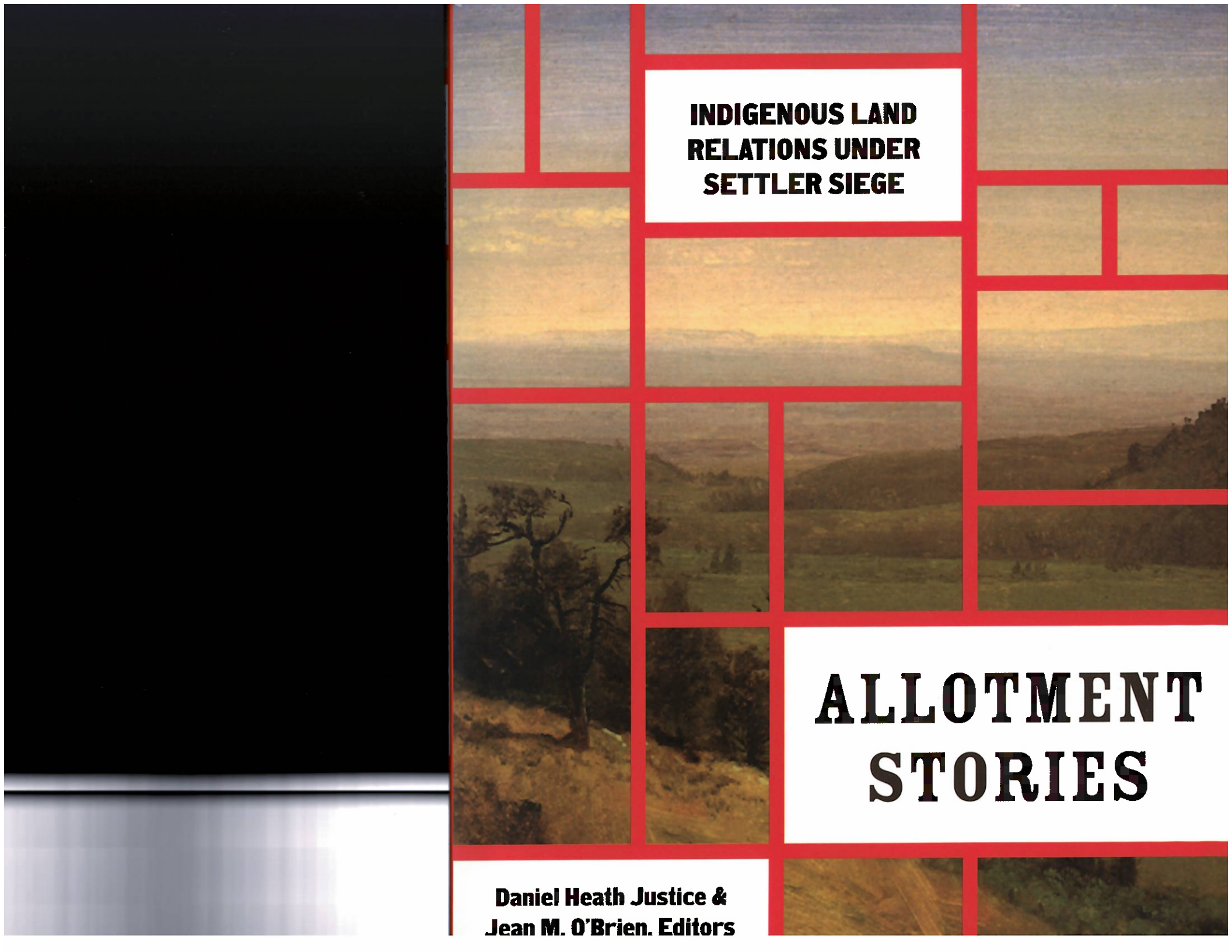
INDIGENOUS LAND RELATIONS UNDER SETTLER SIEGE
ALLOTMENT STORIES
Daniel Heath Justice &
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"Why Does a Hat Need So Much Land?"

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What Is Crown Land?

If we look at a political map of Canada, it is striking how much of the land is claimed by the Crown. Eighty-nine percent of the country has been roughly divided between the federal and provincial governments.[1] In the westernmost province of British Columbia, 94 percent of the province is claimed as B.C. Crown land.[2] Other regions, particularly the northern territories, fall almost entirely under federal jurisdiction, save for some modern treaty settlement lands and municipalities. Indian reserves also fall under federal jurisdiction, in the sense that "Indians and the lands reserved for Indians" are federally governed, but also because reserves are lands held "in trust" by the federal government. They occupy 0.02 percent of the total national land base that spans 10 million square kilometers (or over 6 million square miles) of mostly Crown lands.[3] It is hard to think of a better illustration of the colonial geography of Canