Ignace (2005, 4) report, "The Salish nations offered the traders security for their persons and trade goods as long as their guests conformed to the economic, legal, and social regimes of the respective host communities."

When the Imperial government established the Colony of British Columbia, it promised to do the same: "The whites made a government in Victoria—perhaps the queen made it. We have heard it stated both ways. Their chiefs dwelt there. At this time they did not deny the Indian tribes owned the whole country and everything in it. They told us we did" (as quoted in Feltes 2011, 129). The Constitution Express' petition recounts the same history:

> We were told that the Royal Majesty had power to protect us and would hold to her promises, we met with her representatives and agreed how our separate Nations would live together. We allowed the Royal Majesty to establish her government and her people in our land on the following terms:
>
> a) Our Sovereignty would always be respected by the Royal Majesty and her subjects.
> b) Her Royal Majesty would protect our Indian Nations against harm from other European Nations.
> c) Our Indian territories would be protected against settlement by the Royal Majesty's subjects unless we consent to their occupation of our land through Treaty. ("Petition," 31)

Here the petition alludes the to the Royal Proclamation, which guaranteed that the settlement of Indigenous lands could only occur with Indigenous consent through international treaty-making.

At this time, Indigenous Peoples' *de facto* (factual) sovereignty was undeniable. More political than legal, this sovereignty weds to jurisdiction as the "actual presence in and control of a territory, involving among other things, the exercise of authority" (McNeil 2018, 298). The Laurier Memorial's "real whites," corroborated Indigenous Peoples' de facto sovereignty by experiencing it—by living under their law. Even after establishing the Colony, there was no chance the Crown, who had little presence outside of Victoria, could claim de facto sovereignty elsewhere in BC, where, "Instances of questionable jurisdiction" were many (Smallface Marule 1981, 7). But importantly, the Crown also recognized Indigenous Peoples' territorial *de jure* (legal) sovereignty, by promising to make treaty before taking up any lands ("Petition," 31). Thus, by confederation, Mandell (1984, 171) would write, "Canada comprised four entities, each with a degree of sovereignty recognized under the constitution – the Indian Nations, Parliament, the Provincial legislatures, and the UK Parliament".

On the timeline of Canadian colonialism, it is rather more recent that the attitude toward Indigenous jurisdiction swiveled from one of consent and recognition to denial and dispossession. For a period, these positions existed in tandem: "At the same time as open recognition was being given to Indian governments and Indian cultures there were other colonial figures who refused to recognize Indian governments. They advocated the destruction not only of Indian governments and Indian cultures, but of Indian people themselves" (UBCIC 1980a, 1). Somewhere along the line, these "other" colonial figures won out.[45] BC decided it needed all the territory and sovereignty for itself, and to get it, went about taking up all the jurisdiction.

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[45] Asch (2014, 161-162) posits, the moment the colonialists won out was the moment Alexander Morris was pushed out as Lieutenant Governor of Manitoba in 1877. Morris, treaty commissioner for Treaties 3-6, was an advocate for the implementation of the treaties' oral, and not just written, obligations, including the principles of reciprocity and

Historian Lisa Ford (2010) links the usurping of jurisdiction to the very origins of settler colonialism. By taking up things like, in the case of Ford's study, criminal law, this made colonial jurisdiction territorial, covering the whole population of a place, not just settler subjects. It was a move to gain ground in de facto sovereignty, by dispossessing the practical operation of Indigenous jurisdiction. This phenomenon also maps onto the long rise of governmentality, which mixed the nation state's previous fixation on rights to territory (i.e. de jure sovereignty) with the administrative (de facto) art of managing populations (see Foucault [1975-1976] 1997, 36). So, by the late nineteenth century, and particularly in the colonial context, it would involve an insistence on jurisdiction over both: territory, and the people on it.[46] It had the effect of severing Indigenous jurisdiction from territory, while the state consolidated those things for itself.

It is fair to say that in Canada this was led, in large part, by British Columbia. By the time of its joining Confederation in 1871, BC had become famously uncooperative with the directives of the Royal Proclamation, taking land without consent and unilaterally applying jurisdiction to it. To curb this habit, it was worked right into the Terms of Union that BC would have no dealings with Indigenous lands or Peoples (Smallface Marule 1981, 9). But Confederation had already been fashioned in response to provincial incursion on Indigenous jurisdiction, by vesting "Indians and land for Indians" in the federal government alone through section 91(24) of the BNA Act. It was meant to delegate to the federal government administration of the Crown's duty to protect Indigenous consent, not to engulf Indigenous Peoples within federal authority. This

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mutual assistance. After ongoing conflict with David Mills, Minister of the Interior, over Canada's breach of the treaties, upon John A. Macdonald's returned to power Morris finally lost his job.

[46] This would reverberate in the governmentality of the post-war period that began this chapter, when the Canadian state would again attempt to subsume Indigenous populations under its authority, though this time by serving them.

confirmed the protection of Indigenous jurisdiction as the very lynchpin of Canadian federalism—a fact seemingly lost on Trudeau by the time of patriation.

The Constitution Express set out to remind him of it. For example, a collaborative paper edited by World Council of Indigenous Peoples affiliate Marie Smallface Marule, with contributions from Rudolph Ryser (WCIP), Sharon Venne (by then with the IAA), and UBCIC staff Norma Pierre and Debra Hoggan, made the point that the BNA Act outlined the exclusivity of provincial and federal jurisdiction *relative to one another*; it did not eat up all the jurisdiction between them:

> When the British Parliament created a Federation of Provinces for the Central Government, our Indian Nations were never invited to join politically nor did we seek to join the new federation. Our nations remained politically separate from Canada, however, we have maintained our political association with Britain. Our only relations with the Government of Canada have been in the nature of Administrative ties - originally arranged by the British North America Act. (Smallface Marule 1981, 3)

In order to uphold its end of relationship, the Crown retained for itself a paramount authority over the BNA Act—a kind of insurance policy on the Royal Proclamation that had the added benefit of mitigating conflict between the federal and provincial governments.

As UBCIC further documented in its petitions and submissions, after joining Confederation, BC's first Lieutenant Governor Joseph Trutch "steadfastly refused" (*Substance* 1980, 103) the existence of Indigenous jurisdiction, declared the so-called "Indian land question" a mere matter of reserve size, and set about downsizing them (Harris 2002, 57). This was in brazen violation of international, Indigenous, and the common law. Indeed, BC's posture towards Indigenous Peoples was so hostile to the obligations of the Crown, that things quickly spiraled into a full-fledged (though short-lived) show-down between the "bewildered dominion

officials" and "their petulant provincial counterparts" (71). The Crown acted on its paramount authority a number of times to censure BC, when the Earl of Dufferin, Governor General of Canada, made a last-ditch effort, asserting in an 1876 address, "No government, whether provincial or central, has failed to acknowledge that the original title to the land existed in the Indian tribes… Before we touch an acre we make a treaty with the Chiefs representing the Bands we are dealing with" ("Petition," 31). To no avail. Unfortunately, instead of BC coming around, it did not take long for the reverse to happen. The federal government reinterpreted the BNA Act as evidence of its exclusive sovereignty, joining BC in its bald dispossession of Indigenous jurisdiction.

Now federalism was being used to appropriate Indigenous lands and jurisdiction, not protect them. Legislation which had been "geared to minimize hostilities and conflicts between Indian Nations and the settlers" were now leveraged as "quasi-legal instruments for usurping Indian authority over territory" (Smallface Marule 1981, 4). The federal government reconstrued section 91(24) as power over, and not obligations to, Indigenous Peoples. Taking it as an invitation to control the Indigenous population, the government expanded legislation such as the *Indian Act*, "a modern example of codified violence… calculated to justify Government manipulations and control over individuals" (5). At the same time, it banned Indigenous Peoples' own social and legal institutions such as the potlatch and sun dance. By 1927 all common law avenues for Indigenous Peoples to pursue lands claims were also banned. Meanwhile, the provinces claimed near all areas of territorial jurisdiction. As Manuel and Posluns (30) wrote, of the provincial-federal power split: "One claimed they owned the land. The other claimed they owned the Indians." Between them, they effectively commandeered both jurisdictional bases for sovereignty: de jure and de facto. The report edited by Smallface Marule (1981, 4) puts it

plainly: “The administrative duties transferred to the Canadian Government in 1867 have clearly been transformed into a totalitarian system of colonial governance.”

The Constitution Express set out to recontextualize the BNA Act within the Crown’s paramount commitments to Indigenous jurisdiction. And it did this at the very moment Trudeau was trying to shake the BNA Act loose of Crown paramountcy once and for all, that is, to ‘patriate’ it. But, as the movement made consistently clear, this thing that Canada was trying to patriate was nothing but a “subordinate instrument” (UBCIC 1980a, 3)—a “delegation of administrative responsibilities” (*Substance*, 54), that retained for the Crown a “supervisory protectorate role over Indian affairs within the context of Canadian federalism” (60), providing a “constitutional framework for the protection of Indigenous rights” (57).

Canada had at its finger tips the framework for a constitutionalism that would foreground Indigenous jurisdiction, not demand its erasure. On the de facto side, it had precedence whereby settlers lived according to Indigenous law. On the de jure side, it had models for a different kind of federalism, where, with Indigenous consent, two or more polities could share the same territorial space. This could be the constitutional tradition it decided to patriate. The Constitution Express put this on offer—a decolonization for us all. Generously, it provided Canada both a substantive model for what this might look like, and the procedure by which to go about getting there—an internationally supervised conference to “define the terms for political existence between the Indian Nations of Canada and the Canadian government” (“Petition,” 38-39). Canada went the opposite direction, sticking with its dehistoricised version of the BNA Act, and its exclusive patriation process too.

In the courts, Indigenous Peoples were rebuffed. For example, when Manitoba initiated a reference case in its Court of Appeal, seeking to challenge Trudeau’s moves to patriate without

provincial assent (one of three provinces to do so before they appealed collectively to the Supreme Court of Canada), a group of BC Chiefs appeared, seeking leave to have the question expanded to include Indigenous consent (Mandell 1984, 173). The application was refused. Meanwhile, after the pleadings closed on UBCIC's own case, the Chiefs decided not to proceed to trial (172). Given the break-neck speed at which Trudeau was trying to patriate, Mandell recalls, "the timeframe was not possible, even if we had 50 lawyers working constantly on it." Nevertheless, she still feels that launching it was strategic, opening up a discourse on Indigenous consent while the patriation bill was being debated.

On the public side, this strategy took effect. Outside of the formal debates, the movement initiated a massive popular education campaign, led, in part, by the advance team in Ottawa. For example, Ron George met with everyone from the Canadian Labour Congress to the lobby to legalize marijuana (George interview). At the former's annual meeting, he was given just four minutes to speak, with no option to put a motion on the floor or formally request funding. Nevertheless, someone started passing the hat. He left the meeting with a "frickin' paper bag full of cash." As the train rolled across the country, these efforts of the advance team gained steam too. As Gardner remembers, "we garnered a lot of support from unions, from the Opposition, from a lot of people… that was solidifying for First Nations people because of the powerful lobby force that we had."

They were also called to follow local law and protocol, asking for the consent of those whole territories the train would be arriving on. Gardner recalls going to Akwesasne, Six Nations, Kahnawake, Kanesatake, and Algonquin communities around Ottawa. In response, they received support in the form of transportation, food and other provisions.

Ottawa, however, was a different story. They were having little luck arranging billets in the city, when Mayor Marion Dewar came through. “She met with us and we told her how many places we had… and it wasn’t much,” George recalls. “And so, she gets on TV and makes an appeal to all citizens of Ottawa.” It was so successful, by the time the train arrived, “we ran out of Indians, there were so many people wanting us to stay with them.” There are other stories to this effect, proving their public education efforts to have worked. For example, accompanying Elders on the flight to Ottawa, Lorna Williams noted a marked difference between the racism they faced on the way there, and the respect on the way back. The flight attendants “asked about the constitution, wanting to learn” (Williams forthcoming).

Of course, there are also stories of allies who got prescriptive, raising concerns about how to word the Constitutional provision. Formerly sympathetic MPs similarly tried to redirect the movement’s aims to be more palatable to Canadian legislators. For example, Liberal MP Warren Allmand, a known supporter of Indigenous rights, complained to the *Globe and Mail* of “finding it increasingly difficult to get his Government colleagues to look past the self-government idea to consider the merits of the other constitutional demands” (Sheppard 1980). For the Express, this was *the* demand, from which other rights and protections would flow. Sentiments like Allmand’s were indicative that while there was some appetite to support cultural rights, there was far less sophisticated understanding of the jurisdiction question.

As this chapter has intended to show, the movement’s “dramatic demonstrations” as *The Province* (1980a) called them, were more than a tactic to negotiate their ways into the existing constitutional package. Their fight for territorial jurisdiction was genuine. Rooted in their historic relationship with early settlers and the Crown, this consistent movement for self-determination in BC was affirmed in the creation of UBCIC, and the resurgence of Indigenous nationhood that

began in the 1970s and fomented on the train ride itself. It challenged Canada's own constitutional narrative—one which, starting after Confederation, usurped Indigenous jurisdiction in order to hoard sovereignty for itself. And it outlasted the federal government's further attempts, in the post-war period, to bring Indigenous peoples into the fold through softer, more egalitarian means of service provision and reform. Inclusion in the existing order of things was not what they were looking for.

UBCIC proved this point when Canada conceded to extend its hearings by two months to allow broader participation in them. Without any substantive commitment to open up the issue of consent, self-government, or political rights, UBCIC voted to boycott the hearings. By now it was an international conference or bust. If Canada wasn't willing to join them there, they promised to seek other remedies:

> As the last recourse, we propose to take whatever other measures are necessary to separate Indian Nations permanently from the jurisdiction and control of the Government of Canada, if its intentions remain hostile to our peoples, while insisting the fulfillment of the obligations owed to us by Her Majesty the Queen. ("Petition," 39-40)

This time, the imposed their own deadline: December 3, 1980 (40). When Canada failed to respond to their conference proposal by this date, it was decided. International they would go. As most of the travelers boarded trains and planes headed back to BC, a delegation of 50 people got on buses, bound for the United Nations in New York. Meanwhile, a small handful of other delegates were already in Europe.

Chapter 4: The Constitution Express and Transnational Decolonization

Throughout patriation's three-year slog, Trudeau repeatedly evoked decolonization. Patriation, he proclaimed, would "break" Canada's "last colonial link" to the Imperial Crown (Trudeau 1982a), promising to rid Canada of "residual colonialism" (Alexander 1980, 1). Trudeau's glib appropriation of decolonial vernacular wrote Canadian fantasies of Indigeneity into the story of patriation, while at the same time erasing Indigenous Peoples from it. But Indigenous Peoples were mobilizing around decolonization too, and in their case, it was not a metaphor.[47] Within the Constitution Express, World Council of Indigenous Peoples affiliate Dave Monture told me, "you started to hear the language of decolonization" (Dave Monture interview, Aug 8 2017). This chapter will look at how the movement deployed this notion of decolonization, as an alternative to patriation. It will do so by focusing on what transpired at two international venues before which the Constitution Express made its decolonial pitch: The Fourth Russell Tribunal on the Rights of the Indians of the Americas, and the United Nations.

Taking place in Rotterdam in November 1980, the Fourth Russell Tribunal operated outside of existing international infrastructure. Rather, as I will explain, it was a kind of shadow tribunal, organized expressly "to adjust the failing international law system" (Kleijn 1980). UBCIC's interventions at the Russell Tribunal drove the conversation beyond protections for rights and cultural survival, into the realm of jurisdiction, self-determination, and decolonization—topics which other international fora, particularly the UN, had reserved for postcolonial states alone. This, in turn, takes me on a brief foray into the history of international law, instigated by the analysis that UBCIC itself presented before the Tribunal. The purpose here

[47] Evoking intentionally Tuck and Yang's (2012) famous article, "Decolonization is not a metaphor."

is to show that contrary to conventional narratives, there is historic precedence within international law—rooted in Indigenous Peoples' international relations and confirmed in British colonial policy—that does not equate self-determination with sovereign statehood alone. That is, there is a model of international law, embodied specifically in the doctrines of consent and trust, which predate the Western nation state, and its colonial dispossession of Indigenous jurisdiction, conforming instead to Indigenous Peoples' international legal principles. It is this model that the movement, through UBCIC,[48] put before the Russell Tribunal.

A week later, a delegation of about 50 Constitution Express participants arrived in New York, where they would put the same arguments before the UN. At both the Russell Tribunal and the UN their critiques extended to modern international law, and the efforts of certain Western liberals to further delimit self-determination as synonymous with Western-style nation statehood, demanding from colonized peoples assimilation to achieve it. Here the movement was informed by Third World anticolonial thought, in order to propose a different pathway to decolonization where statehood was not necessarily the end point of self-determination, and where assimilation was not the way to get there. In this, the movement sought to bring about the "Fourth World," a world beyond the Three Worlds of the UN, where institutions, constitutions, and confederations could be built collectively beyond imperial domination (Manuel and Posluns, 12). To borrow Adom Getachew's (2019) pertinent phrase, it was "worldmaking."

Methodologically, this chapter strays slightly from the others, in that relies heavily on three sources: the analysis of Sharon Venne, the archives of the Fourth Russell Tribunal, and the

[48] It was UBCIC who made a submission, and lawyer Sharon Venne who presented it. However, the submission echoes arguments made by other of the movement's leaders in Canada, London, and elsewhere. So, this is a case in which I refer to UBCIC's submission as part and parcel with the broader Constitution Express movement.

recollections of individuals who went to New York. Venne, who is Cree from Treaty 6, was a fresh out of law school when George Manuel sent her off to present at the Russell Tribunal. She was articling with Douglas Sanders, UBC law professor and one of UBCIC's legal strategists.[49] I draw heavily on the international analysis she produced then—in the form of the movement's Russell Tribunal submission—and on the analysis she continues to put forth today, shared with me through a series of interviews, friendship, and academic collaborations.[50] To bolster Venne's memories and analysis, I also rely on the Tribunal's archives, housed at the International Institute for Social History in Amsterdam, where I spent five days with Vicki George. My archival endeavours were not so successful in New York. And so, by the time we get to the UN at the end of this chapter, the main source of analysis are the recollections of those who were there.

4.1 The Russell Tribunal and Decolonization in International Law

On November 24, 1980, the very day the Constitution Express left the station, the Fourth Russell Tribunal on the Rights of the Indians of the Americas began. Over seven days it would hear 14 cases, and receive a much larger number of standalone presentations, petitions, and submissions, including that of UBCIC. It was modelled after any other international tribunal or court of law, though without their statist structure, nor their institutional clout. Rather, under the direction of a private body, the Bertrand Russell Peace Foundation, it had an expressly anti-imperial bent.

The first Russell Tribunal, on which the fourth was modeled, had taken place in 1966, investigating American war crimes in Vietnam. It was organized by Bertrand Russell himself—

[49] Upon finishing her articles in 1981, Venne took a position with the Indian Association Alberta. This landed her in London, where she fought patriation in the courts—a topic for the next chapter.
[50] A version of this chapter, co-authored by Venne, will appear in a forthcoming issue of *BC Studies.*

then well into his 90s—and presided over by Jean-Paul Sartre. Through their recruitment, the jury was a veritable who's who of the global Left, including artists, intellectuals, and leaders of the social movements of the 1960s: Stokely Carmichael, Simone de Beauvoir, David Dellinger, and Mahmud Ali Kasuri, among others. Without the "force majeure" of a state-backed body, they had no formal capacity to compel law- and policy-makers to implement their findings (Russell as quoted in Fleet 1980). Yet, this was seen to be boon, not a shortcoming. As Russell put it, "I believe that these apparent limitations are, in fact, virtues. We are free to conduct a solemn investigation, uncompelled by reasons of State of other such obligations" (*ibid*). Sartre agreed: "We are independent because we are weak" (1967, 10). Unlike the UN system at the time, it threw open the protocols of participation, inviting those directly impacted to testify. State parties, on the other hand (the accused) declined to take part. Though US officials tried to downplay the Tribunal, deriding it as a kangaroo court, its finding that the US was committing genocide in Vietnam circulated globally, made famous through Sartre's rendering, *On Genocide* (1968).

Shirking the official flags of legitimacy—state sanction and abstract neutrality depended upon by the UN and World Court—the first Russell Tribunal refused to fall prey to the ideological and imperial contests that played out in those venues. And yet, it was exceedingly careful to speak "the language of international law" (Manfredi 2018, 79). Throughout the hearings, it followed strict standards of legal precedent for the presentation of evidence and witness testimony, and adhered scrupulously to the "arsenal of jurisprudence" contained in existing treaties and conventions (Sartre 1967, 5). Law, in Sartre's view, was a both a product of history and a superstructure, exerting a "'feed back' effect" by allowing one "to judge a society in terms of the criteria which it has itself established" (4). The creation, at Nuremburg, of an

international law to preside over "political crimes," provided the precedence needed to condemn Western imperialism on the basis of its own criteria—not just moral criteria, but legal ones (5).

Sticking, then, to the standards of international law served two important purposes. For one, it helped to fend off charges of "petit bourgeois idealism," where the "indignant disproval" (5) of a group of progressive personalities could be written off as mere moral indictment. Sartre and Russell sought to create a new kind global forum—a space where the dialectical rigour of such personalities could be brought to bear on the "juridical dimension" of international politics (5).[51] Second, it allowed the Tribunal to take established measures of criminality and extend them beyond the individual. Perhaps informed by Hannah Arendt's *Eichmann in Jerusalem*, the Tribunal understood that guilt lay not with a few hideous, power-wielding war criminals but with the whole policy of a state and its structuring ideology. Finding collective culpability in the US government, legal scholar Zachary Manfredi (2018, 85) writes, "Sartre connected the question of criminality and intention to large-scale military and political practices and found evidence for that criminality not in individual consciousness but in a systematic policy".

This approach, while serving the tribunal, also opened it up to anticolonial critique. While on the one hand seeking to reimagine international justice beyond state impunity, the trial fit squarely in the Eurocentric lexicon of international law. It relied on the assumption that there are legal parameters inherent to imperialism, where it crosses from legitimate action into the realm of criminality (and namely, into genocide). In a 1967 interview, Sartre clarified, "We only have

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[51] Sartre had been formulating this role for the intellectual against the backdrop of the Vietnam War. In 1965's *A Plea for the Intellectuals*, he implored them to apply their skills in dialectical analysis to act in solidarity with the exploited—those whose "very existence" contradicts the universality presumed by the ruling class (256). Rather than abstract, Sartre wanted this role actualized "at the level of events" (251). The Russell Tribunal, it seems, was his attempt to realize this model of intellectual practice (Arthur 2010, 157)—that is, to make an event of it.

to try and find out whether, in the course of this struggle, there are people who are exceeding the limits; whether imperialist policies infringe laws formulated by imperialism itself" (6). This suggests, of course, the legitimacy of policies which operate within these limits, i.e. that there is an imperialism which is not criminal. Here the Tribunal accepted the criteria set by imperialist powers themselves—Western ones, universalized in international law—and not, for example, the consent, jurisdiction, or international law practiced by the peoples imperialism oppressed. For Sartre, this was the very point: "to apply to capitalist imperialism its own laws" (6). The Tribunal sought legitimacy, not in state sanction, but in Western state legal custom nonetheless.

Elements of this critique were raised by James Baldwin, who, after enthusiastically accepting Russell's invitation to participate in the Tribunal, developed reservations about its Eurocentrism. Declining to attend the sessions in Sweden and Denmark, Baldwin's contribution came in the form of a fiery 1967 article, titled "The War Crimes Tribunal," published in the Black theory journal *Freedomways.* In it, he globalized the war as an inheritance from France, noting, when it comes to imperialism, "all the Western world is guilty" (242). For Baldwin, it seems, the crux of the issue was not that the West be more consistent with its own laws and limits, but that Western imperialism be done away with altogether—that the world decolonize.

Given the predominantly European jury, Baldwin suggested they instead investigate their own actions in, say, South Africa, Algeria, or Rhodesia. By the same token, he proposed that any tribunal on the Vietnam War "should really be held in Harlem" (243), where, among the Black community, the material and moral conditions of American imperialism could really be felt: "No one, then, could possibly escape the sinister implications of the moral dilemma in which the facts of Western history have placed the Western world" (243). This was a nuanced, total condemnation of imperialism, linking its transnational and domestic violences. What's more, it

shone a light on the Tribunal's neglect of the racism behind American efforts to "liberate" south Vietnam. As Baldwin concluded, "A racist society can't but fight a racist war—this is the bitter truth. The assumptions acted on at home are also acted on abroad, and every American Negro knows this, for he, after the American Indian, was the first 'Vietcong' victim" (244).

Perhaps provoked by Baldwin's article, Sartre wove thick threads between European and American imperialism in the Tribunal's findings. While conceding that colonialism, as a "system," is always "cultural genocide" (1968, 13), he stayed focused on proving that American intentions in Vietnam met its specific criteria. Establishing this, Sartre concluded not with the countervailing self-determination of the Vietnamese to decide their own place in the world, but by universalizing the threat of American hegemony as a crime against all humanity, appealing to the immanent idiom of Nuremburg. This turning of imperial law on itself was a shrewd way to take the US to task—a chilling, yet juridical, warning against its hegemony. Yet, it retained the tacit implication that imperialism's internal checks and balances were enough to rein it in.

The question, then, is did the Fourth Russell Tribunal, launched more than a decade later, follow the same path as the first? Did it stick to this model of immanent critique? Or did its focus on the rights of Indigenous Peoples within the Americas redress its tensions and gaps? By contrast, what model of international law did they put forth?

By the late 1970s, a crop of European solidarity groups emerged, attuned to the threats facing Indigenous Peoples' cultural and material survival, and, most prominently, their rights. The '70s had seen the rise of a global human rights movement unlike any before, exceptional for its proliferation outside of international institutions. As faith in the respective promises of socialism, liberalism, and postcolonialism began to wane, historian and legal theorist Samuel Moyn (2010) argues, human rights arrived just in time to fill the moral and emotional void left in

their wake. It was the harbinger of a new kind of universal justice and liberation, this one generated beyond state governments. It was led instead by concerned intellectuals and publics, as a league of non-governmental organizations took up the cause.

The UN followed suit, finding for itself a renewed relevance in human rights. At the same time—for the first time—it took an interest in discrimination against Indigenous Peoples, and in 1971, the Sub-commission on the Prevention of Discrimination and the Protection of Minorities appointed Special Rapporteur José Martínez Cobo to undertake a comprehensive study on the issue (a report that would take him twelve years to complete). Meanwhile, many on the European left were captivated by the high-profile actions of the American Indian Movement (AIM), news of which had made it into local media (Yvonne Bangert interview, Apr 12 2018). By the first International NGO Conference on Discrimination Against Indigenous Populations in the Americas, held in Geneva in 1977, a number of solidarity organizations had coalesced, many of them helmed by anthropologists.

Building on the momentum of the 1977 conference, and taking to heart its final resolution that more efforts should be made to bring Indigenous rights abuses before international scrutiny, one such group—a Dutch collective called the Stichting Werkgroep Indianen Projekt (Workgroup Indian Project Foundation)—came up with the idea for a tribunal. They contacted the Bertrand Russell Peace Foundation seeking sanction to hold a fourth Tribunal to investigate rights violations committed against Indigenous Peoples in the Americas. This they received in full. As then Secretary of the Foundation, Ken Fleet (1980), put it, "the case of the Indian peoples, does seem and has seemed to us to be very suitable… The oppressions and the disabilities of the Indian peoples are not well-known, even though they are deep-rooted and long-standing and very closely connected with the actions of western countries." Like the previous

tribunals,[52] this one would investigate infractions of Western imperialism—but an older, yet ongoing form of imperialism, newly understood through the lens of rights.

As with the original, the Fourth Russell Tribunal sought to provide a forum for recourse where the existing international system would not. Though the UN had taken an interest in Indigenous Peoples, it provided no avenues for their direct participation. Their grievances could only be addressed by proxy, through the goodwill of sympathetic state parties, many of them former colonies themselves. As Survival International legal advisor Gordon Bennett (1979, 1) wrote in a legal brief to the Russell Tribunal, Indigenous tribes were classified "as the object rather that [*sic*] the subjects of international law." In contrast, the Tribunal created an open forum where a host of injustices could be brought to the table by Indigenous Peoples themselves. Plus, this time the world was perhaps better primed for a "kangaroo court" than it had been in the mid-60s, as the intervening discourse on human rights normalized extra-judicial, citizen-based advocacy. This had pushed aspirations of justice beyond the state, beyond formal political and legal institutions, and into the hands of grassroots movements and NGOs[53]—closer, at least, to Sartre's vision of creating an international legal space in "the peoples' public sphere" (as quoted in Manfredi, 79).

The Fourth Tribunal also found for itself a particular *raison d'être* in restructuring rights to include Indigenous Peoples. When the Workgroup Indian Project laid out its memoranda, the

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[52] After the first, Italian socialist Lelio Basso launched a second Tribunal on Repression in Brazil, Chile, and Latin America, before establishing the Italian-based Permanent Peoples' Tribunal (Manfredi, 79). It was at this second tribunal where, according to Umberto Tulli (2021), the focus started to shift towards the language of human rights. A third Tribunal was convened in 1978-1979 on civil liberties in West Germany. The tradition was revived in the 2000s, with tribunals on human rights abuses in psychiatry, American intervention in Iraq, and the Israeli occupation of Palestine.

[53] Though this process of "NGOization" is not without critique (see Choudry and Kapoor 2013), including by Sharon Venne (2013) who points out that filtering Indigenous Peoples through NGOs undermines nationhood.

idea was to follow in the steps of the first, and investigate whether actions against Indigenous peoples met the legal definition of genocide (Eickholt 1979, 2). At the same time, it sought to take up the mantle of the 1977 conference, and investigate the violation of Indigenous rights more broadly. But, it was quickly deciphered that the question of rights and of genocide could not be so easily conjoined (and an effort to link them through "ethnocide" was quickly abandoned). Genocide, as it was defined, could not capture the myriad insidious rights violations underway. Sartre's model would not quite work, as "Many rights claimed by Indian peoples and the Inuit, are not recognized and formalized in international and national law, and are therefore automatically violated" (*Elucidation of the Memorandum* 1979, 1). So, the tribunal amended its focus to inquire after the recognition of Indigenous rights in international law.

The question as to whether human rights, with their Western bent, could account for the specific and collective rights of Indigenous Peoples was then a new one, and the Tribunal would be an early testing ground for it. As coordinator Fons Eickholt (1980) put it in his open speech, it was the Tribunal's "obligation" to try to extend human rights to include the "rules, religion, social structure" of Indigenous Peoples, "structures that are neglected in our definition of rights." In a way, the Fourth Tribunal would both embrace and exceed the mandate of the first. It would apply to Western imperialism its own criteria, now articulated through the language of rights. At the same time, it would expand and redefine that criteria to encompass a new set of rights: Indigenous ones, generated from within their own 'social structures.'

However, in the case of Indigenous Peoples in the Americas, the international system had failed them in another way—one it was not clear that rights could resolve. In a sinister moment of collusion between some of the Western world's most beloved liberals, Indigenous Peoples were excluded from accessing the UN's decolonization mechanisms. This predated the 1960

Declaration on the Granting of Independence to Colonial Countries and Peoples (known as the "Decolonization Declaration") by a decade, when, in the late 1940s, the workings of the UN Charter were still taking shape. At the time, Belgium was going around admonishing states who were "administering within their own frontiers territories" populations who "did not enjoy self-government in any sense of the word" (as quoted in Thornberry 1989, 873). In so doing, Belgium effectively made the argument that the provisions of the UN Charter (1945) pertaining to other colonized peoples in "non-self-governing territories" should apply equally to Indigenous Peoples in settler states. This would require, per Article 73 (b), that their respective colonizers "assist them in the progressive development of their free political institutions" (UN 1945). Throwing a "hissy fit" (Venne interview), Eleanor Roosevelt stepped down from her role as Chair of the Commission on Human Rights in order to bring a counter-resolution to limit the right to self-determination to overseas colonies, laying the roots of the "blue water thesis."[54] Venne explains:

> In the UN system it's completely unknown to have two resolutions at the same time. You usually have to debate one, and if that one is defeated then the next one comes forward, but to have them on the floor at the same time is a no-no… And guess who [stepped into] the Chair, and allowed that to happen. In 100 years, you'll never guess. Lester B. Pearson… Everybody thinks Pearson is this great guy, but… he's over there at the UN trying to stop us being put on the list for decolonization. If we are the most colonized people, we were the ones that that made the criteria.

This set the groundwork for Resolution 1541 ten years later, defining which territories would be eligible for decolonization as those ''geographically separate… from the country administering it" (UNGA 1960), thus formally excluding Indigenous Peoples. By the '70s, they would instead

[54] For the full story see Venne's forthcoming article on the history of the "blue water theory" and the role played by the USA and Canada to redirect attention away from the non-self-governing Nations of Great Turtle Island.

be “offered a carrot” (Venne 2011, 564), jettisoned to the human rights side of the UN as a consolation prize for decolonization.

Given the Fourth Tribunal’s focus on redefining rights, it is not clear whether it was prepared for testimonies whose sights were set on redefining decolonization, as Venne’s would be. Whether they anticipated it, the relationship between rights and decolonization—particularly whether rights could compensate for decolonization—would be put before the jury.

This time around, the jury was stacked with activist anthropologists and Latin American anti-imperialists. It included high-profile exiles such as Uruguayan writer Eduardo Galeano and Bolivian feminist labour leader Domitila Barrios de Chungara. Isabel Allende was also slated to participate, but, facing health issues and a broken arm, was unable to travel (Fleet 1980). When Xavante leader Mario Juruna was elected President of the Tribunal, Brazilian officials refused to issue him a passport. However, with support from the Tribunal’s organizers, Juruna successfully challenged the decision in Brazil’s Supreme Court, and by the end of the first week made it to Rotterdam to take up his seat. In lead up to the Tribunal, an “International Advisory Council” was also convened, including the likes of Noam Chomsky, anthropologist Shelton Davis, and Bishop Edward Scott, primate of the Anglican Church of Canada (*Members of the Jury* 1980, 2). Invited expert witnesses included Vine Deloria Jr., AIM leader Russell Means, and Canadian Justice Thomas Berger (Eickholt 1979, 5).

By the time the Constitution Express coalesced, it had missed the window to submit a full case. Nevertheless, Tribunal organizers reached out to George Manuel, encouraging him to make a stand-alone submission. By this time, Manuel was well-known globally. He had spent much of the 1970s on what was essentially an anticolonial world tour, from Aotearoa, to Tanzania, to Sápmi. Starting in 1972, when he served as an adviser to the Canadian delegation at the UN

Conference on the Human Environment in Sweden, he built close ties with solidarity groups, including those who would come to be involved in the Russell Tribunal (Crossen 2017, 542).

But most significantly, Manuel forged alliances with and between Indigenous Peoples, as well as with newly "postcolonial" peoples. He was influenced by his close friend and colleague, Blackfoot scholar and strategist Marie Smallface Marule, who had worked with the Canadian University Service Overseas (CUSO) in Zambia in the late 1960s. There she met her partner, South African exile Jacob Marule, formerly of the African National Congress, who was deeply immersed in the Non-Aligned Movement (Coulthard 2019, xv). When the two of them returned to Canada and Smallface Marule landed a job as the NIB's Executive Director during Manuel's presidency, it was a historic joining of anticolonial minds. Through Marie and Jacob, Manuel became taken with Third World anticolonialism, and set out to learn from its thinkers and leaders (including an accidental tête-à-tête with Tanzania's Julius Nyerere himself[55]). Inspired by their cosmopolitanism, Manuel similarly imagined uniting Indigenous Peoples worldwide, and developing global institutions outside of imperial domination. He relayed this vision to Mbuto Milando, the First Secretary of the Tanzanian High Commission in Ottawa, (McFarlane and Manuel, 144). Milando responded, "When the Indian peoples come into their own, that will be the Fourth World" (Manuel and Posluns, 5). Manuel leapt at the concept, elaborating on it most vividly in his 1974 book, *The Fourth World*, written with Michael Posluns. That same spring, he convened an international meeting of Indigenous Peoples in Georgetown, Guyana, followed in 1975 with the historic World Conference of Indigenous Peoples in Port Alberti, BC, where the

[55] For the incredible story of this meeting, see McFarlane and Manuel, 145-150.

World Council of Indigenous Peoples (WCIP) was founded. Smallface Marule would become its long-serving Secretary General.

Throughout this period, Manuel and Smallface Marule carried a cautious optimism that the UN—and human rights in particular—held promise for Indigenous Peoples. They sought non-governmental accreditation at the Economic and Social Council (ECOSOC), first for the NIB, and then the WCIP (Venne 2011, 563). When member states of the Third World rallied in support of their applications, this kindled hopes for "another wave" of decolonization (Crossen 2017), but, Manuel imagined, one revamped to meet the particular conditions and aspirations of the Fourth World. He did not just want to join the ranks of state governments at the UN; he wanted to reshape international law (558). Yet, by the end of '70s, his confidence that this could be achieved at the UN was beginning to dim (555). At the same time, an urgent struggle was calling him back to BC: the suddenly imminent patriation of the Canadian Constitution.

Given Manuel's international trajectory, his return to BC to tackle Canada's Constitution may seem a surprise. But Manuel saw the struggle over patriation as more than domestic—it had the potential to open up the very international pathways to decolonization he had been seeking. And then, at moment when the UN's structures were proving less than willing to forge such pathways, the Russell Tribunal presented a new opportunity to get on the international agenda. Manuel set Venne to work on a submission on behalf of UBCIC. Sadly, the day before he was to fly to Rotterdam to present it, Manuel suffered a heart attack. It was his second.

Rosalee Tizya, UBCIC's Administrator, called Venne to the hospital. Pretending to be Manuel's daughter, she was cleared to see him in recovery. It was an emotional scene, but he was focused on the task at hand. Turning to Venne he said, "You need to go to Rotterdam." She returned to the UBCIC offices to tell her articling principal, Douglas Sanders, the news:

> He said, ‘what?!’
> I said, ‘I’m going to Rotterdam.’
> And he says, ‘and where’s that?’
> I said, ‘you know, in the Netherlands.’
> And he said, ‘I know there’s a Rotterdam, Netherlands! But you're an articling student… you need to clear it with your articling principal.’
> I said, ‘okay, I'm telling you I’m going to Rotterdam, because your client, George Manuel, says that I’m going to Rotterdam for him.’
> ‘When are you leaving?’
> I said, ‘tonight.’”

And off she went. It was no small task, to fill Manuel’s shoes: “people were disappointed that George Manuel wasn’t there… and there’s this young woman there, saying ‘I’m mandated by George Manuel.’” But Venne was focused on the even more formidable challenge before her: explaining the confounding quirks and intricacies of patriation before an international audience.

4.2 The Patriation of ‘Trust’: The Constitution Express at the Russell Tribunal

The story of the Canadian Constitution as told by Venne on behalf of UBCIC at the Fourth Russell Tribunal begins not with the federal and provincial governments, nor does it hang on who acquired which rights, when. Rather, it starts with the first inklings of a legal relationship between two much older jurisdictional entities, the British Crown and Indigenous Peoples:

> The constitutional debate involving the interpretation of the relationship and constitutional authority as between the Federal and Provincial Governments… has focused on a relatively recent history and truncated conception of the constitution of Canada. The commencement of the discussion encompass[ing] the complete Canadian constitution begins with the relationship of Great Britain, as the primary colonizer, and the Indian People, as the original Nations inhabiting North America. It is the fundamental laws and compacts involved in this relationship which must inform the present constitutional debate… (*Substance*, 1).

To recover this "complete" Constitution, UBCIC's submission draws on a suite of "Royal instruments and directions" that span the first century of British colonialism in Canada. This includes, of course, the Royal Proclamation of 1763, in which the British articulated its code of conduct in the colonies. Each of these corroborates unequivocally that in order for British settlement to occur there were "fundamental obligations which Great Britain undertook toward the Indian Nations" (*Submissions* 1980, 10). Chief among these was the tenet that settlement on Indigenous lands could only occur with Indigenous consent through international treaty-making.

The submission traces this obligation, indeed the Royal Proclamation itself, in centuries-old international law, dating to 1532 and the Spanish cleric Francisco de Vitoria. Writing in the context of Spanish conquest in the Americas, Vitoria affirmed Indigenous Peoples' "true Dominion in both public and private matters" (as quoted in *Substance*, 5). As UBCIC argues, this dominion was consistently endorsed in customary international law from the 16th century through to its formalization in the League of Nations (7).

Legal thinker Antony Anghie (2005) reads this moment—not just the colonial encounter, but the sorting out of juridical obligations brought on by the colonial encounter, as interpreted by Vitoria—as the origin of international law altogether. This fundamentally shifts the conventional origin story of international law, typically beginning in later, in Europe (Anghie 5-6), where the "sovereignty doctrine" emerged alongside the nation state, culminating in the 1648 Peace of Westphalia. In this model, sovereignty is premised precisely on its territorial exclusivity, domesticating jurisdiction within each nation state—"political entities that are theoretically equal to one another and supreme within their territorial limits" (McNeil 2018, 294)—in order to fend of each others' meddling (see Biolsi 2005). As the story goes, it is then universalized—brought over to the Americas by colonizers, who, when finding Indigenous polities not arranged in nation

states, deemed the land they lived on *terra nullius*, devoid of sovereign peoples. The version of story that starts with Vitoria's recognition of Indigenous authority in the Americas, and the relations of consent it proliferated, changes that narrative radically.

Following Vitoria, by obtaining Indigenous consent, colonial powers recognized the self-determining authority that lay behind it, entering into a different mode of political relationality in which they weren't the only sovereign game in town. As the report edited by Smallface Marule (1981) notes, British colonial policy "clearly recognized the sovereignty of Indian Nations," untethered to European nation-statehood, from the 16th to the 19th century. It was only then that the history of international law would be re-written and relocated to 17th century Europe, where exclusivity became pre-requisite.

However, there is some debate over Vitoria's position, and the position he put Indigenous Peoples in vis-à-vis sovereignty. According to Anghie, the recognition of Indigenous Peoples' international legal personality per Vitoria was partial at best. As is usually the case when it comes to recognition (Coulthard 2015), it came with a catch—a workaround, whereby Vitoria included Indigenous Peoples in the international ambit only promptly exclude them from it (Getachew, 19). The jurisdiction they possessed, while imbuing them with a degree of international personality (enough, at least, to consent to the dispossession of their lands) fell short of European sovereignty, which was defined in contrast to this lesser jurisdiction. To make this case, Vitoria relied on patently racist arguments about Indigenous deviation from Western cultural and economic norms (Anghie, 21). Indigenous Peoples helped to establish the international community as sub-sovereign members, only to be penalized for their nonconformity with it. Following this, Anghie finds the sovereignty doctrine to be the product of Indigenous difference, not inherent to European statehood (16).

From this perspective, international law is at its heart structured by imperial domination. On this basis we might conclude that efforts to hold imperial powers accountable to its criteria, as Sartre would have the tribunal do, are thus compromised. This is fair, and we could leave it at that. We might also surmise that the treaties that sprung from this unequal integration of Indigenous Peoples in international law should be read as qualified agreements made between sovereign and less-than-sovereign polities in the interest of imperial expansion. These suppositions, however, ignore the presence of Indigenous law.

As Venne has written (1997, 184), Indigenous Peoples dealt with arrival of European subjects the same way they dealt with others who entered their jurisdiction: by concluding agreements according to certain protocols. Which is to say, for them, international law did not originate with the colonial encounter, but far preceded it. This perspective goes further than Anghie to dispel the history of international law that begins in Europe with the sovereignty doctrine, as is later applied to Indigenous Peoples in the colonial encounter. Rather, it reverses it. Instead of the sovereignty doctrine, UBCIC argues, it was the "doctrine of consent"—a marker of mutual self-determination already familiar to Indigenous international law—that was affirmed in this moment of encounter (*Substance*, 4). When the Royal Proclamation came along, it only codified consent as the "fundamental principle of relations" between Indigenous Peoples and the UK (Smallface Marule 1981, 3). Colonial polities arranged themselves relative to Indigenous Peoples' legal systems, and not the other way around.

This, of course, has implications for Sartre's ambitions to apply to imperialism its own laws. It changes the criminality of imperialism if we understand its "criteria" to be generated not just of Western legal orders, but Indigenous ones. It is this understanding on which UBCIC's submission to the Russell Tribunal is based. Where Anghie (21) focuses on the consequences

brought upon Indigenous Peoples for violating the early precepts of international law, UBCIC focuses on the consequences of its violation by the Crown—a Crown which was struggling to actualize its international obligations in the Royal Proclamation.

First, before warranting any lands to British subjects, the Crown had to set about treaty-making. On December 7, 1763, just two months after the Royal Proclamation was issued, James Murry Esquire, Captain General and Governor in Chief over the Province of Quebec and America, was given specific instructions on how to do so:

> You are to inform yourself with the greatest exactness of the Number, Nature, and Disposition of the several Bodies or Tribes of Indians, of the manner of their Lives *and the Rules and Constitutions, by which they are governed or regulated*. And You are upon no Account to Molest or Disturb them in the Possession of such Parts of the said Province as they at present Occupy or possess (*Submissions*, 17, emphasis mine).

Over the next century of treaty making, where consent was obtained, it was to the sharing and disposition of certain tracts of land, not to the extinguishment of Indigenous title, and certainly not to the extinguishment of Indigenous jurisdiction. These international agreements would not demand the erasure of one another's sovereignty, as unlike the European law of nations, relative exclusivity was not necessarily prerequisite within Indigenous legal traditions.

Relative exclusivity did apply, however, when it came to relations *between* colonizing powers and their rivalry for trade and use of Indigenous lands (Smallface Marule 1981, 3). This was formalized through the rule of pre-emption, which undergirded the Royal Proclamation, stipulating that Indigenous Peoples' lands could only be ceded to the British Crown (by treaty). Many have pointed out how brazenly entitled and paternalistic this right of pre-emption was—i.e., its poorly-veiled assumption that territories would eventually and inevitably be ceded, as if a forgone conclusion (see Christie 2005, Pasternak 2014, Mackey 2016). Furthermore, it is hard to

see past the seemingly fundamental paradox of the British unilaterally claiming sovereignty while at the same time making Indigenous consent mandatory—a phenomenon Pasternak (2014, 156) calls the "double move" of recognition and subordination. UBCIC points this out too, noting the Royal Proclamation's subsequent usage by the courts to qualify Indigenous jurisdiction (*Substance,* 45). Nevertheless, counter to its reinterpretation, UBCIC argues that pre-emption acted as a limit on colonizing powers only—it retained their exclusivity *relative to one another*—and not on Indigenous Peoples' territorial jurisdiction. As Louise Mandell would later explain to community leaders at UBCIC's 1981 General Assembly, "they said that you had absolute rights to the soil and rights to your own government, and the only limitation to your sovereignty as a matter of Crown law was that you couldn't sell your land to anybody if there was to be an open surrender, it was to be the Crown of Britain only" (Mandell 1981, 9-10).

In the meantime, until treaties were made, and in the places where treaties were not made, as in much of BC, the Crown had an obligation "to protect unceded Indian lands" from any non-Indigenous person who endeavoured to enter them for the purposes of settlement or trade (*Submissions,* 25). This put the Crown in a "protectorate" role, springing from another tenet of customary international law—the "sacred trust of civilization." The Royal Proclamation was, UBCIC would argue, only the formal expression of this principle of trust, whereby imperial powers assume a responsibility to protect the property, status, and institutions of the peoples in their colonies (*Substance* 6-7).

While taking up the language of 'trust' could rightly be seen as a dangerous path to go down, UBCIC's submission was quite specific in its conception and application of the term. UBCIC understood the trust taken up by the Crown not as an assumption, per private law, of "the *incapacity* of individuals or nations to manage their own affairs" (Slattery 1992, 275, emphasis

the author's), nor as a sneaky way to usurp Indigenous jurisdiction while awaiting (and abetting) their assimilation, as the "fiduciary doctrine" was subsequently deployed by the Canadian courts (see Christie 2005). Instead, UBCIC shone a light on how trust was initially presented to Indigenous Peoples—that is, an admission of the corruption of the Crown's own citizenry. Citing Justice Chapman of New Zealand in 1847, UBCIC clarified that the stipulation that lands could only be ceded to the Crown, "operates only as a restraint upon the purchasing capacity of the Queen's European subjects" (as quoted in *Substance*, 51) and not on Indigenous title. This trust, then, was as an international legal responsibility to defend Indigenous Peoples' territorial integrity from its own settler subjects, and from any local legislature who might assist embolden them. For in all practicality, enforcing the Royal Proclamation meant curbing settlers and local governments from taking up land without Indigenous consent.

This was not rhetorical. The Royal Proclamation was, after all, not just as aspiration of international law, but a legislative act" in the common law, with "the same force as a statute". [56] To this point, UBCIC's submission lays out an extensive catalogue of evidence spanning 1763 to 1876 in which the Crown moved to embody its trust obligation, enacting and enforcing countless measures to boot settlers off of lands where they had "no authority under the law" to be (*Submission*s, 27), and to censure the local governments who had let them in. Such measures included frequent legislation, regulation, Executive Council decisions, and Imperial directives to its governors, all of which demonstrate the Crown's repeated attempts to rein in its own citizenry from dispossessing Indigenous land. Stiff penalties would befall any settler who overstepped the

[56] *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at 48 [*St. Catherine's Milling]*.

bounds of consent, prompting the relevant Dominion authority to nullify their land grants (*Substance,* 36), remove (37), fine, and prosecute them (*Submissions*, 21). Those who disputed or petitioned the government for land they had no business claiming were invariably, and most satisfyingly, rebuffed (27).

When I asked how she knew of this historical evidence of the Crown's attempts to actualize its obligations in the Royal Proclamation, Venne recalled a fortuitous foray into Canada's national archives. She was in Ottawa researching efforts of the Canadian government to undermine the treaties for her honours degree in history, when it landed in her lap:

> [This was] the early 70s, [and the archives] were a complete mess. I mean, they just dropped boxes on your desk—archival boxes—so you start pawing through them. And I started seeing some stuff… and I'm thinking, oh, this is interesting. So, I sort of made a mental note of it. Which didn't really have anything to do with my particular thesis, but [it was] interesting to me… because Canada tries to discount the Royal Proclamation. But without the Royal Proclamation there would be no Canada.

In a satisfying moment of administrative irony, Canada's own colonial archives betrayed it, uncovering extensive evidence as to its recognition of Indigenous title and jurisdiction, and plopping it on the desk of someone who would come to find a very good use for it.

Nevertheless, between 1876 and 1980, two mysterious things happened in Canadian law which would reverse the previous century of colonial policy. First, Crown title magically slipped beneath that of Indigenous Peoples, becoming "underlying,"[57] regardless of Indigenous consent. And second, unbeknownst to the Indigenous nations who negotiated them, and through no

[57] As far as I have been able to trace it, the word "underlying" in reference to Crown title first appears in *St. Catherine's Milling*, at 55: "there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished."

explicit act of law, the federal government swapped itself in for the British Crown as a partner to the treaties.[58] Together, these would sow the conditions for a colonial about-face—a "relentless policy of assimilation for well over one hundred years" (NIB, as quoted in *Substance,* twelve 7).

While the second of these phenomena will be addressed in the next chapter, the first demands some attention here. For much has been written about the way the courts managed to vest underlying title to the land with the Crown, despite its being new to the scene. It did so, in part, though a reinterpretation of the principle of 'trust' so as to situate Crown sovereignty as paramount to that of Indigenous Peoples. In its first piece of jurisprudence on the issue, 1888's *St. Catherine's Milling*, the Privy Council flipped the terms of the Royal Proclamation, designating it the source of Indigenous rights to use the land at the pleasure of the Crown, rather than, as the Constitution Express understood it, the source of British subjects' rights to use the land on terms of Indigenous consent. And it was a wildly inferior right at that: "personal and usufructuary."[59] Through some impressive time-bending alchemy, this made pre-existing Indigenous title a burden on the title newly acquired by the Crown (Borrows 1999).[60] By 1973, in *Calder*, the Supreme Court of Canada would revise its position, sourcing Nisga'a title not in the Crown's recognition of it but in their own legal orders (McNeil 2019, 149). Nevertheless, it remained a usufructuary right relative to "the Crown's paramount title as it is recognized by the law of nations."[61] In *Guerin* a few years later, Justice Dickson would employ an even narrower application of the "fiduciary doctrine" in order to justify the status of Aboriginal title as

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[58] Technically, it did not replace the Crown, but acted as though it were the Crown—a topic taken up by the British Courts in Chapter Six.
[59] *St. Catherine's Milling,* at 54.
[60] A century later, the courts would double-down on this reasoning in *Delgamuukw,* arguing Aboriginal title "crystallized" the moment the Crown asserted its sovereignty (at para. 145).
[61] *Calder,* at 352.

something personal and usufructuary vis-à-vis the "ultimate title" of the Crown.[62] Here, he interpreted trust through banking and finance law in order to imagine the Crown as an agent who manages Indigenous assets for them—a far cry from the "sacred trust" of international law defending Indigenous Peoples' territorial integrity and self-determination against incursion.

To get to any of this reasoning, some legal vacuum—i.e. some version of *terra nullius*—had to be mobilized in order to sweep away the Crown's previous recognition of Indigenous territorial authority, and make way for its own (Asch & Macklem 1991, Borrows 2016). As Manuel and Posluns (32) write in *The Fourth World*, "It is as though the land was moved from under us." However, as Asch writes, "given our legal history, it would not be easy for the courts in this country to dismiss the claims of aboriginal peoples by recourse to an unambiguous (if erroneous) legal belief that, at contact, the land was completely unoccupied" ([1984] 1988, 47). With astonishing colonial finesse, more than a century of engaging with and arranging itself relative to Indigenous "rules and constitutions" on the part of the Crown had to be imagined away in order to make the retroactive claim that Indigenous Peoples lacked any sort of recognizable jurisdiction in their lands at the moment the Crown asserted sovereignty.

The especially repugnant irony is, it is precisely because Indigenous Peoples' legal and political orders accommodated settlers, rather than insist on exclusivity, that they were deemed incapable of sovereignty. Racist evolutionary anthropology, as well as a virulent sect of British legal positivism,[63] were mobilized to argue that Indigenous Peoples had no capacity for territorial jurisdiction, while the colonial government fantasized its own exclusive sovereignty into being,

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[62] *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at 378.
[63] Including people like John Westlake, WE Hall, and later Lassa Oppenheim, who saw territorial sovereignty as the sole purview of Western-style statehood (*Substance*, 4).

with a bewildering time-warp effect. If not through the consent of Indigenous Peoples, one would think some other source of Canadian sovereignty would have to be established in its place, since, "To discount the legitimate governments of Indigenous Peoples is to discount Canada's own legitimacy" (Venne 1997, 207). And yet, the jurisprudence "unreflectingly" accepts its mere assertion to be sufficient (Borrows 1999, 574). In the end, the source, it seems, makes little difference, sidestepped repeatedly by the courts (Asch 2002). The effect is the displacement of Indigenous authority, fueling what Eva Mackey (2016) calls Canada's "fantasies of entitlement."

These sentiments were fortified in the decades following Confederation, when the Crown enacted a series of statutes, amendments, and decrees which granted Canada incrementally more independence—including, of course, the BNA Act. Canada also took them as evidence of its unilateral jurisdiction over Indigenous Peoples, turning the "administration of Britain's trust responsibilities by the neo-colonial governments of Canada" into "a state of suzerainty" for First Nations (Smallface Marule 1981, 10). But, as Venne argued before the Russell Tribunal, none of these "contentious Statutes[64] which some argue have nullified the effect of the Royal Proclamation" (*Submission,* 29), had the legal capacity to do so. Nor could they devolve or domesticate the obligations it contained. For none of this could be achieved without Indigenous consent. Nevertheless, what these acts *did* do was shore up delegated Canadian jurisdiction in other areas, which continued to inflate the government's heartfelt sense of sovereignty.

Patriation would be the "final betrayal" (*Submissions,* 7)—a last act of fortifying Canadian jurisdiction, and with it, state sovereignty. "To Indian peoples the issue of the Patriation of the Canadian Constitution represents the final stages of colonial imperialism" (1). It

[64] Including the *Colonial Laws Validity Act* of 1868, *Statute of Westminster* of 1931, or 1949 BNA amendments

would domesticate the Crown's obligations *for the first time*. But for this, they needed permission. It is on the basis of this permission—a practice of consent that ran through the very foundations of international law, from Indigenous treaty law to the sacred trust of civilization—that Venne would urge the Tribunal to oppose patriation and condemn the alchemies on which it rests.

4.3 From Sacred Trust to Decolonization: The Constitution Express at the UN

Canada's handling of patriation was another strange alchemy. On the one hand, it was branded a mere formality, codifying something already assumed indisputable: full Canadian sovereignty. As the next chapter will show, Trudeau framed it this way aggressively in London, where it was argued that any move to deliberate the patriation bill by British parliamentarians would be taken as colonial interference in the domestic affairs of an all-but-sovereign state (Ford 1981). Trudeau insisted it be rubber stamped, while the details and controversies were dealt with in house, out of the international eye. But in so doing, he alluded to a process that was more than a formality, and certainly more than a domestic one. Declaring patriation would dispose of the "last vestige of colonialism" (*Notes for an Address* 1980, 9) Trudeau claimed for Canada the decolonial aspirations that Indigenous Peoples had been left out of at the UN. But in so doing, he also invoked the very conventions of international decolonial process that patriation aimed to bypass. "Patriation," a made-up word, perfectly captured this appropriation of decolonial emotion while at the same absolving Canada from proper decolonial procedure. Trudeau wanted to create for Canada a totally singular process—a bringing home something that had never been here in the first place. UBCIC wasn't going to have it. If Trudeau was going to conjure decolonization, then decolonization he would get. Drawing on international law, Indigenous law, and Third World

anticolonialism, UBCIC ran the decolonization argument to its logical conclusion: the self-determining authority of Indigenous Peoples.

To do this, UBCIC relied again on the "rubric" of the sacred trust of civilization (*Substance*, 6)—that notion in international law of protecting the property and institutions of colonized peoples. More than a bygone idea, the sacred trust found "its clearest modern expression" (*Substance*, 5) in the mandate system of the League of Nations, followed by the trusteeship system of the UN, where colonized territories were administered in "trust" until they gained independence. By this time, it exceeded a protectorate function: Imperial powers were not just to *safeguard* the self-determination of the peoples they had colonized, but *advance* it, supporting their self-government and facilitating their eventual decolonization. As a 1970 Advisory Opinion of the International Court of Justice on the continued presence of South Africa in Namibia would confirm, the foundational treaties, mandates, and subsequent actions of the UN, "leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned" (as quoted in *Substance*, 9).

Refuting its constrained application to overseas colonies by Roosevelt and Pearson, Venne extended this 'trust' to the Fourth World, and the obligation of the British Crown to advance Indigenous self-determination. During her testimony before the Russell Tribunal, she explained:

> I am going to try to draw a line between the royal prerogatives and the royal proclamations made by the non-Indian Crown, the King or Queen of Great Britain, in relation to the Indian Chiefs and our Indian nations, and this line can be drawn right till today and documented in international law. The line which is called the "sacred trust" is a non-Indian term and it is used by the white man in relation to various relationships between them and the rest of the people in the world. We are submitting that Great Britain entered into a sacred trust with the Indian nations of Canada… We maintain that this sacred trust between the Indian nations and the British Crown is very strong and very real. (Venne 1980, 3-4)

The submission goes on to draw this line gracefully, tracking the language of "trust" throughout Britain's history as a colonial power, its modern UN commitments, and citing examples from its conduct in places like India, Fiji, Kenya, and South West Africa (*Substance*, 6-9). But trust did not just apply to its Third World colonies. "Trust" was also used in direct reference to Indigenous Peoples in North America during the 1837 Select Committee Report of the House of Commons, affirming it could not be devolved to the local legislatures (6). As UBCIC writes, "That the United Kingdom recognized it had a positive duty under customary international law (and therefore under the common law) involving legally binding obligations to the Indigenous Peoples of the colonies is clear" (8). The mandate and trusteeship systems were not new inventions of international law, they merely "formalized" (*ibid*) this customary practice.

Acknowledging that Canada is not by definition a trust territory (*Submissions*, 4), UBCIC nevertheless wove a strong thread between the notion of trusteeship and Canada's colonial origins. It did this by demonstrating that the very custom on which trusteeship is based—that this, the sacred trust of civilization—included, if not originated in, the Crown's encounter with Indigenous jurisdiction in the Americas, where, "The Royal Majesty agreed to continue to treat Indian Nations as protected people with collective national status, amounting in modern terms, to a recognition to the right to self-determination" (10). As the rules and obligations of trust evolved and were made manifest in modern international law, UBCIC argued, they should continue to apply equally in Canada as in other colonies. This would require the Crown assist Indigenous Peoples in decolonizing—an obligation which would persist despite Canada's incremental independence (2). As UBCIC explains,

> Thus, the obligations acquired by the Imperial Crown through the consent of the Indian Nations included the fundamental obligation, the sacred trust of civilization, to protect and

> preserve the property and status of the Indian people. Subsequent developments of that doctrine show that this obligation was to adhere until the Indian peoples had attained independence or otherwise exercised self-determination" (*Substance,* 9).

In this sophisticated move to suture together the self-determination of global colonized peoples, UBCIC not only called the Crown to make good on its promises; it made a tacit jab at Indigenous Peoples' omission from the UN's decolonization mechanisms, refusing to treat so-called settler states differently from other colonies.

However, invocations of the trusteeship system were not made uncritically. The model for decolonization that UBCIC put forward took its cues from Third World anticolonialism more than from the League of Nations and the UN, where the trusteeship system had been "redeployed in service of expanding imperial power" (Getachew, 81). Here, the decolonization process universalized the Western nation state as its common—indeed, only—aim.

When Edmund Burke first described trusteeship before the British House of Commons in 1783, it was to argue for limitations on Imperial rule. In speaking to the *East India Bill* he made the case that Imperial power should be used to the benefit of colonized peoples, describing the rights and obligations of British rule as, "in the strictest sense, a trust" (*Substance,* 6). But when Woodrow Wilson—a professed Burkean—brought trusteeship into his vision of international order, it was to expand colonial rule, taking on a markedly racist flavour. Self-determination would not it be handed back at any old time; rather, it was the burden of the trustee to decide if and when colonial subjects were ready for it—i.e. when they demonstrated the institutional capacities, habits, and discipline required. As Adom Getachew (46) makes clear, Wilson defined these traits on racialized lines, transforming self-determination, "from a right to which all people were entitled to an achievement of historical development and a specific inheritance of the

Anglo-Saxon race" (see also Grovogui 1996, 121) South African President Jan Smuts further argued for the development of self-determination on racially differentiated trajectories, creating a kind of scalar, conditional jurisdiction fitted to the capacities of different peoples, and laying the groundwork for apartheid (Getachew 48-49; Grovogui 127). Together, Wilson and Smuts wed trusteeship to assimilation, preserving racial hierarchy and colonial longevity in the mandate system of the League of Nations.[65]

However, with the formation of the UN, Third World thinkers seized upon the right to self-determination and remade it along radically egalitarian lines. Here Getachew (14) dispels the idea that the Third World simply appropriated the Wilsonian notion of self-determination, mimicking the institutional form of the nation-state in order to prove their capacity for it. Such "anticolonial critics and nationalists" (2) as WEB Du Bois, Ghana's Kwame Nkrumah, and Tanzania's Julius Nyerere instead launched concurrent projects of nation building and "worldmaking," insisting that postcolonial self-government would require correlate international institutions designed expressly to prevent their continued domination. Rather than vernacularize self-determination as it was conceptualized by Western, liberal internationalists—the Wilsons and Smuts of the world—they untethered self-determination from the "Westphalian regime of sovereignty" (74). Instead, they set about reinventing it, "beyond and below the nation-state" (4), experimenting with different political forms, transnational alliances, and regional federations, redistributing political and economic jurisdiction beyond the "fortress-like concept of state sovereignty" (31). Which is to say, they remodeled international legal institutions on anti-imperial lines well before Russell and Sartre did. Instead of simply applying to imperialism its

[65] To do this, they also appropriated the language of consent—a topic theorized further in the next chapter.

own flawed laws, they reshaped those laws to fit a variety of decolonial formulations. In this sense, self-determination became a collective transnational project—one that imagined anti-imperial and "often antistatist" futures (4).

In conversation with these critics, though two decades on, the Constitution Express undertook its own project of decolonial worldmaking. Seizing on the patriation moment, they too sought to remake self-determination at a local and transnational level, invoking international law while reimagining of the kinds of jurisdictional arrangements and confederations it made available to Indigenous Peoples and to Canada. Indeed, the model of decolonial process that UBCIC put forward at the Russell Tribunal—particularly its calls for an Imperial Conference—did both things at once, applying to British Imperialism its own laws while also exceeding them.

In proposing the Imperial Conference, UBCIC drew on British legal tradition, while asserting its alliance with Third World decolonial process. It took inspiration from this long-time practice of the UK to gather together leaders from its dominions and self-governing colonies. These conferences took place regularly between 1887 and 1937, when they became known as Prime Ministers' Meetings, and from 1969, Commonwealth Heads of Government Meetings. While at first intended to promote unity within the empire, they quickly became a forum for dominion governments—notably, South Africa, Fiji, Rhodesia, and India—to introduce their plans to decolonize and develop new constitutional arrangements for the Commonwealth. So, when Venne testified before the Russell Tribunal that "we are asking that an international tribunal will be set up to determine once and for all our relationship between Great Britain and Canada… and that Canada doesn't unilaterally cut off our rights with Great Britain" (Venne 1980, 5), it was not without precedent. The idea was to transpose this customary legal practice of the Commonwealth into the Canadian context, while remodeling it in a few key ways.

In the tradition of treaty negotiations, the Imperial Conference would operate as a kind of meeting place of Indigenous and Crown jurisdiction, though this time, for the first time, it would involve the Canadian state. The objective was twofold: to determine how the Crown would discharge its treaty obligations, and to define the jurisdictional relationship between Canada, the UK, and Indigenous Peoples. In effect, it would open up to decolonial possibilities beyond the singular model of Western state sovereignty, and its exclusivity. Rather than mimic the state's institutional form, this would revamp Canadian federalism at its base. As Third World anticolonial critics had done, it would imagine different political forms and federations in order to redistribute jurisdictional authority along anti-imperial lines. Though in this case, the lines would be drawn in accordance with the resurgence of Indigenous political and legal relationality, drawing on treaty, nation-to-nation configurations, and other models of Indigenous confederacy and partnership. Applying such a model to relations with the Canadian state as a whole would be formidable task, requiring new Indigenous *and* non-Indigenous institutions.

As a quasi-legal interface, the Russell Tribunal provided a testing ground for such an idea, where UBCIC could put it before other peoples also left out of the UN's decolonization process. In this, the movement made space for "decolonization's forgotten people" (Banivanua Mar 2016, 2). Fulfilling Sartre's vision, this idea dug up the laws of imperialism—both its principles, such as the sacred trust, and its procedure, such as the Imperial Conference—and applied them to the Canadian colonial context. But ultimately, it would exceed Sartre's vision. Wedding to Third World decolonization, it sought to re-establish Indigenous jurisdiction at the international level, and develop the infrastructure needed to support it.

Though it is hard to qualify the total effect of UBCIC's presence at the Tribunal, it resonated strongly in the tone of the discussions. The most direct impact came in the form of the Tribunal's final report, where the jury's sixth finding reads:

> *The General Refusal on Failure to Involve Native Nations in the Creations of Constitutions or Basic Instruments of Government in the States of the Americas,* even in instances where the federal principle of government obtains, as in the current creation of a new constitution in Canada where Indian rights are, at present, not being considered. As sovereign units of governance, Native Nations and Republics or Pueblos possess the inherent right of refusing any incorporation or of being authentically represented as a self government unit where their territory has been included in the area claimed by a state apparatus. In other words, a constitution and government cannot be imposed on Indian people without authentic participation and right of refusal to be incorporated involuntary is a precondition. (Workgroup Indian Project 1981, 4)

Strikingly, the Tribunal did not just adopt UBCIC's proposal, but applied it broadly to the position of Indigenous Peoples throughout the Americas. It took the trickery of patriation and transposed it to the common situation of Indigenous Nations, Republics, and Pueblos, forcibly "incorporated" or falsely represented by their respective colonizing governments. The principle of consent—that key tenet of trust—rings clearly through this finding, reframed as an inherent 'right of refusal' to be encompassed by the state apparatus. The jury understood this right to be a "precondition" of colonial constitution making—indeed, as the very basis for relations between Indigenous and state governments. In this way, something novel happened at the Fourth Russell Tribunal, which reformulated Sartre's vision for the first. Rather than understand international law to be colonially-derived, holding imperial powers to their own immanent standards—no matter how flawed or fantastical those standards may be—colonial states were held to an international standard generated instead by the resurgence of Indigenous Peoples' refusal.

Though not articulated as such, this is consistent with the way Third World anticolonial critics had institutionalized the right to self-determination at the UN—a "novel" (Getachew, 73) and "prerequisite" right (74), from which other rights flow. The Tribunal took a similar approach, situating the denial of self-determination as antecedent to other rights violations, and retaining its status as a "precondition" for just anticolonial arrangements. And so, rather than extend human rights to encompass the "rules, religion, social structure" of Indigenous Peoples, as coordinator Fons Eickholt had originally envisioned the Tribunal would do, you might say it did the reverse, incorporating human rights under the banner of Indigenous self-determination.

Such transformations would not be limited to the domestic realm. This proposal, if realized, would institutionalize Indigenous Peoples' jurisdiction at the local and the transnational level, and UBCIC understood that correlate international institutions would need revamping too. It proposed the UN act as mediator of the Imperial Conference, drawing again on the model of the sacred trust, where international law and institutions were seen as necessary to mediate the relationship between states and their constituent populations to prevent their domination (Criddle 2014). In this case, however, the UN would oversee a negotiation understood not to be between a state and its inequitably-served subjects, but between self-determining peoples. It would be obligated to create and maintain the right conditions so that novel jurisdictional arrangements might emerge, making available longstanding principles of international law in order to imagine something wholly new. If executed, it would be the realization of a new decolonial process—one which could then be adapted to different Fourth World contexts, where, if requested, the UN could reprise its mediator role.

A week after the Russell Tribunal concluded, the Constitution Express would take this proposal straight to the UN. Their stint in Ottawa had just ended, and those who could continued

the journey to New York. They were led by Kukpi7 Wayne Christian under the auspices of the "Provisional Indian Government" which had been formed in Ottawa. The trip was buoyed by the WCIP, as Smallface Marule enlisted Dave Monture and Wayne Haimila (both WCIP staff) to go New York ahead and scout out arrangements. It was a stop over on a trip they were making to Scandinavia to fundraise for the WCIP. "We had a plane ticket that looked like an accordion," Monture told me. From New York they also stopped in on the Russell Tribunal in Rotterdam.

While in New York, Smallface Marule set up meetings for them with her UN connections,[66] priming them for the bigger delegation on its way. But the meetings that stick out most for Monture, were the ones with other Indigenous folks. "We met with the friendship centre[67] in New York, just to get the heads up and do some preliminary logistics." They then went to Central Park, where the AIM was holding a rally. They found Russell Means, and chatted about their respective international aims (Monture interview). They left New York just as the Constitution Express delegation was rolling in.

"I know it's all about a train but we actually joined in Montreal, which was all about a bus," Marie Wilson joked with me when I called her up to talk about the Constitution Express (Marie Wilson interview, Sept 15, 2017). She was referring to herself and her partner, Dene leader Stephen Kakfwi, who hopped on the chartered bus to New York.

The Dene helped to popularize self-determination, having used the international term in their 1975 Dene Declaration. "[We] collectively gave Canada a very strong message that we were, in fact, a self-determining nation," Kakfwi told, me at his home in Yellowknife (Stephen

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[66] While I found Smallface Marule's letters to the President of the General Assembly, requesting he meet with Haimila and Monture, I found no evidence of his reply.
[67] Known as the American Indian Community House.

Kakfwi interview, Oct 14, 2017). When that happened, he said, George Manuel was "dancing in the street." It aligned beautifully with the vision he had articulated in the *Fourth World*. The way Kakfwi describes it, the affinity was mutual. Manuel had been National Chief of the NIB between 1970-1976, and his "stark and uncompromising" manner of talking about "nations and sovereignty and total rights of Indigenous people" resonated with the Dene.

So, five years later, when Manuel called for people to join the Constitution Express as it continued to New York, Kakfwi jumped at the chance: "Something just born out of BC, came all the way across the country and picked up people… I felt I had to, [it was] my duty." He continued, "something like that big, that concentrated, that focused, that rolled across the country is a source of energy. It's an event. Like it's another Woodstock." At the time he was technically "unemployed," though he had been representing the Dene Nation at the NIB's constitutional assemblies. He was living with Wilson in Quebec City, when she found herself on strike from CBC Radio-Canada.[68] Being suddenly available, she joined not as a participant, but a "witness": "I was very aware of my journalistic obligations of objectivity and detachment and so on. So I went along… as my husband's spouse and I was an observer" (Wilson interview).

It was the first time to New York for the both of them. And each told me about the thing that struck them first: the hotel rooms. When the bus pulled up, it was "most stunning, elaborate hotel that we had ever seen" (Wilson interview), with "a huge, cavernous lobby" (Kakfwi interview). But when they got up to the rooms, they "were like tiny little closets… you literally

[68] Wilson, of course, would go on to have a long career in journalism and eventually join the Truth and Reconciliation Commission as one of its three commissioners.

had had to squeeze your suitcase in first and then your body and then close the door" (Wilson interview). "This is America, you know" (Kakfwi interview.)

But there wasn't much time to hang around the hotel, anyway. There was a full slate of meetings to get to, which required their rapid-fire education in international diplomacy. As Ron George, who was also on the delegation, remembers it, Smallface Marule, and WCIP affiliate Rudolph Ryser prepared intense briefing packages for them, outlining the intricacies of the UN system. They spent the first day in New York going through all of this material. "I would characterize it as poli-sci, plus," George told me. "Many of us were hearing it for the first time, you know. A lot of us didn't have any reference points… really you just absorbed what you could." But the real education came in "going and meeting with delegations and embassies."

This was before there was any formal infrastructure for Indigenous Peoples at the UN. So the strategy was to split into small teams, and each would meet a few different embassies and missions. As Ryser (forthcoming) reports, the list of embassies was chosen on the basis of six criteria: membership in the "Committee of 24" concerned with trusteeship and decolonization, Nordic Council, Commonwealth, Non-Aligned Movement, or Human Rights Commission, or a signatory to the Helsinki Accords and European Court of Justice. Of these, members of the Committee of 24—i.e. the keepers of the Decolonization Declaration—were given top priority. The hope was to get at least one member state to sponsor the petition and bill of particulars they hoped to get before Issoufou Saidou-Djermakoye, the Under-Secretary General for Political Affairs, Trusteeship and Decolonization and ultimately before the UN Secretary General.

As Ron George recalls, logistically, "it was very well orchestrated," largely due to Manuel's and Smallface Marule's existing networks. However, when they got into the meetings, responses were mixed. As Christian put it to me, "in making those kinds of submissions

internationally, it was the first a lot of these countries had even heard a lot of stuff. So, it was interesting for them to even let us in the door." It was "an education" for those states as much as it was an education for the delegates, and everyone was courteous: "We experienced them all as very positive receptions," Wilson recalls, noting that "it's the world of the UN where people are groomed in diplomacy." But at the same time, it was state-centric world—a world that wasn't too sure what to do with Indigenous Peoples.

Ryser (forthcoming) writes, "UN Mission officials proved relatively inflexible as they persisted, one-by-one, to advance their view to the Chiefs' delegations that the issues contained in the "Bill of Particulars" fell into the political category of domestic Canadian affairs and the Human Rights Commission." With the exception of two missions—Tanzania and Norway—who promised to raise their concerns with Canada, most states were hesitant to interfere in what were deemed Canada's "internal affairs."[69] This would more or less support Trudeau's position that Indigenous grievances were in-house issues, and not patriation-related concerns. But the delegation, in line with advocacy that WCIP had long been doing, was fixated on situating Indigenous Peoples within the economic and political sections of the UN. As Venne would write for *Indian World,* "We are sovereign people. We have international rights under international law to determine our destination as a sovereign people. This is the message which our delegation… took to the United Nations" (1981, 4). Refusing to be domesticated, they "focused on promoting the external character" of Indigenous Peoples' position in the international

[69] McFarlane and Manuel (262, in contrast, report that four Non-Aligned states – Tanzania, Cuba, Iran, and Yugoslavia – supported the idea of putting the movement's case for independence before the Decolonization Committee and even recommended it go to General Assembly for a vote. I unfortunately couldn't find any further information about this, or where such recommendations led.

community (Ryser forthcoming). Norway was the one country to take this up,[70] pressuring the Saidou-Djermakoye to meet with the delegation. He agreed, representing both his office and the UN Secretary General. However, to get this meeting a concession had to made to meet with a representative of the Under-Secretary General for Human Rights as well.

Thanks to some fortuitous timing, the fact that they gained an audience with the Under-Secretary General in charge of trusteeship and decolonization took on particular significance. The week they were there happened to coincide[71] with the twenty-year anniversary of the Decolonization Declaration. To mark the occasion, Secretary General Kurt Waldheim was doing the rounds, making elaborate speeches to the effect that in two decades, the project of decolonization was essentially complete. It was a time of celebration, marking the fulfillment of a promise "To colonial peoples everywhere… of a new world order" (UN 1980, 1). Such statements support Sheryl Lightfoot's (2016, 200) point, that according to the UN, decolonization is 99.75% complete, leaving only a smattering of peoples left in "non self-governing territories." Peoples, that is, excluding the more than 300 million within territories that states claimed for their own citizens.

Referring to the 'sacred trust' in a speech before the General Assembly, Waldheim traced the roots of decolonization back to the creation of the UN altogether: "It can therefore be said without under dramatization, that the Charter of the United Nations formally ushered in the era of decolonisation" (Waldheim n.d., 2). This sentiment confirms UBCIC's assertion that in

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[70] Norway, at that stage, was very supportive of Indigenous Peoples globally—outside of their own borders, of course. While the Norwegian development agency provided substantial funding to the WCIP, the country was at the same time breeding conflict with the Saami, particularly, at that time, in the Alta Dam Crisis (Monture interview).
[71] The other thing it coincided with, sadly, was the killing of John Lennon, just a few blocks from the hotel where they were staying. This haunting event stayed with people, arising in all of my interviews.

principle the sacred trust always had decolonization in mind, intending to support the self-determination of colonized peoples, rather than manage it for them.[72] Yet, considering whether the Declaration would continue to be relevant, now that the "end of the era of colonialism" was nigh (2), Waldheim was somewhat obtuse. After "the remaining non-self-governing territories… have freely chosen the political and legal status corresponding best to their particular geographic, economic, cultural and social conditions and aspirations," he asked, would it continue to have "practical importance" (4)? From UBCIC's perspective, the question probably should have been whether it could apply to Indigenous Peoples. If he was sticking strictly to Roosevelt's definition of non-self-governing territories, then no. Nevertheless, he concluded, the "authors of the Declaration also formulated basic principle of equal rights and self-determination," that should be a "source of inspiration for a long time to come" (4).

4.4 The Result

The tenor of Waldheim's speeches, and his exclusion of Indigenous Peoples, while at the same moment the Constitution Express delegation was articulating its persistent decolonial aspirations in backrooms and embassies at the UN, is telling. And yet, for those involved their very presence was a landmark. For Kakfwi, whatever was said between officials mattered little. "The fact that it went to the UN, that was the value." That embassies and Under-Secretaries took the meetings, noted Wilson, was significant: "The very fact that people were invited into the rooms was already felt and experienced as something worthwhile." To prepare the delegation for those

[72] Yet, Waldheim's statement also has the effect of undermining the efforts of African and Asian delegations to bring the Decolonization Declaration about, attributing its triumph to their benevolent colonizers.

meetings, Albert Lightning held ceremony on the sidewalk directly across the street from the UN—itself an act of great significance. As Wilson recalls, "It was such a profound centering for all of us… speaking up for ancient rights and responsibilities," while building their courage that "there was every right in the world for that to be known… in the context of the UN."

Though counter to their aspirations, the push towards the human rights side of the UN was useful in drawing attention to Canada's human rights record. As Christian recalls, "the material we were presenting was unknown to other countries, obviously, because Canada was viewed as an upstanding international citizen." Venne agrees. Counter to the impression that "everything is great over here… people are tripping through the fields, spreading lightness and happiness everywhere," the movement's international involvement—both at the UN and Russell Tribunal—shone a light on the fact that "Canada is a colonial project. And that as a colonial project, it's a very vicious colonization of the Indigenous Peoples."

For Venne, these were international actions with international effect. They turned a global eye to the utterly colonial aspirations of the Canadian government, at the very moment Trudeau was touting patriation as a "decolonial" move. At the same time, they drew attention to Indigenous exclusion from the UN's decolonial process. Perhaps this is why this story is still so significant. It demystifies the prevailing alchemy by which Canada claimed jurisdiction over Indigenous lands, and somehow became a global symbol for liberal equality—an alchemy which sharply delimits the range of decolonial possibility. Refusing to be delimited this way, the story of Indigenous jurisdiction that the Constitution Express told in international venues like the Russell Tribunal and UN rewrites colonial history, and with it, the narrative possibilities of decolonization, which rumble from below the assertion of state sovereignty.

Members of the Constitution Express—Venne in particular—would go on to take the argument for Indigenous self-determination much further in the UN system, contributing to the *UN Declaration on the Rights of Indigenous Peoples*. Which is to say, the movement's impacts in what was then a relatively new wave of Indigenous internationalism still echo today.

Meanwhile back in Canada, the immediate impacts of the movement's international actions were mixed. The Russell Tribunal caught the attention of some media, for example, *The Province*, who reported that the Tribunal found Canada guilty "of stealing the land and crushing cultures" of Indigenous Peoples (*Associated Press* 1980). Perhaps thanks to such attention, Sarah A. Nickel (2019, 164) believes the Tribunal to have had major political effect, surmising it was likely the Tribunal's findings which pushed Canada to delay constitutional hearings from December to January so that Indigenous Peoples might be consulted. (As I noted in the last chapter, UBCIC refused to participate.) The UN delegation also touched a nerve in Canada, particularly when Norway and Tanzania started to raise doubts about Canada's touted leadership in the realm of human rights (Ryser forthcoming). But *The Province* picked up on the work of the movement outside of the human rights realm, reporting on their meeting with Saidou-Djermakoye, their lobby for a "trilateral conference" on the Constitution, and murmurs of their desires to seek membership at the UN (*Canadian Press* 1980a).

However, where these actions really took effect, was in London. The way Venne tells it, she could feel the value of the Tribunal in the UK, in contrast to Canada's muted response:

> [George Manuel's] goal was to try to bring these issues to an international community. When I was in London lobbying, people knew about the Russell Tribunal because Bertrand Russell has a big profile… We used it a lot in the lobbying effort, so in that way it was effective in trying to bring attention to the issues. But… back home here on Turtle Island it was much more difficult to try to get people's heads wrapped around that. I mean even

> today if you talk about the Russell Tribunal to people, they probably wouldn't know what was in it or why it was done.

The delegation to the UN was similarly effective in the UK. When Norway and Tanzania took up the movement's message directly with Canada, Cuba and India instead carried it to the UK. This, it turned out, was crucial. "If we didn't have international attention [on] the Constitutional Express," Dave Monture told me, "it would have us totally contained domestically, without any obligation on the part of the Crown." As so, as Christian remembers it, the delegation came away from the UN strategizing another, more extensive, international action—a "Constitution Express II"—though this one would journey through Europe.

Chapter 5: The Constitution Express II

The Constitution Express' first forays into the international legal scene—the ripples made at the Russell Tribunal, and ground gained at the United Nations—bolstered movement morale as the patriation fight stretched into 1981. Yet, when everyone involved returned to their respective communities, Canada's efforts to frustrate and funnel participants' aims into less-than-jurisdictional processes and provisions returned unabated. In fact, the favour they had won internationally, with the Canadian public, and with certain political factions (mainly NDP), was now being leveraged as a bargaining chip between the federal and provincial governments (Sanders 1983, 314). It was becoming clear: the battle over patriation had only just begun. However, having moved into the international ambit the movement was not about to be domesticated now. Here I pick up the story in 1981, when the movement redoubled its efforts to thwart patriation by continuing to focus its energies outside of Canada.

At the end of January, a provision protecting "aboriginal and treaty rights" was inserted into the constitution (then called section 34). Plus, at the behest of the National Indian Brotherhood, Section 25 of the *Charter* was also strengthened, preventing its blanket egalitarianism from infringing Indigenous rights. This was something—it marked an about-face for the federal government, who had hitherto been consistent in its assimilation by omission approach. And yet, these developments were also riddled with red flags, with no response to calls for self-government or an Imperial Conference, and little clue as to what "aboriginal and treaty rights" meant. As the headline that ran in *Indian World* (1981a, 9) put it, "Constitutional Amendments: Government Says We May Exist." The NIB nevertheless celebrated this as a win for Indigenous self-determination (Sanders 1983, 315). Within days, the federal government was claiming the win too, circulating news of the provisions to London as a tool to assuage fledgling

British concerns about the impacts of patriation for Indigenous Peoples. Among the provinces, however, they assuaged opposite concerns, instead circulating new caveats to the clauses which hadn't been negotiated, assuring their easy amendment without Indigenous involvement. People were furious. As one NIB staff put it, this swift betrayal by the federal government was the "shortest treaty in history" (315). But it had the unfortunate side-effect of losing the NIB credibility—particularly in BC and the prairies—for having compromised with the government in the first place (316). At the same time, the NIB's presence in London was flagging. As Trudeau began to ramp up his lobby of British Parliament, the Constitution Express girded itself to do the same.

By springtime, UBCIC held a Special Emergency Assembly in Vancouver. Here, plans began to be laid for a major journey to the UK. The ambitious proposal—initially, at least—was to send up to 1,000 people, first by caravan to Montreal, and then by chartered jet to London ("Indian Survival State of Emergency" 1981, 10). But, as things shaped up, I suspect it became clear that not so many would be able to afford the estimated $2,500 cost of the trip, no matter how many feats of fundraising were pulled off. At the same time, through the summer the legal and political lobby teams were finding themselves frustrated on a particular front: "one of our major difficulties is the lack of education on the part of everybody in Britain and in Canada, and even in the world situation, about the position of the Indian Nations" (Mandell 1981, 17). While by this point there was sense, among the Canadian public, of Indigenous Peoples' concerns with patriation, the particulars of the movement's position were lesser understood. In Europe it was hardly on the radar. As Mandell (ibid., emphasis mine) put it before the next assembly:

> *we know* the Constitution history, and *we know* the way in which Trudeau's proposal is going to seriously violate fundamental Crown obligations to the Indian Nations, and *we*

> *know* how seriously the proposal is illegal on the basis that Indian consent is needed and it simply has not been obtained.

The task was to make it so that others – particularly Brits and other Europeans – knew this too. So, the plot began to shift. Funnily enough, it shifted in such a way as to become more akin to the first Constitution Express. They wouldn't go directly to England. Instead, they would tromp through Western Europe, gaining steam on their way to the UK. In this, it would be a popular education campaign as much as a political one. Plus this way, a smaller group could make a bigger impact, creating buzz that would support the London efforts. Thus was born the "Constitution Express II"—a splashy sequel to the trip they had made almost exactly one year before.

This chapter follows the Constitution Express II through Europe. But it starts exactly where the first journey had: in community. Just as the movement spent 1981 re-grounding itself in community, nurturing the resurgence of nationhood and self-determination in the lands and political contexts from which they sprung, it also took those things international. In the most major campaign to introduce Europeans to Indigenous self-determination to date (particularly the formerly empire-seeking ones), the Constitution Express II found themselves on uncertain terrain. From established human rights activists to 'hobbyists' who played Native on weekends, these were new cultures of white people to politicize—and to convince that their plight was more than one for just cultural survival.

5.1 The Constitution Express Potlatches

Re-anchoring the movement in people's home territories, Ron George remembers, "George [Manuel] recommitted his team of workers to go back in the communities." But the communities

were already galvanized; they needed little prodding to keep the movement afloat. This became especially clear through a series of "Constitution Express potlatches" held in communities across the province, which buoyed the movement through 1981. It was at the first of these potlatches, held in Kamloops at the end of March, that the idea to send a delegation to Europe was suggested, and then decided upon. A reported nine hundred people were there to support the mandate, where the movement "transformed from a one-time protest event to a political movement in itself" (*Indian World,* 1981b, 12). Nickel (forthcoming, 2) calls this a "turning point" for the Express.

"We are still in a State of Emergency," *Indian World* (1981b, 2) called out, in its report on the Kamloops potlatch. A significant statement to come out of the event, given that at the time, a rights clause was *in* the patriation package. If the Kamloops potlatch made anything clear, it is that section 35 (or 34 as it was then numbered) changed little for the movement. They didn't trust the government's promise of rights one bit, anticipating their swift amendment out of existence: "The Provincial and Federal Government in its move to finalize assimilation of Indian people would wipe out all Aboriginal Rights according to Canadian Law (thus never recognizing Aboriginal Rights according to our Law)" ("Indian Survival State of Emergency," 6). But even if the clause wasn't amended away as soon as the Constitution came to Canada, neither did they trust the courts, who would then be tasked with interpreting the rights clause—courts known to "limit our Aboriginal Rights to mean no more than the right to use and enjoy land at the pleasure of the Government" (5). Instead of rely on the whims of government benevolence or bounds of court interpretation, they set out to "make the world community aware of our definition of Aboriginal rights" (8) per their own bodies of law. Rights which were not ends in themselves,

but, as the Aboriginal Rights Position Paper made clear (7), were grounded first in their self-determining authority. Until then, the state of emergency would continue.

And so, over the next year, seven more potlatches would be held: in Port Hardy, Lytton, Lillooet, Williams Lake, Kitimat, Bella Coola, and Gilford Island (Nickle forthcoming, 2). That this was a resurgence of the very institution the Canadian government prohibited between 1885 and 1951—in one of its most martial acts of cultural genocide—made the Constitution Express potlatches all the more powerful as a forum of resistance. As I understand it, these were generally less formal than a traditional potlatch might be. However, some of the time, the more informal Constitution Express potlatch would follow immediately on the heels of a traditional one[73]—for example, in Bella Coola, where Hereditary Chief Lawrence Pootlass oversaw the potlatch in the Nuxalk legal tradition (*Indian World* 1981c, 8). Through this institution, the grounding that had anchored the first Express only grew stronger. And here, the political, legal, spiritual, and intellectual preparations for the next journey—slated to leave November 1, 1981—took place. As *Indian World* would reflect, "Our ancestors' values shine through by the sharing that takes place at the potlatches" (ibid.). Through formal ceremony and through informal conversation, they provided a forum to spend time, recalibrate, and foment the movement's resolve. It was directly from the Lytton one, held in July of 1981, that the Concerned Aboriginal Women left for Vancouver, to occupy the Department of Indian Affairs regional headquarters in Vancouver.

[73] I use the word potlatch throughout, as this is how the "Constitution Express potlatches" were broadly referred to in *Indian World* and other promotional materials. However, I know there are different terms for this institution in the respective languages of the peoples who hold them, which people may have used with each other.

Another thing to distinguish the Constitution Express potlatches, was their being so broadly international. They brought together nations from across BC, including introducing interior nations to this traditionally coastal institution. It was appropriate, then, that the movement's ongoing international aspirations were solidified and planned at these already international fora.

The European delegation would be a particularly ambitious—and expensive—aspiration. And once again, the fundraising effort itself was an incredible expression of community resolve. A group of women, including Bev Manuel, made a historic "Constitution Express quilt" and raffled it off. At events in Lillooet, Mount Currie, and Port Hardy, Ron George, the great non-status and off-reserve leader, found himself at the helm of two little Coleman stoves, selling French fries; "one batch came out of one pot, another batch came out of another pot…whatever it took we were doing it!" In addition to French fries, people hawked all kinds of wares, selling artefacts, posters, "BC is Indian Land" shirts, ice cream, fry bread, and, as Vicki George likes to remind me, "people sold their furniture!" People, it turns out, including her dad: "I just told people to come to my place and pick up everything that they might need," he told me. As a kid at the time, and the daughter of two central Constitution Express organizers—Ron and Phyllis George (nee Pierreroy) —the impact of such a sacrifice was profound.[74] But, as Vicki also reminds me, the sacrifice was not just material; it was emotional too.

But George had protection for this trip. As he told me, "again, the glue was spirituality. I know I say it a lot, but there's no other way to say this. We couldn't have done it ourselves—

[74] Something Vicki George speaks publicly about, including in *The Road Forward*, a powerful musical documentary by Marie Clements which traces the movement for Indigenous nationhood in BC from the 1930s to the present day. In the film, George appears, fittingly, on a train.

impossible." George, for one, relied on the spiritual people to create the right conditions for going as he found himself back in sweats, or spending time with pipe carriers ahead of the trip ("pipe carriers were always around, they were part of the Express"). Even once away, they continued to carry him through. "And Europe, they told us… if we're feeling a little bit vulnerable to just look up in the sky and look at the birds. Cause that would be our connection," George told me. "[It's a] big country over there when you're all alone on a train going from one place to the next, and by yourself. It was very comforting." Spirituality, for George, became more than "an idle curiosity" on the Constitution Express II. "It worked, man… We understood what it meant, you know, that [it] was our connection. So it made believers of all of us… [a] bunch of grassroots people going out doing something and making it work because the Creator was there."

5.2 From Kamloops to Cologne—Introducing 'Hobbyists' to Self-Determination

The reason that George found himself alone, in moments of strange solitude on trains in Europe, was his role in the advance team. Actually, you might say he was a part of the advanced-advance team. The first person to go off to Europe was lawyer Lyn Crompton, sent solo six months ahead of the delegation at the behest of George Manuel. After some time, Ron George joined her, lending a hand with the formidable logistics on her plate. The rest of the advance team—comprised almost entirely of the Concerned Aboriginal Women and their children—would not arrive until the 8th of October, where they split into groups of two or three, each assigned to a different country. Four former colonizers were their particular targets: France, Germany, the Netherlands, and Belgium. And just as they had done with the first Express, the plan was for these advance teams to lay the groundwork for bigger delegation to follow.

"My instructions, especially for the European part of the journey were so clear," Crompton told me. "I was to create an international staging of nationhood. There was no talk of Aboriginal title and rights." In his characteristic way, George Manuel had issued these instructions on a ferry ride to Port Hardy. "He took me for a little walk on the deck… and he said to me, 'I have a mission I want you to take on.' And I looked at him, and I went uh-oh." It was a half-year mission, to organize this international "staging." Initially, she set up shop in Cologne, where she happened to have one contact—a childhood neighbour who was now an international lawyer. There, she connected with the solidarity groups that Manuel had been building ties with through the '70s—some of the same involved in the Russell Tribunal.[75] To Crompton it was a pleasant surprise to find a solidarity movement "way further advanced in those days than we were here."

According to Yvonne Bangert, however, then a student working with Gesellschaft für bedrohte Völker (The Society for Threatened Peoples) in Germany, the Constitution Express pushed their understanding of Indigenous self-determination much further than they'd had going in. When I rang her up in Göttingen in 2018, I was surprised to hear that it was Arthur Manuel, and not his father, who had initially reached out to the organization, giving its founder, well-known activist Tilman Zülch, a heads up of the movement's plans. One day not long after, Crompton and George appeared: "they were just knocking at the door of our office… they

[75] Each country had at least one established organization which supported the Express: in the Netherlands it was Greenpeace, the Workgroup Indian Project (of Russell Tribunal) and the Netherlands Association in Support of Endangered People (NANAI); in Belgium it was the Belgium Association in Support of Endangered People (BANAI); in Germany it was the Society for Threatened Peoples; and in France it was Greenpeace. On a trip to Europe when I was 25, long before I began research on the Constitution Express, Art sent me to drop in on a few of these groups and say hello.

introduced the project and asked whether we would help to organize the Express. And of course, the decision was yes."

In those days the Society for Threatened Peoples—one of the biggest and best-known human rights organizations in Germany—had organized a number of "pan-Indian" speaking tours, particularly after the first conference of Indigenous Peoples in Geneva in 1977. Bangert started out as a volunteer on one these tours; but the Constitution Express would be her first paid job for the organization. To start, this meant helping to pique the interest of journalists ahead of the delegation's arrived in Bonn. It also meant featuring the movement in two issues of the Society's journal, *Pogrom* (now called *Bedrohte Völker*). This was a learning curve for Bangert, who, until that point, had a "liberal image" of Canada. It was "an experience to see how easy the government tried to just get rid of basic Native rights by just changing the Constitution… and telling the people it is to their own good because then all Canadians are the same and nobody is different from anybody else and thinking it's [a] positive spin." She learned from them about Imperial duty, the treaties, and the Royal Proclamation. "All this was new to me… I think that it was rather unknown in Europe as whole." The Constitution Express II, Bangert says, was "first big initiative to make the struggle for First Nations self-determination known in Europe."

Generally, Bangert told me, "First Nations people or Indian people, as we called them in those days still, were a very new thing, in the German public, and they were kind of exotic." I thought this was an interesting statement coming from a culture long known for its quixotic fascination with Indigenous culture, including a well-known "hobbyist" tradition in which large groups of Germans get together to "play Indian on the weekend" (Christian interview). Which is to say, while Indigenous politics may have been new the German public—particularly the kind of politics the Constitution Express was peddling—a fascination with Indigenous life was not.

Almost everyone I interviewed from the European Express marveled at having discovered this phenomenon, pointing to a series of books which they were told had popularized (if fetishized) Indigenous culture for generations of German children. They were likely speaking of Karl May's beloved Apache hero, Winnetou.

Though it is hard to overstate the influence of Winnetou, in his study on this subject historian H. Glenn Penny (2013, 3) finds the origins of this "preoccupation" with Indigenous life (a preoccupation he calls "unrelenting" in its "breadth and depth") to be "more complex and poignant" than anticipated (13). Penny situates this preoccupation deep in the German political psyche, where an "affinity" for what he calls "tribal polycentrism" and resistance resonates with the aggregate German cultural identity and the "fractured, composite nature of the German nation-state" (15). He writes:

> It is the polycentric character of German national and cultural identity combined with a history of resistance (putative and actual) toward Roman imperialism, Christianity, cultural homogenization, and a profound sense of loss stemming from that history that makes the German position particular. (16)

While particular, it is also this character that breeds affinity with Indigenous Peoples' cultural histories, he argues. (An interesting thought when compared to Canada's utter refusal of any "affinity" it might find with the model of federalism the Constitution Express was putting forth.) But did this mean that the German psyche was prepared to move beyond the more essentialized aping of Indigenous life that had become so ubiquitous, and listen to a group who was prodding them towards the "political dimension" (Bangert interview)?

Ron George was on the receiving end of both sides of the German fixation on Indigenous culture: an authentic interest in their political resistance and its mocking misappropriation. For

example, while preparing for the delegation's arrival, he noticed posters all over Bonn and Cologne, with "this big teepee with a bunch of braves dancing around it… and a big Bengal tiger with his mouth open over top of this picture of this Indian Chief with a headdress." Not knowing "what the hell that was about," he was too busy to give it much thought. When the group finally arrived in Germany some weeks later, and "we're doing our drumming and we had some dancers then too, I saw the people sitting around watching and, you know, derisively laughing at us." In that moment, "the penny dropped for me… okay they think we're the circus." The posters, it turned out, had been for Barnum & Bailey.

For Vera Manuel, then a budding playwright and poet, what struck her about their German reception was its misogyny. She and Dinah Schooner (plus Vera's young nephew, Rainbow), made up the advance team in Bonn. "When Dinah and I first got to Germany we seemed to sense a slight underlying feeling of non-confidence in our abilities because we were women," she would later report for *Indian World* (V Manuel 1981, 11). Interviewers asked them point blank why women were sent instead of men. Reflecting on it, she wrote:

> We spent a great deal of time explaining the traditional roles of men and women in Indian society, emphasizing the deep respect we held for our men, the confidence and support that was shown to us by our men and how we are working to bring our own ways back where men and women work together and there is no question of one being above the other. We told of the hardship and changes we have had to endure, the concern we have for our children, welfare, the bureaucracy of the Department of Indian Affairs who control our lives. The weight of our words and the strength of our conviction could be felt. (*ibid.*)

Ultimately, Manuel seemed content that both, intersecting, messages had gotten across: the resurging leadership of Indigenous women, and their resistance to the tight grip that the federal government had been holding around the lives of Indigenous Peoples: "The effect we had was

strong because we spoke the truth from our experience and they came to know Trudeau for what he was" (*ibid*.)

Germany is also where the movement had perhaps its most major political breakthrough. Lyn Crompton was tipped off that a certain German parliamentarian might be sympathetic to their message—one Peter von Ersten. "I must have had his home address and I went and knocked on the door," she told me. Peter wasn't home, but his wife Ursula was, and she and Crompton hit it off famously. Crompton found herself invited to their "lakeside home." They were gracious hosts, giving her the whole top floor to work from, and a special shelf in the fridge, perpetually stocked with "cheese and sausage and some heavy bread and a couple of beers." But the extra boon was Peter's connection to Social Democratic Party leader Willy Brandt, the former Chancellor of West Germany. Between them, Crompton and Ursula convinced Peter that the Constitution Express "was a worthy cause." And he, in turn, convinced Brandt to meet the delegation.

Having resigned as Chancellor in 1974 after one of his closest aides was revealed to be an agent of the Stasi (the East German secret service), Brandt was nevertheless still "a very prominent figure" in German politics.[76] "He was good friends with Trudeau, so we knew we had to get his ear," Wayne Christian recalls. Christian, who was getting ready to resume his role as spokesman of the Constitution Express II, flew over to Germany early to make the meeting. It was he and Ron George who went. And to Christian's surprise, Brandt spoke with them for over an hour. Together, he and George made sure to get a few digs in at Trudeau, couching the

[76] He was not an uncontroversial Social Democrat, however, known for being fiercely anti-communist and having supported American policy through the Vietnam War.

movement "in the context of the North-South dialogue" which Brandt had been advocating internationally, in which resources from wealthier manufacturing economies would flow to the Global South. "We're saying, well that's fine, but Canada has to deal with us because the resources, and everything that comes from Canada comes from our lands, it comes from our resources."

"Did he get it?" I asked both Christian and George, during our respective interviews.

"I don't know if he understood it, that our relationship was a nation-to-nation relationship with Canada based on the Royal Proclamation" Christian answered. "I was advocating just what we know, right? Our oral history. I don't know if I got through to him." But, as Ron George put it, "it's hard to dispute the fact that the *Indian Act* controlled people from cradle to grave in a country that purports [to be] the champions of human rights." Both were confident that at the very least these reputational questions got back to Trudeau. Meanwhile, in terms of its effect in Germany, the meeting "took front-page German news," Lyn said.[77]

In Holland,[78] Gabriel Williams encountered a different attitude. At only 18, she was one of a three-person advance team there,[79] alongside her aunt Dr. Lorna Wanosts'a7 Williams and Lorna's young daughter. While Lorna stayed with a Dutch linguistics student who had been studying the St'at'yem'c language, Gabriel had a separate billet, where her host kept telling her

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[77] Unfortunately I have not be able to find such news coverage. Perhaps this is something for future research endeavors.

[78] Though I can find little information on this, Vera Manuel reports that the first speaking engagement for the advance team was at the Congress Hall in The Hague. UBCIC's legal team had investigated getting a case there, but unfortunately found that they couldn't scrounge up the requisite number of UN member states to refer the case. Nevertheless, they made it in for some kind of address, which was a feat in itself.

[79] In France it was Terry Williams, Frank Rivers, and their children, Tamara and Delmar; in Germany Dinah Schooner, Vera Manuel and her nephew, Rainbow; in Belgium Karen Anderson and Sylvia Woods; while Lorna Williams her daughter Meagan and Gabriel Williams stayed in Holland. Meanwhile, Vera's son Judalon, Rod Jefferies, Ron George, and Lyn Crompton moved from place to place when needed.

he “wanted Indian” (Gabriel Williams interview.) Then, she told me, “it clicked”—they wanted the TV version. “It was funny though; I said to him, I’ll try get you one.” Letting the joke land, she explained, “we don't think of ourselves as Indians, we’re Lillooet,” describing the history and diversity of Indigenous Peoples in BC. “I told them I was really disappointed when I came here; I didn’t see the wooden clogs and bonnets.” Then, for him it clicked too.

And yet, on the political side, Williams and her mother agreed that they found the Europeans to be surprisingly receptive. Speaking before classrooms, they noted how they seemed to be more “politicized” even as youth. “They were a lot more responsive than Canada,” Gabriel said. “I felt that too,” Mary Louise responded. “They got it a lot more.”

When the rest of the Constitution Express II finally arrived in Hanover on November 2, 1981, it was a delegation nearly 200-strong. It included representation from communities throughout BC as well as from Alberta, including renowned Cree Elder Albert Lightning, a spiritual leader and former president and founding member of the IAA. It would be a whirlwind tour: four countries in twelve days, and then on to London. They spoke for packed rooms in every country, and gave interviews to news outlets reaching all over the world. Through Greenpeace, they also hooked into existing environmental movements, at one point invited to address a rally of more than 150,000 in Antwerp. In order to deliver his allotted three-minute speech, George had to climb a 40-foot ladder to reach the stage high above the crowd. A chopper suddenly flew right overhead, shaking his confidence: “pretty disconcerting if you’re just a grassroots dude that’s not politically hardened.”

In Paris, there was some talk of occupying the Canadian Embassy. It was in Paris, after all, where they found out that section 34 had been dropped from the Constitutional package.

Chrétien and the premiers had been meeting in Vancouver and after days of deadlock, Indigenous Peoples were sold out in order to win over the provinces. Though known as the "night of the long knives" for their midnight, backroom betrayal of Réné Lévesque on the amending formula, Art Manuel writes, "the knife that was used first that night was on our people" (Manuel and Derrickson 2015, 73). For the Constitution Express, this was no big revelation—the only surprise at being "tossed out" of the Constitution (*ibid.*) was that it came even sooner than expected. As George Manuel would write in his "President's Message" for the next issue of *Indian World,* "after all these years, as a country, when the chips are down it is the Indian people and the Quebeckers who are brutally ripped off by the majority" (Manuel 1981c, 5). In Canada, Indigenous Peoples were mobilizing rapidly. A parallel occupation of the embassy in Paris seemed appropriate. However, on a trip to scout out the place, Crompton's cover was blown. The young Rainbow Manuel popped in with Vera, needing to use the bathroom. Shouting across the room "Hi Lyn!" everyone burst out laughing. The forsaken occupation didn't shake them, though. Crompton, at least, took it as a sign that they should move on. The delegation instead led a march through Paris from the Canadian to the British Embassy.[80]

In Belgium, they slowed down. The purpose here was different. They would spend three full days honouring the Indigenous people who had fought and died in the First World War. This was momentous; at this stage, Indigenous efforts in the war had been little acknowledged in Canada. "There was a radio program on our radio—the name was service telephone," Joseph Baccarne told me at his home in Langemark-Poelkapelle. It was a show where people could call

[80] Some report that contingent from the Irish Republican Army joined in the march in support of the movement's cause (see McFarlane and Manuel, 273). Other have cast some doubt about this, however (see Hebert 2019, 594 n189).

in seeking support with one thing or another. Someone from Antwerp called on behalf of a group of Indigenous Peoples from BC who wanted to visit the Western Front, to "remember their comrades, their families, who died in the First World War." Joseph and his wife Ingrid answered the call. "That was the start for me." A few days latter, Ron George and Karen Anderson (Nuxalk) arrived on his doorstep, sparking a life-long friendship between George and the Baccarnes. Within two weeks, they had everything arranged for the delegation—billets, food, speaking opportunities, etc. The community opened their doors.

It felt appropriate, then, that Vicki and I should end our trip to Europe at the same home where the Baccarnes had hosted her father almost forty years previous. We spent a weighty few days being driven around to the very same locations where those involved in the Constitution Express II did ceremony for their fallen relatives, led by Albert Lightning.[81] It was a truly stirring experience to accompany Vicki, Joseph, and Ingrid to these places whose importance and complexity I could scarcely fathom. But what really caught me off guard was how deeply connected Joseph and Ingrid still felt to the movement. Speaking from the heart, Joseph carefully explained to Vicki and I the uniquely "human" feeling that happens when one comes to understand and respect another peoples' plight. At that point, he dug out a VCR, popped in an old VHS tape, and suddenly there was the delegation, drumming and dancing in the "sport hall" in Langemark. As it turns out, in addition to the ceremonies they had done, which were mostly private, they held an evening event open to the public. According to Joseph, 2,000 locals showed up. "I think it was very special because there are a lot of people here who know the Indian

[81] Ron George was so affected by their visit to Belgium that it spurred him to bring a delegation of veterans back to Belgium in 1990, and to fight for the recognition of Indigenous veterans in Canada.

people, from television, from movies, they never see them real… and now they have contact with each other and that was good for everyone." The event made national and international news.

Making international news was an especially good thing, given that the lobby underway in London was not having a great impact outside of the UK. The Constitution Express II's efforts to politicize European sympathies drew significantly more curiosity among media and civil society, making it increasingly difficult for Canada to shrug it off as political pageantry. As they left Belgium by ferry, bound for the UK, they were finally off to see the people whose obligations they had been calling upon.

5.3 One More Potlatch

Had the Constitution Express II done its job? Had it politicized European publics in favour of Indigenous self-determination? On our last day in the archives in London, stuck in amongst the files of British MPs Vicki and I found evidence that it had: letters. There was something uniquely moving about these 40-year-old scraps of paper, many handwritten, from people all over Europe who had been compelled by the Constitution Express to implore British Parliamentarians to stop patriation. That those MPs kept them, and oftentimes responded, made it even more poignant. "We all feel deeply concerned about the repatriation of the Canadian Constitution without the consent of the Indian Nations," read one letter to Margaret Thatcher, jointly signed by about nine people from the Netherlands. "We think that the agreements that the Indian Nations made with the British Crown should be preserved in the new Constitution" (Letter from Dutch citizens 1981). *Huh*, I thought, noting the words 'consent' and 'agreements.' "We support and shall continue to support the goals of the Indian Constitution Express," began another set of letters, most handwritten, also from the Netherlands (van der Berg 1981, 1). Some

collective must have done a letter writing campaign, I figured, given the five or six identical letters. “The Indian Nations have a special relationship with the Queen through Treaties,” (ibid.) it continued. And those without treaties, it noted, “are supposed to be recognized as Nations under the 1763 Royal Proclamation… We demand that a trilateral commission be set up under the United Nations to seek international justice for the Indian Nations in Canada” (2). *Wow,* I thought. *They got the details down pat.* For some at least, the political message had clearly gotten across.

“Both of the Expresses were forceful,” Lyn ended off her interview with me. “I think the European one even more so in the sense that we got outside of Canada, and then Canada was starting to get worried, you know. I don’t think they worried as much with us on the train.” The worry had only just begun, as an anxious and impatient Trudeau—who now had a majority of provinces on broad—applied ever increasing pressure in London. But now the Constitution Express II was in London too.

Before going to Parliament, they set their own political institution into motion: a potlatch. This one was held at the Central Methodist Hall, across from Westminster Abbey, honouring their relationship with the Crown. They invited members of Parliament and the House of Lords, Church groups, and community groups to witness it—an invitation, really, into a jurisdictional institution that had sustained them all the way through. A thousand people reportedly attended (Hebert, 583). “There was only one awkward moment,” reports Historian Joel Hebert (2019, 584), when one of the UK’s own “Red Peoples Societies” showed up. Similar to those in Germany, these groups were known for their dual role as both reliable allies and romantic appropriators, dressing up and performing “mock rituals.” Ignoring UBCIC’s request that they not wear dress up for the event, they showed up in their “Aboriginal garb” (Mandell 2005-2006).

Unphased, the Indigenous people in the crowd—dressed mainly in "blue jeans and blue jean jackets" (ibid.)—carried on. At one powerful moment, Nuxalk Hereditary Chief Lawrence Pootlass, who had led the Constitution Express potlatch in Bella Coola, plucked two eagle feathers from the headband of another Chief, who was acting as a stand-in for Pierre Trudeau, and set them on fire, symbolizing the revocation of an honorary chieftaincy bestowed upon him by the Nuxalk in 1975 (Hebert, 583-584). "Deep in the political center of the British Empire," Hebert writes, the Constitution Express "effectively demonstrated their desire for continued association with Britain, at the same time highlighting their well-founded distrust and defiance of the settler state" (583). From there, they went to Parliament, joining a political and legal lobby that was well underway.

Chapter 6: "Our Words Will Come Back to You Like Quiet Echoes from the Past"—Calling on Consent in London

As Louise Mandell would later write for *Socialist Studies,* UBCIC's legal journey in the United Kingdom "continued a process for the B.C. Chiefs which had begun in 1906" (Mandell 1984, 180). She was referring to a trip made to London by Squamish Chief Joe Capilano, Cowichan Chief Charley Isipaymilt, and Secwépemc Chief Basil David (Feltes 2011, 65). There, they aimed to get a case before the Privy Council—then the highest court of recourse in the empire—arguing that the Crown's constitutional obligations "were being violated by the Provincial Government, who was taking away their land without their consent" (Mandell 1981, 19).

This was not the only trip to London made by Indigenous leaders in this period.[82] An earlier one, in 1904, was made by Syilx Chief Johnny Chilaheetza, and Secwépemc Chief Clexléxqen (Petit Louis) accompanied by Oblate missionary, Father J.M. LeJeune (Nickel, 37).[83] Another delegation, I believe mostly Tsimshian, went in 1909 (Sanders 1985, 294). In 1909 and 1913, respectively, Cowichan and Nisga'a groups also tried without success to get a case before the Privy Council regarding the illegal expropriation of their lands,[84] and in 1919 and 1923 the Allied Indian Tribes of British Columbia—a conglomerate of regional organizations which coalesced in 1916—did too (Mandell 1981, 19-20).[85] Finally, in 1926 the Allied Tribes

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[82] Historians, geographers, and legal scholars such as Hamar Foster (1995; 2007), RM Galois (1992), Paul Tennant (1990), Keith Carlson (2005), Cole Harris (2002), and Sarah A. Nickel (2019) have covered this period of Indigenous organizing extensively—a history which will not be reproduced here save for their appeals to the Crown.
[83] These were some of the same Chiefs involved in the Laurier Memorial, touched on in Chapter 3.
[84] In response, in 1914, the government of Canada passed an Order-in-Council agreeing to submit the claims to the Exchequer Court of Canada, with right to appeal to the Privy Council, but only on one condition: should the Privy Council decide in their favour that there was something to their title claims, the claimants would consent in advance to extinguish it at that moment (UBCIC et al. 1981, 20). They didn't go for it.
[85] In 1910, as a result of the staunch efforts of Indigenous Peoples organizing across BC, Prime Minister Wilfrid Laurier had given some indication he would facilitate getting a case before the Privy Council (Manuel and Posluns,

petitioned the Parliament of Canada to take the necessary steps to "secure judgement" from the Privy Council on "all issues involved" (as quoted in Manuel and Posluns, 88). "It was clear, I think," wrote George Manuel of the petition, "that Parliament was not being asked to act in place of the Privy Council" (*ibid.*). Even then, the Allied Tribes tried to pre-empt any attempts to domesticate their claims.

Finally, Canada set up a Joint Committee of the Senate and House of Commons to address the Allied Tribes' petitions. But rather than stick to the request at hand—that they refer the matter to the Privy Council—they instead took it upon themselves to decide whether Indigenous Peoples had any more land rights in BC. In the Committee's opinion, they did not (Manuel and Posluns, 94). Anyway, eleven days *before* the Joint Committee tabled its report, the government passed Section 141 of the *Indian Act*, effectively banning all formal avenues of legal and political advocacy. Indigenous advocacy continued, though now that it was criminalized, it had to take more creative configurations. The Privy Council, at least, was officially out of reach. (And when it came to Allied Indian Tribes of British Columbia, the autocratic *Indian Act* amendments had the desired effect: they were done.) More than 50 years later, with the ban long lifted, Indigenous Peoples made it back to London to take up the case.

When the Constitution Express II arrived in the UK on November 15, 1981, it joined a cluster of Indigenous lobbies already underway. The lobby had begun in earnest in 1979, led largely by the National Indian Brotherhood, Indian Association of Alberta, and Federation of Saskatchewan Indian Nations. UBCIC's own lawyers, staff, and volunteers had been there full-

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31), and put an order-in-council before the federal court (Feltes 2015, 470). However, a year later, he lost the election to Conservative Robert Borden, leading to the infamous McKenna-McBride Commission.

time since the spring of 1981, working every angle to remind the UK of its legal obligation to obtain Indigenous consent on any action involving "the taking of Indian land or to the change of Indian sovereignty" (Mandell 1981, 12). Patriation, they argued, fell squarely into these criteria. But the lobby stretched further back, to those early 20th century delegations, when hereditary and elected leaders journeyed repeatedly to the belly of the colonial beast. The delegations that Indigenous Peoples made from 1979-1982 picked up on the legacy of their forbearers, reviving this tradition of going to the metropole, and calling on the Crown to make good on its commitments.

"Our fight is finished in Canada, it is in England now," announced Bobby Manuel (1981, 55) at UBCIC's 13th General Assembly. This chapter will examine that fight. In England, where the movement took a characteristically multi-pronged approach: a political lobby in Westminster; a popular education campaign, bolstered by the Constitution Express II; and an extensive legal campaign, including eventual litigation in the British courts. By the fall of 1981, both the IAA and FSIN launched their own, parallel cases, though these focused on treaty. In the end, the IAA case was the only one heard before patriation, eliciting an important, if otherwise confounding, ruling from Lord Denning. The chapter will look at the immediate impacts of these cases on patriation, but will also begin to consider the impact of the lobby as a whole on British understandings of their obligations to and jurisdictional relationships with Indigenous Peoples.

Just as the 1906 delegation had not gone to London "asking for new protections" (Carlson 2005, 6), 75 years later, UBCIC tried again to get the Crown to honour its *existing* promises and obligations to Indigenous Peoples. This hinged on consent. In London, the Constitution Express argued that consent was always the hallmark of Crown-Indigenous relations, and that major changes to the Constitution (say, for example, its patriation) could not

be made without it. But actually, the movement theorized and deployed the notion of consent a number of different ways, ultimately lobbying for a 'consent clause' to be added to the Constitution, in place of a rights one. In this, they would effectively take over the paramountcy that the UK had been left with all these years, stepping into its role to approve (or refuse) constitutional amendment. However, the way they envisioned this clause working was quite radical. Consent, as they framed it, was clearly not a vehicle to sign-off on their own submission, in the tradition of social contract theory (and, it must be said, in the newer tradition of recognition; see Coulthard 2014; Simpson 2014). Nor was it just a right of refusal, institutionalized at the highest level (though it was this). Rather, they sought to establish a consent-based relationality, in which Indigenous Peoples would have a leading role in shaping what it was they were consenting to. As this chapter will argue, this was a radical and jurisdictional intervention into Imperial and international politics—and ultimately, into the politics of recognition in Canada too.

6.1 The Lobby in London: Enter the Constitution Express

Though UBCIC didn't ramp up its presence in England until the spring of 1981, Indigenous groups had been going to London on and off since 1979, pretty much as soon as it became clear that patriation was on the agenda, and Indigenous jurisdiction was not. In July of that year, Clive Linklater led a group of more than two hundred Chiefs and Elders to London on behalf of the NIB. They were incredibly efficient. As Linklater et al. (1982) would later report for the *Saskatchewan Indian*, in just one week they addressed over a hundred MPs and Lords, met the

Archbishop of Canterbury, visited various Embassies and High Commissions,[86] and established ties to a number of support groups and Human Rights groups (Linklater et al., 4). They appeared before both houses of Parliament and delivered a petition to 10 Downing Street. It was a splashy affair, boasting a reported 120 interviews with news outlets from all over the world. However, historian Coll Thrush reports (2016, 213), media perceptions were "mixed," even verging on "derisive." In a strangely romantic colonial lament, the UK Parliament's own news organ reported: "we cannot hold out much hope for these Red Indians making the British Parliament look back at its great Imperial past" (as quoted in Thrush, 213). And yet, at the delegation's send off, an official of the Foreign and Commonwealth Office (FCO) essentially promised to do just that, assuring them that further study of "the question of Britain's residual responsibilities" to Indigenous Peoples was forthcoming, and with it an official response from the Imperial government (Linklater et al., 5). Following the trip, the NIB established an Office of First Nations in London, sometimes referred to as their "embassy," with an "ambassador" running it (6).

For its part, Canada badly bungled its handling of the London delegation, to their benefit. The group planned to deliver a petition to Buckingham Palace, but the federal government asked the Queen not to meet with them (which she abided). It was a curious move, given the government's usual line that Indigenous Peoples were naïve to seek Queen support, since she had no clout, and, in their opinion, no longer any role in protecting Indigenous rights (Sanders 1983, 305). Why, then, obstruct the meeting? If the goal was to downplay the whole event, this move had the reverse effect, generating more publicity, while embroiling the government in it

[86] Including Denmark, Cyprus, Barbados, India, Bahamas, Australia, Kenya, and Tanzania (Linklater et al., 5).

(306). In fact, when the Honourable Nicholas Ridley, Minister of State for the FCO visited Canada nearly a year later, there was still chatter of the delegation. His briefing package stressed that the NIB visit had aroused interest among British MPs, warning, "It seems likely that Indian angles, if no others, will give rise to considerable Parliamentary interest if HMG[87] are asked to patriate the constitution under any circumstances other than unanimity between all parties in Canada (which will be exceedingly difficult to achieve)" (North America Department 1980, 3). When Trudeau visited England the following week, Prime Minister Thatcher pre-empted any concerns Trudeau might have on this front. The minutes from their meeting document her assurances that "if, for example, queues of Indians knocked on the door of No. 10,[88] the answer would be that it was for Canada to decide her future and not HMG" (*Prime Minister's Meeting* 1980, 2).

As Vicki and I parsed through archival materials in London, we were stunned by just how much placating of Trudeau was going on, particularly on Thatcher's part. Initially at least, it seems his antagonism to the effect that *any* engagement by the British government with the patriation question would be taken to be colonial interference (Ford 1980) had worked. It struck a nerve in the UK, anxious to distance itself from its colonial past. As a confidential telegram to the Secretary of State from Sir John Ford, British High Commissioner to Canada warned that Trudeau was "evidently ready to exploit to his advantage any obstruction by the UK Parliament" (Ford 1980, 1). Both parliamentarians and bureaucrats girded themselves against such exploitation. Private messages flew between the Thatcher's Office and the FCO, pledging "to

[87] Her Majesty's Government
[88] Referring to the Prime Minister's Office at Number 10 Downing Street

protect ourselves against accusations of residual colonialism" (Alexander, 1). Similar communications from the British High Commissioner in Ottawa stressed the need to "do all we can… to underline that we are not colonialist" (Ford 1980, 1).

But the High Commissioner was not too happy to be put on the defensive like this, as other documents show. "That Britain is involved is entirely Canada's doing" (Ford 1981, 2), he complained bitterly in a letter to the North America Department. He was referring, of course, to the *Statute of Westminster* and its decision to keep authority over constitutional amendment in the UK. The British Parliament "remained the ultimate guardian of those bits of the Canadian constitution which at Canadian wish were kept outside the competence of the Federal Parliament and the Provincial Legislatures. You Canadians asked the British Parliament to guard against unilateral action in Canada" (2). Now, here was Trudeau ironically exploiting this residual British authority in order to take his own unilateral action. Fed up with Trudeau's bullying, the High Commissioner implored his counterparts in the UK to "pre-empt" any pressure to "rush things" on "a wave of anti-imperial emotion" (1). Some where not too pleased, then, when Trudeau announced "flatly" in British Parliament that it was their "duty" to approve the package, the alternative to which, Chretien would echo in an interview given days later, was to "make this country a colony again" (*Canadian Press* 1980b). To this Scottish Labour MP George Foulkes responded: "The whole set-up is beginning to look a bit like blackmail" (*The Province* 1980b).

The sheer gall of Canada to hijack colonial anxieties this way, using them as a kind of forcefield around patriation, was rebuked repeatedly by Indigenous Peoples. Appropriating decolonization, Canada's "fantasies of entitlement" (Mackey 2016) had reached gluttonous new depths. But the notion that the UK might continue to indulge such fantasies was even worse. Smallface Marule's (1981, 21) report reads, "Like many colonial powers, Britain has mistakenly

believed that decolonization means granting independence to her own subjects who established settlements within the territories of other nations." Not only was this a mistaken belief, but "Such colonial expansion and continuing domination over Indigenous homelands and territories is contrary to the spirit and intent of the United Nations Charter, the Declaration of the granting of independence to colonial countries and peoples and a host of international instruments to which Britain is a party" (22). Comparing the situation to that of Zimbabwe, Belize, New Zealand, and Australia,[89] the report warned, independence only "forbodes escalated colonization" (23).

Indeed, while Thatcher was preparing to placate Trudeau, the irony of the anti-colonial argument was not lost on certain MPs who were beginning to understand their 'duty' to lie not with the Canadian government, but with Indigenous Peoples. According to Venne, this group of "got it." What they particularly got was the idea for an Imperial Conference:

> [They] understood the Imperial Conferences… they didn't even bat an eyelash… they didn't even question it, [because] they had done it in other instances… And that's what we wanted. Because we wanted a clear line on who is responsible for treaties and what was going to happen, and what was our take in all this. (Venne interview)

Imperial Conferences were their thing, after all, held every few years until 1937, after which they became known as Prime Ministers' Meetings, and later "Commonwealth Heads of Government" meetings.[90] After all, these were the very fora where the UK's constituent Dominions would

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[89] It is worth noting that Australia and New Zealand were also lobbying for constitutional independence during the same period, with similar resistance from Indigenous Peoples. Though each underwent their own processes (and crises), by 1986, both had essentially achieved what Canada did through patriation.

[90] Five Indigenous representatives from Alberta, including Sharon Venne, would actually go to one these, held in Australia, in 1981, where they lobby heads of government to address with Canada the situation of Indigenous Peoples. Ultimately, Indra Gandhi, Prime Minister of Indian does so. As Chief Sam Bull (Treaty 6 Vice President) would report back to the IAA, it also provided the opportunity to meet with other emerging countries "who used to be under the colonial rule of Great Britain" who gave "pointers" on lobbying for independence (Bull 1982, 5).

reject “all forms of imperial centralization” (Hillmer 2006) and arrange for their own incremental independence, often with Canada at the helm. One, for example, produced the Balfour Declaration of 1926, proposed by South African Prime Minister J. B. M. Hertzog and Canadian Prime Minister William Lyon Mackenzie King. In it, the notion of the ‘Commonwealth’ was formalized, it was declared that Britain and its Dominions were constitutionally equal, and legal power “shifted decisively” to Canada (Tattrie 2006). Which is to say, the Canadian government should have ‘gotten it’ too; that it appeared confused by what Indigenous Peoples were asking for could only be willful. What Indigenous Peoples were arguing for—a conference—was the very decolonial process Canada had enjoyed, perversely, to establish itself as a nation state.

And then there were those who did not get it at all. Sir Kershaw, for example, and the special parliamentary committee he was the chair of, charged with examining the role of Westminster in patriation. On January 21, 1981, the committee released its much-anticipated report. In the three short paragraphs dedicated to Indigenous Peoples, it concluded that “the UK has no treaty obligation or other obligations to Indians in Canada” (as quoted in Mandell 1984, 177). It shrugged off the Royal Proclamation altogether, writing that there is “no reason to suppose” the Proclamation “was in any way entrenched or protected against the legislative power of the Canadian Parliament.” Instead, it was up to Canada to protect “Indian rights and interests” as connected to the “welfare of Canada and its peoples” (*ibid.*). It was an explicit articulation of Indigenous Peoples’ domestication and, as Mandell later pointed out (1984, 178), a patently racist one. The flippant equation of Indigenous “interests” with that of Canadian population assumed their assimilation. Politically, it could only rely on one of two things: Canada’s mere assertion of de jure sovereignty, fortified over time, or its brute usurpation of the de facto (jurisdictional) kind. To get to this argument, it parroted the statements of a single lawyer from

the FCO—a Mr. JR Freeland—while ignoring entirely the written submissions of UBCIC, IAA, NIB, Inuit Committee on National Issues, and Native Council of Canada. The committee further refused their requests to appear before its November hearings and provide oral evidence.

In response to the committee's report, FSIN enlisted the help of Rosalyn Higgins, then a professor of international law at the University of London (Higgins would, of course, go to serve on the UN Human Rights Committee and as President of the International Court of Justice). After slamming the committee for taking at face value the brief assertions of one lawyer "without any examination at all of the evidence" (Higgins 1981, 3, emphasis the author's), Higgins issued a series of question. If, as Kershaw's report assumed. the treaties had passed off to Canada, when? And "by what process of international law?" (4). By the same token, what were the legal consequences of the Royal Proclamation never having been formally repealed (5)? These questions, dodged entirely by the Kershaw committee, would foreshadow those to eventually come before the British courts at the behest of the IAA, FSIN, and UBCIC. In the meantime, however, despite the holes Higgins had poked in it, Kershaw's report was used repeatedly to frustrate the Indigenous lobby in Westminster.

This was the scene into which UBCIC was entering when it dialed up its presence in London starting in the winter and spring of 1981. In February, not long after the Kershaw report came out, UBCIC's lawyers traveled to London in investigate initiating a legal process there (Mandell 1984, 180). They found the Canadian government also there, trumpeting its new clause recognizing Aboriginal rights, and exploiting this clause to counter the "myth" that patriation would be bad for Indigenous Peoples (as quoted in Sanders 1983, 316). The fact that this clause could be amended without Indigenous consent—or removed altogether, as it would be nine months later—was of course absent from the 'myth-busting' materials Canada was circulating.

By May 14th and 15th of 1981, when UBCIC held its Special Emergency Assembly, it was another pivotal moment for the movement, establishing a formal mandate to go to London. The materials prepared for the assembly outlined clearly Britain's historic and international obligations to fulfill its 'trust' to Indigenous Peoples by upholding their consent. That this consent persisted despite Canada's efforts to eat away at it "bit by bit," was a political marvel, but a legal reality ("Indian Survival State of Emergency," 4). "Our Indian Nations do not consent to the Trust being forgotten, as Canada proposes, or delegated to Canada, as Britain suggests. We demand that the Trust be discharged on terms which we will agree to. Then, the Constitution can be patriated, on terms which entrench our Agreement" (5). On this basis—consenting agreement—the ground was laid for a robust legal and political strategy in London.

By now, the NIB's London presence was losing steam, and in March its 'ambassador' returned home, leaving the Office of First Nations unmanned (Linklater et al., 6). By June 1981, the Constitution Express would install itself there full-time, and by October would take over administration of this "mini-embassy" entirely (Monture interview). Mary Thomas, who managed the office from October 1981 through to April 1982, described it to me as basically a self-contained flat, with a living room where the work would get done, and a big foyer for reception (Mary Thomas interview). Chiefs would stay there when they came through town, but Thomas (who is Secwepemc from Williams Lake) lived there for six full months, having been selected by the Cariboo Tribal Council to coordinate the lobby alongside Valerie Morgan (also Secwepemc, from Bonaparte). Pauline Douglas (non-Indigenous, UBCIC staff), was often there too, as well as Leslie Pinder and Louise Mandell, who would bring her young son Max in tow.

On the political side, it was a fierce, if sometimes hasty, operation. "[We] were actually using payphones, coins and payphones to phone members of the House of Commons," Thomas

told me, laughing. A difficult thing when you're trying to lobby, to suddenly have to say, "Oh, excuse me, your Lord, I ran out of coins." Nevertheless, Thomas, Mandell, and their crew were astoundingly effective. There was a method to their cold-calling: "political parties and governmental communities were approached first, then the nationalist Parties, selected members of the government party and Opposition, members of the Kershaw Committee, the Archbishop of Canterbury and members of the House of Lords" (Mandell 1984, 181). And in the end, "I had a list of 1,135 lords and 635 members of the House of Commons, that I probably called everyone of them to make appointments." If there weren't any Chiefs around, then Thomas and Mandell would take the appointments themselves.

As Thomas described it, they usually had to start out with some "cross-culture training … because [without] an intrinsic feeling about a cultural foundation, they wouldn't have a clue—and may never have a clue, unless they came over here and actually lived with us, and learned about culture, values, customs, language." Some thought that "John Wayne had killed us all off." In another meeting—a story Louise Mandell loves to tell—where both FSIN and BC Chiefs were in attendance, the MP turned to the delegation and ask them where they came from. "A Chief replied, 'Saskatoon, Saskatchewan.' The MP turned to his researcher and said, alarmed: "They do not speak English" (Mandell 1984, 181). Yet others "had shares in many companies and resources here in Canada… gas and oil, and land and resources, forestry" (Thomas interview). Support was pretty much a non-starter for this group, who "didn't want to jeopardize" (ibid.) their Canadian investments.

Among those who were supportive, many came from three camps: the Scottish, Irish, and Welsh nationalist parties.[91] "So, the ones who were also colonized," I said. "Yes," Thomas replied, "they are Indigenous groups in their own country, so they were the ones who gave the most support." The Scottish National Party stuck out for Thomas in particular, especially when party leader Gordon Wilson spoke on their behalf in parliamentary sessions, including the eventual readings of the *Canada Bill:* "He was a very keen supporter and actually spoke up… for the First Nations of Canada in their quest for aboriginal rights and title." He wasn't the only party leader whose ear they had, however. Former Labour Prime Minister and Opposition Leader James Callaghan, was also "sympathetic" (Woodward and George, 122), though stopped short of committing to official party support (Linklater et al., 4).

Then there was a group who truly made the Indigenous cause their mission, though these were more of a motley crew, which didn't conform to party lines: Liberal and Labour MPs who supported Indigenous rights, and Conservatives who felt Trudeau was a communist who needed to be stopped (Sanders 1985, 302; 1983, 328 n17). Some of these characters who were spearheading Indigenous solidarities in London wrought controversy among Indigenous groups there, though not because of their party politics. For example, a rift opened up between the Federation of Saskatchewan Indian Nations (FSIN) and Bruce George (Labour) and Sir Bernard Braine (Conservative), who objected to FSI's staunchly sovereigntist stance. Practically, they advised, it would not get them very far in London. For their part, FSIN resented their 'setting out rules' for the Indigenous lobby, deeming George in particular unwilling to "hear of Indian

[91] See Hebert (2019, 590-594) for a fascinating account of the alliances forged between Indigenous Peoples and such "resurgent nationalist divisions in Scotland, Wales, and Northern Ireland."

Government or nationhood" (Linklater et al., 5). In September 1981, FSIN undertook a "cultural tour" of Liverpool, Blackpool, Birmingham, and London, dropping in on the annual conventions of the Conservative and Labour parties on their way. As Grenville Jones (1982, 2) would report back to the IAA, they discouraged any MP from pursuing the "minority and human rights line." A rift developed between the FSIN and IAA too, who worked in close alliance with George, Braine, and Jones (a political consultant whose company, External Development Services, boasted Nelson Mandela as a client as well as the Biafran government during the Nigerian civil war). At the start, at least, it seems the Constitution Express managed mostly to stay out of the fray, as UBCIC partnered at different points with the IAA and FSIN.[92]

For example, in the summer of 1981, lawyers from the IAA, UBCIC, and Four Nations Confederacy of Manitoba were working together to prepare arguments for the British Courts (Mandell 1984, 180).[93] They were invited to test these out at a conference on the question of patriation at All Souls College at Oxford University.[94] Then, through Sir Ian Brownlie, Oxford's resident international law expert, they together presented the Office of the Attorney-General with a joint memorandum of law. "The term 'patriation' is a misnomer which forms part of an argument intended to influence the uninformed or superficial observer: that is, that the problem is to remove the constitutional traces of an outdated colonial supremacy" the document begins (UBCIC et al., 2). "This approach, designed to give an umbrella of legitimacy to a highly

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[92] I am certain others would characterize the fracturing that happened in London differently than I have here. I have tried to represent the FSI's and British MPs' perspectives by referring only to primary sources they produced at the time. However, I am in no position to delve into stories of Indigenous factionalism, and have been careful to avoid such stories throughout. The purpose of this short paragraph is only to say that some British MPs, like the UN, were uneasy with the sovereignty argument. Or, at least, they strategically managed it, drawing criticisms of paternalism.
[93] By now UBCIC was broke, and the Four Bands of Hobbema (as they were then known) were carrying many of their legal costs (R Manuel 1981, 38).
[94] Michael Jackson, who had been Mandell's law professor at UBC attended the conference and advised on the legal argument. Brian Slattery's recent dissertation on the Royal Proclamation was also a big help (Mandell interview).

irregular political process may be fairly described as a coup d'état (in constitutional terms) by the Federal government at the expense of constitutional legality, of the rights of the Indian Nations, and of the provinces" (ibid.).[95] Against Trudeau and Chrétien's fear mongering, the memorandum argued that British *non-intervention* into the patriation process—a process in which it was legally enmeshed—would be just as egregious as an "unjustified refusal to comply" (24). Britain was in this, whether they liked it or not.

Writing from both treaty and non-treaty contexts, the memorandum argued that the UK should retain its "supervisory role" until "it can be devolved to the Indian Nations or devolved with their consent to another body and under no circumstances should it be blindly eliminated or devolved to the Federal or Provincial government" (25). Essentially, they were asking the UK to do what it had done for the first hundred years after the Royal Proclamation was issued—stave off local governments from overstepping the terms of consent. Though the British had not done much to fulfill this supervisory role since then, the movement tried to reignite this sense of responsibility in the minds of British MPs. By now, however, the local government that needed staving belonged to a Prime Minister, and one who was not fond of being interfered with. Ultimately, it asked that the question of Indigenous consent and the Crown obligations to it be referred to the Judicial Committee of the Privy Council for opinion. The irony now was that the Privy Council—the very court Indigenous Peoples from BC had lobbied tirelessly to get a case in front of since 1904—was without teeth, having become somewhat superfluous as the dominions developed their own court systems throughout the 20th century.[96] Nevertheless, they chose this

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[95] Oddly enough, UBCIC also prepared a memorandum on the need for provincial consent. As Mandell would write of this strange solidarity: "Although there was no basis for an alliance between the provinces and the Indian Nations, each had strong arguments to block the request and the success of one would benefit the other" (1984, 181).
[96] Canada, for example, abolished Privy Council appeals entirely in 1949.

path because of its affordability—a cheap recourse until they could raise enough funds to pursue a full case in the British Courts. The hope was that the memorandum would cause the UK Parliament to at least hold off on introducing legislation to patriate until the Privy Council reference was settled.

This was a savvy strategic move, using consent—a consent connected to the very honour of the Crown—as a stick in the spokes of patriation, just as it was beginning to accelerate. The British were serious about their honour, after all. As Bobby Manuel (1981, 56) pointed out, "That really gets them upset, the thought of undermining or damaging in any way the image of the Crown… in terms of their obligation, their duty, that is what they really want to know about." But the consent argument was more than a tactical or discursive one, playing into British pride. As the movement developed—and eventually did get that case filed with the courts—it advanced a relational and deeply jurisdictional theory of consent as the very grounds on which their relationship with Canada would need to be revamped in order for patriation to proceed. Without this revamping, they would refuse. For the Constitution Express was serious about its honour too. Refusal, I propose, is not only consent's alternative (Simpson 2017), but its horizon. Hauntingly, on the inside back cover of the memorandum was printed: "Our words will come back to you like quiet echoes from the past."

6.2 Consent's Refusal

Right around the time that I was beginning this research into the Constitution Express, Audra Simpson started speaking, and then publishing, on the topic of consent (2016; 2017). I struggled to rectify the "ruse" of consent that Simpson spoke of so compellingly—linked, it seemed inextricably, to the politics of recognition—and the calls for consent that my interlocutors on the

Constitution Express were starting to tell me about. That consent is rife with colonial baggage didn't help—deployed by people like Woodrow Wilson and South Africa's Jan Smuts in order to solicit Third World amenability to its own domination. This usage is rooted in Western social contract theory, where a single act of acquiescence is undertaken out of desperate necessity (Hobbes [1651] 1904) or of property protection (Locke 1690). Now, as an ongoing "technique of recognition and simultaneous dispossession," Simpson (2017, 17) argues, that single act has become recursive, sustaining the apparatus of the settler state (22) while handily masking it at the same time (20). This "liberal move again and again to pretend as if this ruse of consent signals freedom" (29) is its very cunning.[97] *Yikes,* I thought. Is there any possibility of a consent that doesn't automatically acquiesce to state legitimacy? To the apparatus of state domination?

The consent that I see the Constitution Express having cultivated and advocated in London is, in short, a relational formulation, rather than contractual or submissive one. That is, as a kind of catch-all, 'consent' was deployed as a theory of ongoing, persistent, jurisdictional relation which harkens much more to Indigenous international and treaty law than it does Hobbes or Locke. To get there, the movement shook consent loose from the hegemonic (in the Gramscian sense) grips of Western colonialists and liberals, and their instrumentalist, if not euphemistic, appropriation of the term. Which is not to say the movement deployed a dehistoricized understanding of consent, abstracted from its colonial or contractual applications. Rather, it *rehistoricized* consent within the historic obligations of the Crown and within Indigenous Peoples own, older, relational understandings of the concept.

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[97] Applying here Elizabeth Povinelli's (2002) term.

In making my way around to this argument, I return to Wilson and Smuts—that twosome who, in the last chapter, glommed on to the principle of trusteeship and used it to remake self-determination at the UN as something not only scalar, along racialized lines, but stadial, along social evolutionary ones. A right into which Western, white, Anglo-Saxon peoples were born, self-determination was held aloft for the peoples they colonized—an aspiration to be attained through a gradual process of liberal reform (aka assimilation) under the "benevolent tutelage" of their trustees (see Manela 2007, 25). In the meantime, those peoples would consent to be governed. Like trust, Wilson and Smuts appropriated the language of consent, using it as a mechanism to justify and sustain this racially differentiated version of self-determination (Getachew, 50). Not unlike Vitoria four centuries before, they imbued colonized peoples with just enough jurisdiction to consent to their own dispossession (of their lands, resources, and jurisdiction), but not enough to wield full sovereignty (Getachew, 19-20).[98] International relations theorist Siba N'Zatioula Grovogui (1996, 80-88) calls this Natives' "right to dispose of themselves."

As I see it, the consent that Wilson (and to an extent Smuts) tried to institutionalize at the League of Nations was a tactical resurgence of "classical" social contract theory which served to sustain their own hegemony. Following Thomas Hobbes' narrative of societal origin, consent was conceived as a submission, though a necessary one. For Hobbes, the Commonwealth (or Leviathan) offered a trade off—the voluntarily surrender of one's individual sovereignty to a mutually agreed upon authority (i.e. state) for purposes of collective self-preservation. In the

[98] Even this instrumental consent was a conceit—a liberal offering made to the Third World in competition with the "instantaneous and universal" self-determination (Levin 1968, 248) that Lenin had on the table (Manela, 25).

case of colonized peoples, the 'consent of the governed' offered the same; however, the authority they would be submitting to would not be born of their own political conglomeration, but an existing imperial one.

For Hobbes the conditions which gave rise to this necessity—scarcity, brutishness, precarity, and violence—were inherent to the state of nature.[99] If this was his inspiration, the 'consent of the governed' was an astonishingly racist analogy for Wilson to use on the colonized, inferring that they were in the same stage, evolution-wise, as pre-political individuals duking it out in a landscape barren of sovereignty. But it was not just an analogy. For Hobbes, political scientist Robert Nichols (2013; 2005) shows, the 'state of nature' was not just an abstract, heuristic device; rather, he used Indigenous Peoples in the Americas as his empirical example of a peoples with "no government at all… living in that brutish manner" the state of nature affords (as quoted in Nichols 2005, 47). Wilson, it seems, applied the same racist logic to colonized peoples of the Third World. He did so explicitly, often describing the colonized in stadial terms, for example, as having "not yet learned the rudiments of order and self-control" (as quoted in Manela, 30). But he also did so implicitly, imbuing whole peoples with the same base right—the consent to be governed—as lawless individuals living in a pre-political state.

But, for colonized peoples, the conditions creating consent's necessity—scarcity, violence, etc.—were not the neutral by-products of some regressive state of nature. Rather, these were conditions wilfully created by a global and racialized system of capitalist imperialism, normatively configured by the very state governments who offered the deal. Under such duress,

[99] See Asch 2014, 120-133, for a detailed analysis which refutes the whole premise of the state of nature, contrasting Hobbes' use of scarcity as motivation for political community to alternative analyses coming from Levi-Strauss and Indigenous treaty relationality which find in kinship and sharing a different motivation for politics entirely.

consent's being voluntary is questionable, to say the least. Enter Antonio Gramsci, whose prison notebooks make explicit the subtle (and not subtle) kinship between consent and coercion. For Gramsci, not only is consent historically contingent ([2005] 1947, 12), but "educative" (242). Mirroring Wilson's promise of "benevolent tutelage," the state, per Gramsci, "educates" consent (259) by mobilizing both public and private institutions to discipline (or assimilate) its constituent consenters. That it has a near monopoly on such institutions, be they legal (12), cultural (258), material, or moral, constitutes the "apparatus of state coercive power."[100] (Wilson, it so happened, had at his disposal a unique institution through which to solicit consent: the League of Nations.)

Simpson (2017, 21) takes this even further, arguing that the "trickery" of consent in colonial contexts is not only the coercive conditions which produce it—i.e. "the deeply unequal scene of articulation that people are thrown into"—but also its ability to bury the evidence, papering over "the very conditions of force and violence that beget it" (20). That is, consent, for Gramsci and Simpson, serves and sustains existing hegemony, rather than limit it.

If Hobbes' consent promised self-preservation, the only 'self' preserved in Wilson's version were imperial powers themselves. Reversing the direction in which 'trust' would flow, the consent of the governed calmed the nerves of imperialists, for whom, returning to Hobbes, the only "trustworthy" people "are those with whom we share a sovereign" (Asch 2014, 123). And so, fearing, in part, socialist revolution, but also Third World self-determination in general, they formalized their own anxious reassurances into international law, commandeering consent

[100] Glen Coulthard (2014), following Fanon ([1952] 1994) takes this even further. Consent, as a mechanism of recognition, produces coercive subjectivities for the colonized in which they become instruments of their own dispossession.

to sustain their own supremacy. Smuts was the worst for this, putting the ultimate promise of 'consent of the governed'—eventual decolonization—perpetually out of reach. He did so by creating distinct trajectories of self-determination, the jurisdictional end points of which would be different for white peoples than for black or brown ones. (A system he formalized in apartheid, famously taking inspiration from the *Indian Act* reserve system, and the differential self-government it affords band governments.) Ultimately, consenting to be governed (even in trust) was the best many could hope for—the highest aspiration of 'self-determination' available.

If this was the manner in which consent was laid out by people like Wilson and Smuts in international law, what could it offer to the Constitution Express that was any different from the very domestication the movement rallied against?

For the Constitution Express, consent was not the end game; it was only a beginning—the initiation of a political relationship. The doctrine of consent, just as Venne had described it at the Russell Tribunal, did not signal Indigenous Peoples' submission to a superior sovereign. Instead, Mandell told me during our interview, "It was about jurisdictional space for the reassertion of Indigenous laws, and Confederation in the right way and in the right place… jurisdiction to make decisions about what happens in the way the land is used." It was a relational and a substantive concept, bursting with Indigenous legal tradition and signalling their full, flourishing self-determination.

Mandell was instructed to take this to the UK: "I was told to bring a case in London about consent." I wondered who issued this instruction. "Was it George Manuel?" I asked. "It was everybody. When you asked people… what do you want? People said we don't want the constitution patriated without our consent." Consent was in the air; "that's what people were talking about then." And so, the movement took it up. But it did so in a number of layered ways.

One usage of consent was perhaps closest to contractual thinking: permission. By the fall of 1981, UBCIC raised enough money to put this argument before the British Courts, with joint participation from the Four Nations Confederacy of Manitoba and the Grand Council of Treaty 9 in Ontario. Though launched in Chief Robert Manuel's name, 124 Chiefs joined as plaintiffs, prompting Mandell to refer to it as the "Chiefs' case"[101] in subsequent writings (Mandell 1984; Mandell and Pinder 2015). In clever use of the *Statute of Westminster*, the case argued that constitutional change in any of the Commonwealth's "self-governing dominions" could only be made with that dominion's consent. The question put before the courts, then, was "who is the Dominion of Canada?" (Mandell 1984, 187). Notwithstanding the Indigenous Peoples' opinions on the matter, it was generally accepted that the Dominion included the provinces. Though the Supreme Court of Canada had ruled the need for provincial consent to be more a matter of constitutional convention, than a legal necessity,[102] the British were generally sensitive to the provincial argument. Upholding the principle of the consent of the governed, they wanted to know that Canada's constituent jurisdictional entities supported patriation and were not too keen on Trudeau's attempts to move unilaterally without them. The Chiefs' case would argue that the Indian Nations too, as sovereign parties to the Constitution, held a right to consent to—or refuse—its patriation.

In a sense, this aligned with contractual thinking, in that it would embrace consent as a single act, undertaken with urgency, for purposes of self-preservation. It is this sense that Michael Asch (forthcoming, 3) deems, "reactive consent"—a right to say yes or no (or yes with

[101] *Manuel et al. v. AG*, [1982] 3 W.L.R. 821 [C.A.] ["the Chiefs' case"].
[102] *Re: Resolution to amend the Constitution.*

some conditions and compensation) to a specific action or incursion initiated by the state. Saying no—i.e. refusing to consent to patriation—was the simplest answer. But this also points to how important the possibility of say no is as a structuring feature of the right to consent. It is this possibility of consent which continues to scare Canada, causing it to oppose the *UN Declaration on the Rights of Indigenous Peoples* for so long, decrying its "veto" power over development projects (Joffe 2015). In this sense refusal is not just consent's "revenge" (Simpson 2016), but its spectre, its horizon.

But if refusal is consent's structuring limit, it is also its "generative alternative" (Simpson 2017, 19). As Gabriel Williams put it to me, "All the demonstrations, all the occupations and the roadblocks, all the Constitution Expresses, [to] Europe, across Canada, and ump-teen more afterwards: all those are just to say no. But those aren't the real bare roots of it." For example, behind this yes/no function, the Constitution Express also put forward a substantive, or what Asch might call "proactive," consent. That is, a right to build together what it was they were consenting *to* (in this case, a whole Constitution). This was the purpose of the Imperial Conference, after all. There, they would figure out what kind of political relationship—what formulation of Canada—would be patriated. Refusing to consent until such a conference was convened was a refusal, certainly, but a generative—and a generous—one.

This brought the movement in line with the kind of consent confirmed in the Decolonization Declaration, where Asch writes, the thing being consented to was not having someone else (your colonizer or trustee) decide the fate of your self-determination, but a commitment to developing another form of political relationship (forthcoming, 5). The process for the Imperial Conference, at least as it was described by Smallface Marule (1981, 24) (again, writing collectively for the IAA, UBCIC, and WCIP), was modeled almost exactly on the

Declaration's process for decolonization: a temporary trusteeship would be established in order to reaffirm Crown-Indigenous partnership; a UN authority would be established to oversee it; and then it would be decided what political arrangement would come out of it, i.e. "whether it is desirable to establish political association with an independent state, seek our own independence as free states or we seek to be politically absorbed into an independent state." Again, this was a consent with refusal on the horizon—incorporation into Canada was not a foregone conclusion.

Going into the conference, the base assumption would be that each was entering as their own polity, and none relegated to some lesser, pre-political, state of nature. Which is to say, contrary to contractual thinking, whichever political arrangement came out of the conference, while new, would not be the first foray into political community for any of the parties. Legal scholar Jeremy Webber has written a similar description of how consent works in relational contexts: "The key question is not whether someone should join in community or not, but how one should reconstruct existing communities so that autonomy – understood as individual and collective self-determination – is maximized" (Webber 2010, 31). Likewise, consent in this case was to the building of a new consensual relationship between already self-determining peoples. As trustee, the Crown would be obligated to bolster Indigenous self-determination, as in its other dominions, not dictate how it would be executed.

As the previous chapters have explored, the movement demonstrated that this notion of relational consent had always been the hallmark of their understandings of their relationship with the Crown, and of Indigenous legal and political practice. For example, Val Napoleon has written provocatively about legal theories of consent springing from Tsilhqot'in (2015) and Gitksan (2010) law, respectively. In the case of the latter, she describes a "dialogic construct of consent as the foundation for their society" (2010, 46), rather than, in the contractual tradition, a

"historic (and generally mythical) act of adherence," (Webber 2010, 32). Consent in the Gitksan legal context is neither a submission nor a single act. Rather, "performed at intervals," it is an ongoing method of political renewal, growth, and relational accountability: "it can be seen as a continual renewal of adherence, a continual and purposeful re-creation of the fabric of community, through deliberation on that community's structure and commitments, all against a backdrop of kin relations and an ethic of respect" (2010, 46).

It is this persistent, relational conception of consent that UBCIC seemed to understand was extended and established between peoples through treaty. As they had put it before the Russell Tribunal, treaties "clearly created a bi-lateral political and legal relationship between two sovereign nations" (*Submissions,* 35). The Royal Proclamation only formalized this practice, enshrining a consent-based relationality within Imperial law. In it, "The Indians were described as 'Nations'" (Mandell 1984, 165), and through their right of consent, their "Government and governing authority were fully recognized" (*Submissions,* 35). Despite the written versions invented by the Dominion government (Miller 2009, 163-165, 181-182),[103] the oral records of Indigenous signatories (Venne 1997; Cardinal and Hildebrand 2000) and written records of the Crown's treaty commissioners (Asch 2014, 89-91) demonstrate a shared understanding that in consenting to treaty, Indigenous jurisdiction was preserved. As legal scholar Maureen Davies (1985, 25) has written, treaties would:

> unite two states under one Crown but not under one law. It would be neither just nor constitutional for treaties establishing free, amicable associations to be construed later as abject surrenders, for to do implies that the Crown wilfully deceived its allies. Nothing could be less compatible with the respect owing the Crown in its sovereign actions.

[103] See also the reports of treaty commissioner Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Prospero Books, 2000), originally published 1880, 126, where he acknowledges that "certain verbal promises" made in treaties 1 and 2 were not included in the written text.

For these reasons, UBCIC points out (as do others[104]), treaties should be seen as fundamental constitutional documents (*Substance*, 1-2) comprised of Indigenous, international, and common law. Indeed, their negotiations were a meeting place for these different legal orders (see Venne 1997, 188), involving "legal and diplomatic" (Stark 2017, 255) ceremonies from each.

Rather than a singular act—a relic of some lapsed contract—the durability of treaty is also much written about (Craft 2021), echoing Napoleon's description of "continual renewal" of consenting relations. As Mandell would report, "it was always assumed that the Crown obligations to the Indian Nations would prevail, as the representatives of the treaty making said they were to prevail as long as the sun shines" (Mandell 1981, 12-13). In places without treaty, the Royal Proclamation prevailed instead—i.e. the Crown's commitment to Indigenous consent was 'durable' here too.

As the movement would argue, this made the Crown's ongoing legal obligation to uphold their consent "an essential and overriding feature of Canadian federalism" (2). The Crown retained a paramountcy over and above the federal and provincial governments, even as legislative power was increasingly distributed between them. And it did this precisely for the purpose of safeguarding its duty to obtain Indigenous consent. As Mandell (1984, 166) would write, "each *Constitutional Act* saved the operation of the *Royal Proclamation*" ensuring that "The Imperial government continued to hold the balance of power, thereby preventing either the federal or provincial governments from extinguishing Crown obligations" (168).[105] In all this

[104] For a sample of these narratives see Borrows (2017, 17-38).
[105] To reiterate a point made in Chapter 3, this argument relied on the fact that section 91(24) of the BNA Act hadn't done it. For one, it never got Indigenous consent either. But it was only an administrative provision anyway, which

time, the Crown's obligations had never lawfully devolved to Canada. For this would require Indigenous consent.[106] Thus, without Indigenous permission, patriation would be a unilateral and illegal move to absolve the Crown of its duties once and for all.

Indigenous Peoples were self-aware of the seemingly strange position this put them in, defending British imperialism to make a decolonial point. For example, a submission to the Kershaw committee by the NIB, Inuit Committee on National Issues, and Native Council of Canada asked, "Are we, as we have been accused by some in Canada, the last of the old-fashioned imperialists?... how can the Aboriginal peoples of Canada, the first victims of colonialism, be the only voice against the patriation?" (NIB et al. 1980, 7). But this position was not so incongruent as it may seem. "The idea that there could be imperial intervention in indigenous policy in Canada was no Indian invention" (Sanders 1985, 295). As chapters 2 and 3 argued, Imperial intervention on behalf of Indigenous consent was the whole structuring ethos of early constitutionalism. So, by calling on Imperial duty, they got a dig in at both Canada and the UK, calling out the British for reneging on their consistent promise of a consent-based political relationship. In seeking to re-establish a consent-based relationality as the basis for modern Canadian constitutionalism, they would radically restructure the Canadian state. The patriation of anything less, they argued, would not only be oppressive, but illegal.

So, when posing to the courts the question, "who is the Dominion of Canada?" the plaintiffs in the Chiefs' case clearly included Indigenous nations. The duty and commitment of

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grafted onto pre-existing constitutional arrangements. In other words, it delegated to the federal government the management of some of the Crown's duties to Indigenous Peoples but not the duties themselves.

[106] And here's where the argument became kind of cyclical: the UK had never obtained Indigenous consent to pass off its duty to uphold their consent.

the Crown to obtain Indigenous consent was the evidence. But in addition to being the evidence, consent was also the solution to the patriation problem.

Here's what they proposed: Indigenous peoples would take over the Crown's duties for them. The paramountcy of Indigenous consent over constitutional matters would persist, but now it would be managed by Indigenous Peoples directly, no longer by the Crown in their trust. The way they proposed to do this was through the addition of an Indigenous consent clause to the Constitution, not a rights one. This was the movement's final usage of consent, and one they increasingly lobbied for in the UK, especially after it became more and more clear that an Imperial Conference was not forthcoming, and that, even if "Aboriginal and treaty rights" were recognized, they could be defined, amended, and eliminated unilaterally by the First Ministers (Mandell 1981, 15). In this, consent was again mobilized not as an acquiescence, but a refusal of state recognition.

By lobbying for a consent clause, Indigenous Peoples effectively proposed to step into the UK's role, taking over its authority to approve constitutional amendments. If the UK was going to renege this role, abdicating its check-and-balance on Canadian federalism, Indigenous Peoples proposed to take it on for themselves. As Bobby Manuel (1981, 57) would tell the next UBCIC General Assembly in October 1981, the message in London was this: "Do not consent, do not patriate Prime Minister Trudeau's Constitution until Crown obligations have been fulfilled. The way in which you fulfill those Crown obligations is to transfer the Crown obligation of consent to the Indian Nation and then you can patriate the Constitution." Here consent would operate not as a submission, but the opposite: an "overriding force" (Mandell 1984, 167). It put Indigenous authority above that of Canada. They would be the keepers of their own consent, holding it apart from the state apparatus. This proposal taunted Trudeau, whose

mission it was to shake the Constitution free of any paramount authority. A consent clause would signal something beyond colonial sovereignty; that is, beyond a sovereignty that was not meant to have anything concurrent to it, let alone beyond it.

The plan was this: UBCIC would launch the litigation as soon as the *Canada Bill* arrived in England, and then move immediately for an expedited hearing before the Bill was enacted (Mandell 1984, 183). While they waited for the *Canada Bill* to arrive, the political lobby would push the consent clause idea among parliamentarians. Meanwhile, the Constitution Express II would make its way through Europe, arriving in London to join the lobbies underway.

6.3 Denning and the Many-Headed Queen

The *Canada Act* passed in Canadian Parliament on December 8th, 1981. The next day, the request for amendment (to legislate patriation) arrived in the UK. And the day after that, the Chiefs' case was filed at the Chancery Division of the High Court. At this stage the clause recognizing Aboriginal and treaty rights was back in the package—now numbered section 35. It had been quite quickly reinstated after fierce Indigenous condemnation, broad public condemnation, the intervention of some major legal and political personalities (see Berger 2002[107]), and some crafty negotiating by the NDP (see Waddell 2018).[108] For Indigenous Peoples in London, however, the clause changed little. All three groups leading legal actions—UBCIC,

[107] Thomas Berger, for example, lost his job as a Justice of the Supreme Court of British Columbia over it. After speaking in Guelph, Ontario on the issue, then publishing an article in the *Globe and Mail*, he was reprimanded by the legal community for his advocacy, prompting his resignation. When I spoke to him about it, he told me, "I spoke as a Canadian seeking to uphold their rights as part… of Canada's commitment to Indigenous peoples" (Thomas Berger interview, October 17, 2017). Notably, Berger made it clear to me that he felt the "main arena" was Ottawa, not London.

[108] Though now it had a new word in it: "existing." Though this addition was crucial to its passage, it is story and a phenomenon I do not have the space to get into here. It has been taken up by others, however, for example Johnston 1997; Slattery 1984 and 1987; etc.

FSIN,[109] and IAA—moved ahead. "The funny thing, which I find really ironic and beautiful, is that… there was all that fuss about pulling section 35 out and putting it back in," Louise Mandell told me. But cases were launched when the clause was in, further proving this was not their goal:

> They were putting on record and opposing a Constitution that was being patriated without their consent even with section 35 in it. It wasn't about getting section 35. It was about fundamentally being a part of constitutional renewal as a founding partner of Canada, as a partner in this whole enterprise of constitutional reform, as having jurisdiction to make decisions… I know that we've kind of forgotten that because section 35 has become the mainstay of litigation and interpretation. And people think that even rights came from section 35… But no, I mean this movement wasn't about section 35. It was about real jurisdictional consent and respect. (Mandell interview)

Two weeks earlier, the Indian Association of Alberta had lodged their case too, with the Union of New Brunswick Indians and Union of Nova Scotia Indians signing on. However, instead of the Chancery Division, this one was filed in the much speedier Queen's Bench Division, requesting a statutory declaration that the Kershaw committee's interpretation of the treaty obligations was wrong in law (Woodward and George, 127)—that is, "that treaty or other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of Her Government in the United Kingdom."[110] On the 9th of December, Court Justice Woolf denied leave to take the case to court, deeming it a matter for the Canadian courts and/or the political debate in British and Canadian parliaments to decide (Bull, 9). The IAA appealed.

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[109] For the purposes of this dissertation, I will not delve into the details of the FSI's case, as I did not interview or communicate with anyone from FSIN (save for one exploratory phone call with Sol Sanderson) and in the end the case, like the Chiefs' case, did not move forward.

[110] *R v. Secretary of State for Foreign and Commonwealth Affairs ex parte Indian Association of Alberta et al.,* [1982] 2 W.L.R. 641, at 641 [*Indian Association of Alberta*].

At this stage of things the IAA was riding on incredible momentum. Two British politicos had traveled to Alberta to attend their All Chiefs' Conference in October—Bill Cash (who would act as their 'Parliamentary Agent' on the case) and MP Sir Bernard Braine (Bull, 6)—advising on how to proceed in London. In early November, after the "night of the long knives," when the draft section recognizing Aboriginal and treaty rights was dropped from the constitution package, the IAA authored a petition to be presented in London, gaining 196 signatures from Chiefs across Canada. And on the 19th of November—the national day of action which the Aboriginal Rights Coalition[111] declared "National Solidarity Day"—the IAA and Chiefs of Alberta sponsored a rally in front of the provincial legislature in Edmonton.[112] Buffy St. Marie, Floyd Red Crow Westerman, and Charlie Hill performed to a crowd of between 5,000 and 7,000 people. At the time, this was the largest demonstration in Alberta's history (8). It was a call, also, to non-Indigenous Canadians for support. As Chief John Snow put it to the crowd: "This demonstration is necessary to inform the Canadian public that my people are angry and very frustrated. To us, as Indian People, there is no justice" (Snow 1981). As I understand it, the IAA's rally, along with parallel protests organized in all major Canadian cities drew resounding support from non-Indigenous publics across Canada, who urged the federal government to reinstate the clause. It was solidarity day, after all. Just four days later, the IAA case was filed in London.

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[111] A conglomerate consisting of the National Indian Brotherhood, Native Council of Canada, Inuit Committee on Nation Issues, Native Women's Association of Canada, and other groups.

[112] On this day, Indigenous Peoples from across BC occupied the Museum of Anthropology in Vancouver (Sanders 1983, 320). A reported 400 people arrived by charted bus, taking the "hapless" security guards by surprise and occupying the museum's great hall for 24 hours (Hebert 2019, 593). Surrounded by their peoples' cultural and material heritage, they used it as a forum to discuss their opposition to patriation. When George Manuel arrived on the scene, he gave one of his most militant speeches of the period, speaking of the need to "lay down our lives" and "spill our blood to defend our identity with our land" (quoted in Robertson 2019, 73), alienating some and raising the ire of the Indian Homemakers Association (Hebert 594).

According to Chief Sam Bull, then head of the IAA's Indian Government Portfolio, the question was simple: "Does the Government in Great Britain have any responsibilities to the Treaty Indians in Canada?" (Bull, 8). It directly challenged the Foreign and Commonwealth Office's evidence-less assertion that the treaties devolved to Canada at some nebulous point in time between Confederation and "at the latest" the *Statute of Westminster* (as quoted in Mandell 1984, 177). The IAA hired solicitor Roger Cobden Ramsay, and the illustrious, if sometimes unconventional, Louis Blom-Cooper as barrister, along with his junior barrister Richard Drabble.

"I have to say we thought that the Court of Appeal would refuse permission to appeal," Drabble told Vicki and I, when we met at his office in London, just across the road from the chambers where he worked with Blom-Cooper forty years previous (Richard Drabble interview, 7 Mar 2018). The First Reading of the *Canada Bill* in the British House of Commons was slated for the 22nd of December. (Forty-four MPs voted against it.) One day earlier, the IAA had its oral hearing before Lord Denning, "the maverick" Master of the Rolls (Sanders 1983, 322), to decide whether to hear the appeal. The hope was that should Denning agree to hear it, Parliament would delay the Second Reading of the *Canada Bill*, scheduled to begin as soon as they were sitting again in January. But it just so happened that there was also a historic blizzard that day, Venne recalled, at our meeting in Maskwacis (12 Dec 2017). With Chrétien and a team of lawyers sitting on one side, and Venne (now working for the IAA), her partner Wallace Manyfingers, and their lawyers sitting on the other, there was a cagey feeling in the room, while they waited for the 82-year-old Denning to appear. Finally, by 11:30am, he made it to the court: "Lord Denning drove himself into London in a Bentley. Like, he ploughed his way into London and came into the court and he said they were going to give a decision," Sharon said. Everyone expected the decision to be no, even the lawyers. "We expected him to refuse, to kill the whole thing,"

Drabble told us. “But he didn’t because he liked the argument about the treaties.” In less than half an hour, he granted leave to appeal (Bull, 10). He would hear the case.

In that moment Manyfingers, “jumped up and ran out and he went down the street to Margaret Thatcher’s office to tell her that they were going to hear it; that’s how they postponed the Second Reading of the *Canada Bill*” (Venne at Maskwacis). The next day, Thatcher’s government announced the decision to delay the bill until the decision was handed down. Ultimately, this would be the only case to move through the courts before patriation.

According to Drabble, the case was kind of “eccentric,” in that it used court proceedings “as a form of bringing pressure on a parliamentary process.” At this point, Drabble laughed, “I’m not suggesting that we went out to lose, but certainly a major justification for doing it… was keep the legal process going while the parliamentary process ran its course.” This is not to say the lawyers could just phone it in. “It was very definitely a case in which you ran the legal argument as hard as you could.” For Drabble, who was seven-years into his legal career, this “terrific interplay between the Parliament and the legal process” was exciting. “One of the things you take away, as a lawyer, is that the object of litigation isn’t always solely the litigation.”

Trudeau, of course, was mad. In the National Archives, Vicki and I found this letter to Thatcher, dated January 13, 1982 (Trudeau 1982b):

> My dear Margaret,
>
> As you know, I have greatly appreciated your consistent support on the Constitution, and I have full confidence in your resolve to deal with the Canada Bill expeditiously... I feel compelled to express to you my concern with your Government’s decision to postpone the scheduling of second reading of the Canada Bill until the Court of Appeal has given its judgement on the Alberta Indian case…
>
> If, in the Alberta Indian case, the Court of Appeal rules, as your officials expect, in favour of the Foreign and Commonwealth Office, I hope that your Government would take the position that since… no Canadian or British Court has recognized the validity of

> Indian claims to a special relationship with the British Crown, there is no argument for any further delay. You could then proceed very quickly to a second reading.
>
> If the Court of Appeal rules against the FCO position, the situation would raise profound questions about the British Government's obligations under the Indian treaties, about the manner of their discharge, and about the meaning of the Statute of Westminster, not just for Canada's sovereignty but for the sovereignty of Commonwealth countries more generally…
>
> Yours sincerely, and with personal regards,
> Pierre

Here was Trudeau, quite plainly identifying the underlying question: that is, the very legitimacy of settler state sovereignty. But he was using it to coerce Thatcher, meddling in the UK's juro-political process. We then found Thatcher's response—a savvy partial apology, explaining her strategy to evade further opposition, while staying silent on the sovereignty implications (Thatcher 1982):

> Dear Pierre,
>
> Thank you for your letter of 13 January in which you expressed concern at the possibility of further delay in the passage of the Canada Bill…
>
> I fully appreciate the difficulties which you describe. As you know, I am equally anxious for a speedy passage of the Bill. However, the Indian cause has attracted some support at Westminster and I have no doubt that, had we proceeded with the Second Reading before the courts had considered the Alberta case, we would have aroused substantial opposition to the Bill. We expect to know the decision of the Court of Appeal in the very near future and in the light of that we shall be considering urgently how best to proceed in Parliament…
>
> I agree that we must continue to keep closely in touch about all this.
> Yours ever,
> Margaret

As she anticipated 18 months previous, the 'Indians' had come knocking at 10 Downing Street (quite literally, when you think about Wallace Manyfingers running over in the snow). But, thanks to the strength of the intervening legal and political lobby, she was unable to keep to the

reassurance she had issued then, that they would be rebuffed and sent back to Canada with their claims. Instead, they would have to be heard out in London.

Hearings for the IAA case began in January. ("I must have worked quite hard that Christmas," Drabble joked.) While the Chiefs' case was premised on Indigenous consent, the IAA case took the line of argument that the obligations taken up by the British Crown through treaty, as a matter of law, had never devolved to Canada. The cases would have complemented each other, had it not been decided that the Chiefs' case, along with the FSI's case, would depend on the resolution of the Alberta one.

The judgement was issued on the 28th of January. All three Lord Justices denied the IAA's argument that the treaties still reside in England. However, they each came to this conclusion on entirely different reasoning. Lord Justice May's theory was the simplest and most dismissive—the *Statute of Westminster*, in making Canada independent, conferred any remaining treaty obligations onto Canada. That this was never made explicit, particularly to their Indigenous treaty partners, didn't come up in the judgement. Kerr, on the other hand, neither dwelled on when the treaties passed off to Canada, nor when Canada became independent, arguing, rather, that the treaties were made by the Crown in right of Canada from the start (or from at least 1867). That the number treaties were made very expressly by commissioners of the Queen, stressing her personal, kin-like honour and protection (Asch 2014), again, went unaddressed.

But Denning did something different. In what I learned was typical Denning fashion, he began grandly, with the history of British Imperialism: "Over 200 years ago, in the year 1763,

the King of England made a Royal Proclamation under the great Seal…"[113] In this majestic chronology of Imperial legal history, Denning found both the Royal Proclamation and treaties to have created binding—and lasting—obligations on the Crown. Indeed, he alluded Indigenous Peoples' territorial authority, before British arrival and regardless of British recognition. "Each tribe," he wrote, had "their own tract of land, mountain, river or lake" as well as established "customs" in those lands, regulated with "the force of law."[114] From here British obligation arose. In encountering Indigenous legal and political society, "as a matter of public policy, it was of the first importance to pay great respect to their laws and customs: and never to interfere with them except when necessary in the interests of peace and good order."[115] For Denning it was clear that as a matter of practice, policy, and of legal obligation, this respect for Indigenous law, was still of "first importance."

However, at some point before 1926 (the Balfour Declaration), by matter of constitutional practice,[116] the Crown became divisible—that is, separate for each self-governing dominion or territory of the Commonwealth. So, as Drabble explained to us, though she was technically still the same Crown (the Queen), for all political purposes she was subdivided: "you have a Crown in Canada, a Crown in Hong Kong, a Crown in Mauritius…" et cetera.[117] In effect, Denning dodged the devolution question entirely. It no longer mattered that, as a matter of law,

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[113] *Indian Association of Alberta,* at 644.
[114] *Indian Association of Alberta,* at 645.
[115] *Indian Association of Alberta,* at 645.
[116] Patel and Raudon (2019, 146) question whether this was a natural process of "constitutional drift" in which the Crown became domesticated and localized in each dominion, or whether it was driven by certain actors, including monarchists in Canada.
[117] Michael Asch has often prodded me about Denning's strange move here. In an email he once joked: "I hope you have a section [in the dissertation] on the fantasy imaginary of the Crown Lord Denning invented to get to the answer he was seeking. I have said that his reasoning may make sense to Christians who after all believe that God can be one and three at the same time; but that it only works until Canada declares war on Britain—at which point the Queen is both our most sovereign leader and the representation of our most hated foe" (29 Jan 2021).

the treaties had never explicitly changed hands. It was the hands themselves that had changed. "Clearly," wrote Douglas Sanders of the decision, "this was a mythical concept cloaking a non-explicit transfer of power" (1984, 323). In *The Shapeshifting Crown,* New Zealander legal scholar David V. Williams describes the Crown's perpetually mythical nature, always having had two bodies (corporeal and politic—see Kantorowicz 1957; Graeber 2017; Agamben 1998; etc.). But divisibility among its dominions doubled this many times over, as "multiple versions of the Queen's 'two bodies'" were created, each with a distinct body politic (Williams 2017, 49).

In becoming divisible, "those obligations which were previously binding on the Crown simpliciter are now to be treated as divided."[118] In this they became obligations of the Crown in respect of Canada.[119] Thus, they were also only justiciable in Canada. As far as litigating treaty rights and obligations in the UK, this would be it. However, Denning reassured, Indigenous Peoples should trust Canada to do right by them:

> There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown—originally by the Crown in respect of the United Kingdom—now by the Crown in respect of Canada—but, in any case, by the Crown. No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada "so long as the sun rises and river flows." That promise must never be broken.[120]

Though the case was a major disappointment, this last assertion of Denning's—that there's no need to fret about Canada's living up to its obligations—had an interesting side-effect. It should have been a boon to Trudeau—a vote of confidence, resuscitating Canada's humanitarian

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[118] *Indian Association of Alberta,* at 652.
[119] *Indian Association of Alberta,* at 653.
[120] *Indian Association of Alberta,* at 653.

reputation. But it seemed to be more of an instruction than a compliment—a kind of pre-emptive parental scolding, as to the consequences Canada would face should it not uphold its end of the deal. It was a provocation, almost, to the Canadian courts, that they take this ruling up as precedence in future litigation. And, it must be said, they did. As the next chapter will examine, *Campbell* ended up using Denning's decision in defence of the persistence of Indigenous jurisdiction quite outside of the division of powers between Federal and Provincial governments.[121]

But in the immediate term, the decision also opened a window to debate the sincerity of Canada's honour, and an opportunity for Indigenous Peoples make public their ample evidence to refute it. Suddenly, the histories of dispossession, oppression, and extinguishment that the Indigenous lobby had been trying to get before British parliamentarians were getting the attention they deserved. As MP Braine would write in a letter to *The Times*, they provided "incontrovertible evidence of past extinguishment of native rights and there is disturbing evidence that Canadian governments intend to exterminate these rights when they have the power to do so" (Braine 1982).

This was the tone going into the Second Reading of the *Canada Bill*, now scheduled for February 17th, 1982. Days before it, Professor James Fawcett, professor at All Souls College and a prominent member of the European Commission of Human Rights (notably, its former President), circulated a paper to the House of Commons imploring a debate of the Bill. In it, he emphasized the risks to Indigenous land tenure, education, and languages (Fawcett 1982, 3). An opinion provided by Douglas Sanders began circulating alongside it, supporting outright the

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[121] *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123.

Chiefs' case claims of the need for consent. But more than anything else, the Indigenous lobby itself was taken up with new seriousness; this was a full-court press.

Douglas Sanders would characterize the debate in the British House of Commons as "a kind of victory of the Indian lobby" (1984, 323). Quantitatively, it surely was. As Mandell often points out, twenty-seven hours of the thirty-hour debate were spent on Indigenous matters. Qualitatively, it hard not to think of it as a win too. Canada's treatment of Indigenous Peoples came under minute scrutiny. But in addition to this public lambasting, proactive solutions were also presented. The FSI and IAA had drafted amendments to the Constitution package—both receiving endorsement from the Joint Council of Chiefs in Canada—in hopes that one or another British MP would present them before Parliament. The British were hesitant to make any changes to the text, however, and some fancy footwork had to be done to present it in such that the Bill would pass as is, with additions coming after, with Indigenous consent.

Ultimately, MPs Mark Wolfson and David Ennals were the ones to propose the amendments. The former moved to introduce a new schedule which would change the substance of section 35 in significant ways. It would: confirm the rights recognized in the in Royal Proclamation, including treaty rights; recognize the inherent right to Indian government, including the right to determine the nature of Indian nationhood and define Indian citizenship; confirm their right of access to the Crown; establish an office for the protection of Aboriginal and treaty rights; and finally, require that any amendments to the constitution which effect Indigenous peoples be made with their consent (Wolfson 1982, 176). It was a version, at least, of the consent clause the Constitution Express had been pushing for. Effectively, it was a motion to change the orientation of section 35 from rights to jurisdiction. Ennals (1982, 175) moved to support a constitutional conference, where Indigenous Peoples would have the opportunity to

consent to the "formal novation of the treaty obligations." But he also took the opportunity to urge Parliament to do as they did for the IAA, and await the decision on the Chiefs' case—now scheduled for June 8th—before passing the Bill. However, when the amendments went into committee to be voted on, they did not come out the other side. At this point Thatcher made good on her promises to Trudeau, using her majority to defeat them (Bull, 14).

Though a loss to them, Indigenous Peoples in London, including those involved in the Constitution Express, influenced the debate fundamentally. Their concerns dominated the conversation but also changed it from one about rights to one about jurisdiction, obligation, consent, and self-determination. It was only a year previous that they were dealing with a handful of supporters fearful of stepping on Canada's toes. They had educated the British about their own colonial history, and in the end, the British 'got it.' Now, at least, it was clear to everyone involved: patriation does not decolonization beget. But there remained glimmers, or bread crumbs, at least, for something different—a consent-based relationality honouring Indigenous self-determination.

The rest, as they say, is history. The IAA's leave to appeal the case to the House of Lords is rejected. The *Canada Bill* goes into its Third Reading on March 25th, and on March 26th is signed into law. On April 17th Queen Elizabeth travels to Ottawa to give Royal assent to the *Canada Act*. Three days later, the British government brings the Chiefs' case to court on an application to strike. It is a forgone conclusion. The stakes have changed. Now, if they were to succeed, and Indigenous consent was deemed necessary to patriation, the *Canada Act* would have to be declared—in hindsight—unconstitutional (Mandell 1984, 188). The Court rules as much: now that it has been passed with the consent of Canada, "they could not look behind the expression of consent to see if that consent was real" (189). Ironically, the Court relies on British

parliamentary supremacy—the very thing Trudeau had begun this whole patriation process to abolish—in order to strike it down. The British had passed the Bill, and "that was good enough for the courts" (Mandell and Pinder 2015, 196).

Mary Thomas is told to pack up the Office of First Nations. She pays the last of the utility bills and ships crates of material back to the NIB, FSIN, IAA, and UBCIC. "I did all that and closed the office and locked it up and went to Heathrow and caught my flight back home."

Chapter 7: No Clause for Celebration

"Today at long last, Canada is acquiring full and complete national sovereignty," began Prime Minister Pierre Trudeau at the rainy ceremony marking the end of patriation on April 17, 1982. He continued:

> We became an independent country for all practical purposes in 1931, with the passage of the Statute of Westminster. But by our own choice, because of our inability to agree upon an amending formula at that time, we told the British Parliament that we were not ready to break this last colonial link. (Trudeau 1982a)

On that day, he, along with the Minister of Justice Jean Chrétien and Queen Elizabeth II—acting in her capacity as Britain's Crown, I suppose—sat down at a desk set up on Parliament Hill to sign the proclamation that would bring the *Constitution Act, 1982* into effect. The day after signing, as the Queen's plane departed, Trudeau did a little pirouette. He had done an even more famous and controversial pirouette back in 1977, when he flouted protocol at Buckingham Palace by doing a little spin behind the Queen's back. But patriation, you might say, was the ultimate flouting of British authority. For Trudeau, a personal ambition had been fulfilled. The Constitution belonged to Canada now.

Needless to say, no one from the Constitution Express was pirouetting. The *Vancouver Sun* quoted Bobby Manuel as saying that any Indigenous person who participated in the celebration would commit a "treasonous act against the Indian nations and their citizens" (as quoted in Sanders 1983, 324). In the same vein, the National Indian Brotherhood declared April 17th a day of mourning. As Herman Thomas (1982, 16) wrote in an editorial for *Indian World*:

> The fight has been a long tedious one and shall not end here, the Indian people are presently planning how to further continue the fight not only nationally but internationally. Indian people have found no reason to celebrate patriation; in fact Indians are

> demonstrating across Canada stating that the Constitution is unconstitutional. If Canada's version of democracy means stripping Indian people of their pride, dignity and depriving them of self-determination and self-government, then I shall not stand for thee O Canada, but continue to fight for democracy and freedom as we see it.

Both Trudeau and the Queen made mention of Indigenous Peoples in their speeches that day. These were uncertain comments, however, tacitly acknowledging that Indigenous Peoples' objectives had not been fulfilled in section 35. The Queen tried a positive spin, calling it a "full opportunity" to bring "further definition" to Aboriginal rights (as quoted in Sanders 1983, 324). Trudeau (1982a) similarly said that "it offers a way to meet the legitimate demands of our Native peoples," noting that "the two orders of government have made a solemn pledge to define more precisely" their rights. They were alluding, of course, to section 37—a kind of asterisk to section 35, which obligated the Prime Minister to convene a First Ministers' Conference "respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada" (*Constitution Act, 1982*). Essentially, section 37 promised an after-the-fact meeting to figure out what section 35 consisted of.[122]

In this concluding chapter, I return to Canada with the Constitution. I begin briefly with the constitutional conferences, and the kind of "recognition" wrought in their wake. Here I return to the theme of Chapter One, focusing specifically on lengths that the Canadian government and courts have gone to circumvent Indigenous jurisdiction, but also to hold it apart from the land.

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[122] In addition to sections 35 and 37, Indigenous Peoples got two other things: section 25 of the *Charter*, which shields Indigenous rights from being abrogated or challenged by any of its sweeping equality provisions, and a mention, within section 25 that Aboriginal "rights and freedoms" include those recognized by the Royal Proclamation. While these are significant and deserving of much further legal analysis (the invocation of the Royal Proclamation in particular) that analysis is beyond the scope of this dissertation.

Then, by touching on a small selection of the jurisprudence since, I question whether patriation did what Trudeau said it would, which was to offer "a way to meet the legitimate demands" of Indigenous Peoples, specifically those on the Constitution Express (arguing generally that it did not). Nevertheless, by foregrounding the retrospective perspectives of my interlocutors, I hope to point towards what the movement did achieve, politically, legally, and discursively, focusing particularly on its impacts in reconstituting Indigenous jurisdiction in Canada and beyond it—a jurisdiction that challenges Trudeau's jubilant announcement that Canadian sovereignty is "full and complete."

7.1 Constitutional Conferences and Beyond

"We were very close to the Imperial Conference, you know that?" Sharon Venne asked me, in the final minutes of our interview.

"Really?" I said. "Tell me more about that."

"I mean, why do you think Canada agreed to the constitutional conferences in Canada?" Venne replied, waiting for the other shoe to drop.

I could not believe this had not dawned on me before. Going into this project, I had never really known the source of the constitutional conferences—how they came to be added to the deal—and I certainly hadn't anticipated they originated outside of Canada. What ended up being four conferences (also known as First Ministers' Meetings) between 1983 and 1987 seemed just a kind of strange, sad fact of history, each ending in near stasis. That these were a domestication of the movement's aspirations for an Imperial Conference, as Venne was telling me they were, changed the tenor of this fact significantly. The news, from Venne's perspective, came directly from Thatcher's office: "we were all of a sudden informed in London, without anybody asking

us or anything like that, there's going to be constitutional conferences in Canada. And we said no. No, we don't want them… We were completely blindsided by it. It was a bit of a shock."

Early on in the patriation process, when there was still talk of a "two-stage" strategy for constitutional renewal, there had been a broader context for something like a constitutional conference. At that point Indigenous questions weren't the only ones being pushed off to a later date. Instead, there was a list of items to be dealt with after the Constitution was in Canada, including, for a time, the very amending formula itself. But the government had a unique reason for wanting to shunt Indigenous concerns until after patriation—one made plain in a confidential document titled *Briefing Material on Canada's Native Peoples and the Constitution* which had made its way into George Manuel's hands before the patriation process had even really begun. After patriation, the document admits, Indigenous Peoples would have a much harder time negotiating any kind of substantive political authority into the Constitution: "Native leaders realize that entrenching their rights will be enormously difficult after patriation, especially since the majority of the provinces would have to agree to changes which might benefit Native Peoples at the expense of the provincial power" (as quoted in Mandell 1984, 172). In this way, the government's strategy was to push off Indigenous concerns to a post-patriation climate, after all the substantive jurisdiction had been eaten up, and when the provinces were sure to oppose them.

Initially, at least, the federal government was able to camouflage this strategy by hiding Indigenous concerns in amongst other issues it also planned for that second stage of constitutional reform. When section 37 was introduced in early 1981, the government still had the benefit of this broader context to cloak it (Sanders 1983, 333). However, as the other issues—amending formula included—were slowly resolved, section 37 still remained, standing strangely on its own. In the UK, the idea was given new life—no longer a part of a broader

second stage of constitutional renewal, it was now recycled as a domesticated version of what Indigenous Peoples had been lobbying British MPs for: an Imperial Conference with international supervision.

Domesticating the conferences was an artful strategy on Canada's part to get the *Canada Bill* passed in the UK. By endorsing conferences to be held in Canada without UK participation, British parliamentarians could nevertheless feel assured that they had done something to protect Indigenous interests, while at the same time avoiding the countervailing charges of neo-colonial meddling that was being leveled at them by the Trudeau camp. Though there was a fundamental contradiction to this perspective—appeasing the anti-colonial sentiments of both colonizer and colonized—it nevertheless represented the profound impact that the lobby had had in London. It seems the promise of constitutional conferences was more to appease the renewed sense of British duty which Indigenous Peoples had cultivated in London, than it was to Indigenous Peoples themselves.

For Canada's part, though strategic, sections 35 and 37 also marked a major concession. This was a government who, as I discussed in Chapter Three, spent nearly four decades trying to eliminate Indigenous peoples' rights, on the premise of equality and egalitarianism. It was a government who tried to ghettoize Indigenous Peoples from the Constitutional process, substantively and procedurally. Given this backdrop, as Asch would write in 1984's *Home and Native Land*, constitutional recognition marked a change in attitude from "entrenched resistance to one of reluctant and skeptical acceptance" (Asch [1984] 1988, ix). Nevertheless, skeptical acceptance was not what the movement was fighting for. And the question remained, acceptance of what exactly? Ladner (2015, 268) writes:

> the attainment of constitutional change by Indigenous peoples was a monumental achievement given the assimilationist (even racist) context or paradigm within which such change was achieved. That said, what makes this even more fascinating is that the First Ministers who eventually yielded to pressure to respond to Indigenous constitutional claims did so without fully comprehending what it was that they had included in the 1982 constitutional package.

Section 37, it seems, was a chance for them to find out what they done.

However, did they really fail to comprehend it, or did they willfully refuse to? That the First Ministers "appeared completely unable to comprehend Indigenous nationalisms, nor could they grasp the moral and legal imperatives behind the demands of Indigenous leaders" (268) Ladner calls a form of "paradigm paralysis" (269). The Constitution Express, from Vancouver to Ottawa, to Rotterdam, to London, had repeatedly spelled out both the kind of self-determining authority it was seeking for Indigenous Peoples, and the kind of decolonial process I deemed necessary to get there. That Trudeau could still claim, going into the conferences that, "I just don't know what you want" (as quoted in Ladner 2015, 269) could not be anything but willful.

The question for UBCIC, then, was whether to bother explaining it to him again. Participation in the conferences was limited to representatives from the four major Indigenous organizations—the Assembly of First Nations (AFN), Native Council of Canada, Métis National Council, and Inuit Committee on National Issues. The AFN, however, created a process for soliciting contributions from regional organizations. So, at the fall 1982 Annual General Assembly, UBCIC asked for direction from its constituent communities on whether they should contribute to the AFN's position and attend the conference, or "pursue strictly international self-determination" (R Manuel 1982, 211). By this time, Bobby Manuel had become President of UBCIC, succeeding his father. As he put it, they were in a conundrum:

> On the one hand, if we don't attend we might lose something we could secure from there. On the other hand, if we do attend, we could lose something as well. It's where we are kind of in a quandry [sic], in the middle. I know attending in terms of international self-determination puts us at odds in the international arena. And I guess what I'm looking for is some kind of direction in terms of how do we reconcile all of this? How do we look at this massive contradiction and the massive risks that we have to take in the next five or six months and come out the other end with the least amount of damage done. (212)

By domesticating the conferences, Canada put Indigenous Peoples up against a wall. They could participate on Canada's terms and try to negotiate their way into the existing federalist framework by making section 35 into something with political substance. But in so doing, they would consent, as Chief Tom Sampson (1982, 219) said, to the idea that "we are a domestic issue in Canada." Or they could go the more ambitious yet more uncertain international route and try to seek self-determination there. Art Manuel (1982, 87) made the case for the latter, where he felt they could more conceivably "assist in the developing of the various kinds of choices which the Indian peoples are to choose from… for example, the third order of government option." Citing the Decolonization Declaration, he put more faith in the international realm as the place where Indigenous Peoples could define, with some flexibility, how their self-determination might take shape, re-establish jurisdiction over their territories, and remake their relationship with Canada (88). Ultimately, UBCIC would choose both routes.

Predictably, some version of the jurisdictional question became the central tension of the conferences—that is, whether section 35 had *political* content, and included the kind of self-determination and/or self-government that UBCIC and others had been fighting for all along. Trudeau, for his part, made it clear throughout the two conferences over which he presided (1983 and 1984) that he couldn't fathom a situation in which Indigenous Peoples had any kind of substantive jurisdiction, let alone a territorial one (Asch [1984] 1988; 2014). Even more hostile

were British Columbia, Saskatchewan, and Newfoundland, refusing to accept the concept of "inherent" rights whatsoever, and in framing Indigenous jurisdiction as a threat to both the territorial (Borrows 2016, 123) and political (Brock 1991, 272-285) integrity of the Canadian federation. Jurisdiction-wise, for Trudeau and most of the First Ministers, the *Constitution Act, 1982* only perfected what he and the Canadian government already assumed to be true: that sections 91 and 92 of the BNA Act had always had jurisdiction—and sovereignty—on lock.

Generally, the federal government's original prediction that provincial bullishness would deny Indigenous Peoples substantive jurisdiction came to fruition. Had it been an Imperial Conference, the provincial First Ministers would not have been on the invite list at all, having no international personality of their own. Further, this was exactly the situation that the Constitution Express' proposed 'consent clause' had been intended to prevent—a situation in which the provinces could unilaterally amend, abrogate, or deny Indigenous Peoples' constitutional rights.

Once again, UBCIC lobbied the AFN to push for a consent clause at the conferences. But even this "smallest measure of self-determination," as Art Manuel described it (1982, 82)—a "device to protect whatever Indian rights were recognized and included in the Canadian Constitution by requiring the consent of Indian peoples before they could be altered"—would not fly. With the exception of Manitoba's NDP government, who supported the idea of a consent clause specific to amendments effecting Indigenous Peoples, the rest squashed it. At the conclusion of the first conference, an amendment was instead added in the form of section 35.1, stating that "The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the Constitution Act, 1867, to section 25 of this Act or to this Part," (that is, to any part of the Constitution pertaining to Indigenous Peoples):

> (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
>
> (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item. (*Constitutional Amendment Proclamation, 1983*)

It was a half-measure, agreeing *in principle* that at least a conversation with Indigenous representatives—relegated, as ever, to some form of observer status—should take place before the First Ministers made amendments pertaining to them. But the latter, in the end, would hang on to the authority to do so. Just as Art had expected, "The Prime Minister, by rejecting this rather moderate request [of a consent clause], has put our rights, our lands and our status at the whim and mercy of the ten provincial premiers and himself. It is like putting the wolves in charge of the hen house" (ibid.).

Instead of consent, or any more substantive version of territorial authority, Canada used the conferences to hold out a kind of "delegated" self-government falling not under section 35, but granted under section 91. Even this was only for those communities "that can meet agreed criteria" (Trudeau 1985, 155). It would apply only to reserves, operate much like that of municipal governments, and be subject to provincial legislation (Manuel and Derrickson, 78). In contrast, the Indigenous organizations present simply refused to stop talking about Indigenous Peoples' inherent jurisdiction, generated from their own constitutional orders, and its broad territorial scope (79). And so, after four attempts, the constitutional conferences stalled out.

When I spoke to people about the conferences, at best, they were treated as irrelevant, shrugged off as a waste of time, and at worst, an outright betrayal, sowing factions among Indigenous Peoples while doing nothing but bog down section 35. As Ron George put it, they

were both "condescending," and "controversial." They exacerbated a rift between the national organizations and the grassroots people who felt this was all being negotiated on the backs of their aspirations and hard-won achievements through the patriation period. With one significant exception—the ground-breaking gains of Indigenous women to get an equality clause added in section 35(4)—the four conferences were, by most every estimation I have seen and heard, a total bust. Generally, I got a sense of grief and loss, in addition to anger and exhaustion, when I talked to people involved in the Constitution Express about the post-patriation period.

In 1984, after the first of the conferences had ended in deadlock—the chairs were stacked, the planes boarded, and the prospects that the next meeting might produce a different outcome were gloomy at best—Michael Asch ([1984] 1988, vii) made an at prediction:

> unless matters concerning political rights and self-government are resolved, or at least understood to be resolvable within a mutually agreed framework, the settlement of issues such as land rights, hunting, fishing and trapping rights, and treaty rights (or rights obtained through express agreement with the Crown) can only proceed on an *ad hoc* basis.

Nearly four decades later, it is safe to say, ad hoc they have been. From Canada's perspective, the conference fiasco left just two avenues by which to fill the supposed "empty box" of section 35: negotiate or litigate. Without historical justification, of course both assume the legitimacy of exclusive Crown sovereignty and the paramountcy of Canada's legislative authority. Though, as Chapter Three argued, the seeds for the era of "recognition" had been laid long before, it was really the failure of the constitutional conferences to address the political aspects of section 35 that secured it. As Glen Coulthard argues, the post-1982 climate spawned an "expansive range of reconciliation-based models of liberal pluralism that seek to "reconcile" Indigenous assertions of nationhood with settler state sovereignty" (Coulthard 2014, 3). Here, plucked from their

jurisdictional contexts, land rights and other cultural rights are "recognized"—demarcated and assembled, piece by piece, on an ad hoc basis. Meanwhile, both law and policy-makers go to bizarre lengths to skirt Indigenous Peoples' territorial jurisdiction, even where self-government is the very topic at hand, and even if the results are all but incoherent. And it's not just that they skirt it, but they pull it apart. It almost seems as though they are trying explicitly to keep Lisa Ford's triad (territory-jurisdiction-sovereignty) separate for Indigenous Peoples, even as they hand bits back in fragmented form.

On the negotiation side of things, Canada has generally been remarkably transparent in its aims at achieving what Pasternak calls "jurisdictional termination" (2014, 160), in exchange for delegated, modified rights. In the years immediately following constitutional entrenchment, the federal government kept with its pre-patriation approach, whereby it would alienate Indigenous land as separate from the issue of jurisdiction. And it did this in the plainest way possible: through the creation of two distinct policy pathways. Territory would continue to be negotiated under the Comprehensive Land Claims Policy, where the federal government would grant Indigenous Peoples small tracts of land (held in fee simple), codify the contents of a contractual agreement into section 35 treaty rights, and surrender whatever undefined rights might remain (Manuel and Derrickson 2015, 90).[123] As with the agreements negotiated before patriation, any provisions related to governance or "special administrative jurisdictions" (see Asch [1984] 1988 66-69) would be limited to things important to cultural survival, such as languages and customs, and delegated per the municipal prototype (Manuel and Derrickson, 90). Meanwhile broader

[123] Anthropologist Eva Mackey has produced an incredibly helpful genealogy of the evolving idiom of negotiation in Canada, from explicit "extinguishment," to "modification," to the "non-assertion" (2016, 60-67). In each case, however, the result is the same—the surrender of broad yet undefined territorial and jurisdictional rights as a trade off for a smaller chunk of fee simple property rights and money.

jurisdiction questions would fall under the Self-Government Policy,[124] introduced in 1995, where authority is somehow characterized as both "inherent" and granted at once. As Ron George explained to me, "the government has successfully been able to water down our original goal of self-government to delegated self-government that the feds were advocating and have advocated ever since." The type of authority negotiated here is also definitively not a territorial one, sticking to the administration of certain programs and services. "Broadly stated," the federal government explained in a guide to the policy, "the Government views the scope of Aboriginal jurisdiction or authority as likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution" (Canada 1995, 5).

Though litigation has borne more promise than negotiation on many fronts, jurisdiction is not one of them. The courts have more or less taken up the legislative line by proceeding, often confoundingly, on the basis that, for Indigenous Peoples, territory and jurisdiction are separate entities, and never the twain shall meet. In part, this has been facilitated by the two-track system for litigating rights and title, each acquiring a different set of proof tests. Jurisdiction—if and when it does get some airtime—flits around awkwardly, implicated in title in only the broadest, least tangible sense, while attaching to rights in the narrowest. This is how we get a situation, as in *Pamajewon*,[125] where the right in question—the right to self-government, and specifically the right of two Anishinaabe band governments to regulate high stakes gambling—is shrunk to its smallest irreducible unit. Rather than answer the question in full, the Court instead focused on

[124] With trademark federal brevity, officially titled, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government."
[125] *R. v. Pamajewon,* [1996] 2 S.C.R. 821 [*Pamajewon*].

the specific activity over which jurisdiction was being exercised, deciding whether gambling itself, and not self-government, was "integral to the distinctive culture" of the Anishinaabe, thus meeting the threshold for proof of an Aboriginal right (it did not).[126] By sticking only to what Richland (2011, 207) might call jurisdiction's "performative" aspect, the Court could then avoid what it deemed the "excessive generality" of "a broad right to manage the use of their reserve lands."[127] On the title side of things, we have a situation, as in *Tsilhqot'in*, where the swath of land to which Tsilhqot'in *title* is recognized, is then treated as if a jurisdictional vacuum, having been emptied of provincial legislation.[128]

The Constitution Express argued (successfully, in front of the Russell Tribunal) that the right to self-determination was a pre-requisite right, from which others flow. In *Pamajewon* the Court reversed the direction of this flow, having jurisdiction derive from the strength and standing of each individual right to perform a specific cultural activity. In *Tsilhqot'in* the courts left Indigenous jurisdiction with even less substance, as the negative space that opens up when state jurisdiction is subtracted from the land.

It is also significant to note, for litigation purposes, that at the behest of Indigenous lobbyists and negotiators,[129] section 35—a rights clause—is in the Constitution, and not the *Charter*. This provides Indigenous rights three important protections against infringement. First, it means it they are not subject to section 1, which allows for certain justifiable and reasonable "limits" to be put on the rights and freedoms otherwise protected in the rest of the *Charter*.

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[126] A test which the Court had established in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 the very day before *Pamajewon* was rendered.
[127] *Pamajewon*, at para. 27.
[128] *Tsilhqot'in v. British Columbia*, 2014 SCC 44.
[129] Though I admit I know little about how they did it, as the actual negotiation of section 35 was not my focus, and few people spoke to me about it.

Second, it protects against section 33, the "notwithstanding" clause, which provides provincial governments the ability to temporarily override certain *Charter* provisions. And finally, it protects against the levelling effect of section 15, the sweeping equality rights clause, and any challenges that might be made to Indigenous rights and status by either private individuals or governments on egalitarian grounds. And if this wasn't enough, Indigenous lobbyists got section 25 into the *Charter* too, a "shield" (Johnston 1997) making it explicit that *Charter* rights "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada." However, as legal scholars have well documented (see McNeil 1997 and 2003; Johnston 1997), the courts have found other pathways through which governments can justifiably infringe on Indigenous rights and title, even once proven in court.

Interestingly, section 25(a) of the *Charter* also brings the Royal Proclamation into it, including its provisions as those that cannot be derogated by those in the *Charter*. One would think, given this is the clause protecting Indigenous rights against individual and government infringement, that this would also bring forward the jurisdictional aspect of the Royal Proclamation—that is, the obligation to protect Indigenous land from settlers and local governments taking it up without Indigenous consent, as the Constitution Express interpreted the Royal Proclamation as having done. However, as far as I know, this issue has not been advanced nor taken up in the courts. Instead, the courts have been inching their way towards consent a different way, through title litigation.[130] Though I am not a lawyer, I see promise in leveraging

[130] It is yet to be seen how the BC and now federal governments' adoption of the *UN Declaration on the Rights of Indigenous Peoples* into legislation—with its consent provisions included—will impact the things here in Canada, though on the basis of their early assurances to the business community (see French 2021), it appears as though the federal government is not planning on changing is current approach to consultation, rather than switch to consent.

the Royal Proclamation along the lines that the movement did, as a way advance the jurisdictional content of consent, as well as the Crown's historic obligation to abide it.

Regardless, the fact that Indigenous Peoples have navigated such legal and political conditions over the last three and half decades with generally stunning success, is a feat of unfathomable triumph. At the same time, the fact that many Indigenous Peoples refuse these avenues, and continue to resist, decry, or simply ignore the various mechanisms of inclusion and accommodation that the current constitutional framework has to offer is another vital through line in the story of constitutional recognition (see Coulthard 2014; Simpson 2014).

However, an unfortunate side effect of the proliferation of state recognition, is its retroactive effect on the backstory behind sections 35, 25, and 37 and the movements that secured them. Which is to say, section 35 has cast a long shadow over the Constitution Express, fueling the kind of misunderstanding I began this work with—that it was a movement whose once radical, decolonial aspirations were channeled into aspirations for domestic rights recognition. Some commentators (for example, Brock 1991) have even reversed the direction of this evolution, adopting the narrative that Indigenous aspirations for self-determination were only "inflated" *after* constitutional entrenchment, when Indigenous organizations escalated their demands extravagantly. Neither is right. The counternarrative, that sections 35 and 37 were the domesticated by-products of what was a much more extensive vision, which would have seen Canadian federalism and constitutionalism revamped at its base, has been almost eclipsed by such accounts.

But perhaps most stunning is the way the retroactive reading of the Constitution Express has obscured its transnational inflections. It is as though the domestication of the Imperial Conference swept the whole of the movement's international aspirations under the rug, written

off as a mere ploy for domestic reform. Rather, refusing to accept "the legitimacy of domestication" (Borrows 2016, 123), the movement's efforts to challenge Canada's presumed exclusive sovereignty, to seek international decolonization, and to expand the conversation from rights to self-determining nationhood, refutes the legacy of recognition that has been applied to it since. Furthermore, these efforts continue to have significance today.

7.2 Something Else

Throughout the process of doing this research, I constantly found myself thinking about one particular piece of jurisprudence, which broached such jurisdictional content. It is telling that this case—perhaps the most explicit statement on the persistence of Indigenous jurisdiction made by any Canadian court—was neither a title nor a rights case. Rather, it was a court challenge by Gordon Campbell, then opposition leader of the BC Liberals, along with his Aboriginal Affairs critic, Michael de Jong, and critic for the Attorney General, Geoffrey Plant, contesting the self-government provisions in the Nisga'a final agreement.[131] By fighting "a tide of incredible resistance" (Blackburn forthcoming, 3) to include self-government rights in the treaty, the Nisga'a had conjoined the two policies. To Campbell, this introduction of self-government into section 35 would "effectively amend our Constitution through the back door" (Campbell as quoted in Blackburn forthcoming, 13), creating a third order of government without going through the proper amendment procedure. Justice Williamson, writing for the BC Supreme Court, ruled with the Nisga'a.

[131] *Campbell.*

The thing that made me keep coming back to the case, was the kind of specter of it, alluding to some other jurisdictional entity beyond sections 91 and 92, which was not a new creation, but has always been part of "the unwritten principles underlying our constitution."[132] In order to come to this conclusion—that the BNA Act *did not* divvy up all of the jurisdictional authority at Confederation, and there was something else remaining—Justice Williamson relied on Denning's ruling in the IAA's patriation challenge. As Denning had established, that 'something else' had never been extinguished, by Imperial policy or otherwise. I marveled at the fact that it took nearly twenty years for a court to take up the kind of jurisdictional arguments that Indigenous Peoples had made during patriation. Yet, in the more than twenty years since, the specter *Campbell* opened up—the specter of something else besides state jurisdiction—had yet to be substantively developed. If there's something else, what is it? And what does it mean for federalism, and the Constitution? As I went along, I kept thinking, the Constitution Express had the answers all along.

In Chapter Three, those involved in the movement stared down the barrel of their assimilation—an assimilation wrought by liberal egalitarianism and equality—got on a train, and reconstituted Indigenous nationhood as something bursting with territorial authority. In the Aboriginal Rights Position Paper, adopted by the NIB as the national response to the patriation package, UBCIC detailed the scope of this territorial authority and vision for operationalizing it within a kind of federalism. However, it was a federalism also reconstituted to align with Indigenous Peoples' constitutional traditions—one where, with Indigenous consent, two or more polities could share the same territorial space. It was a constitutionalism that also aligned with

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[132] *Campbell*, at para. 70.

the commitments (and practices!) of the Imperial Crown to uphold Indigenous jurisdiction, before its dispossession. It was a framework for a constitutionalism that would foreground Indigenous jurisdiction, not demand its erasure.

In Chapter Four, the movement recontextualized these historical commitments of the Crown within international law. It did this at the Russell Tribunal and at the UN, where it faced the marginalization of Indigenous Peoples from decolonization. Here, the movement's theoreticians connected the Crown's duty to safeguard Indigenous jurisdiction to the founding tenets of international law—namely the sacred trust of civilization. Then, they sought to remake modern international law, from which Indigenous Peoples had somewhere along the line been excluded, in order to gain entry into the same decolonial pathways that other 'trust' territories and colonies (i.e. the Third World) had established. Here they proposed an Imperial Conference—a practice taken straight out of Commonwealth decolonial procedure—as the venue where the political relationship between Indigenous Peoples, the Crown, and the Canadian government would be sorted out. Instead of patriation, it proposed decolonization.

In Chapter Five, the movement went public, re-grounding its aspirations in community, through a series of potlatches, and at the same time, taking them to Western Europe. Here it launched a first-of-its-kind campaign promoting Indigenous self-determination among former European colonizers—the Constitution Express II.

In Chapter Six, the movement took that campaign to London, where it took the notion of consent—a consent which was central to the Crown's original commitments to Indigenous jurisdiction—and deepened it, promoting a kind of consent-based relationality as the hallmark of its proposed new constitutionalism. Consent, in a sense, would operationalize the kind of jurisdictional arrangements the movement was seeking: first, through an Indigenous consent

clause, effectively taking over the Crown's paramount authority to approve (or refuse) any constitutional amendment related or relevant to them; and second, through a more generative and substantive process, embodied by the Imperial Conference, where Indigenous Peoples would have a self-determining role in shaping whatever political arrangements they were consenting to.

By avoiding it so furiously, Canada has created a specter out of Indigenous jurisdiction, keeping it apart from territory. But if Canadian colonialism is a pulling apart, the Constitution Express was a coming together. Indigenous Peoples in BC have continued to make manifest their jurisdiction—to refill the box, you might say—through the resurgence of their own laws, through advancements in international law, and also through strategic use of the common law, closing the gap between their self-determining authority and the territories to which that authority applies. Such manifestations and assertions, Pasternak (2014) points out, "interrupt the socio-spatial production of state territory" (154), revealing Canada's sovereignty claims to remain partial, an "unfinished project" (147).

Reflecting on the movement, Dave Monture told me, "It was our civil rights model among grassroots people in Canada." The Constitution Express gave us a blueprint for what that 'something else' is, and the pathway to get there. It made worlds—the Fourth World, specifically—beyond colonial domination. It challenged Trudeau's celebration of a "full and complete" sovereignty. And yet, it was generous. It made worlds for consenting polities to co-occupy and maintain, continuously, together. It set a framework that would ensure Secwepemc Peoples' right to consent (or not) to a pipeline. But it also set a framework for the Secwepemc to (re)build something different in its place—their territorial authority.

Bev Manuel ends the story of the Constitution Express this way: "we're still here after how many years; today we're still out in the territory. So, with that Constitution Express I think

it really, I think it gives people strength today—all the ones that went on it. Because they know they were part of protecting our Aboriginal title and rights."

Gabriel Williams ends it this way: "On [the] Constitution Express, I think we set out to [do] what they were meant to do, but I think… we still have to… empower ourselves to understand that we do have the right to do what we're doing, to exist the way we are."

When Mary Thomas reflects on it, she puts it this way: "One of the things it achieved is the reconnection to the path of our ancestors," Mary Thomas told me, citing the historic delegations that went to London. "It reminded our people of the history that we never gave up."

Finally, Eddie Gardner says: "Nobody would have ever even dreamed that it was possible, until it happened."

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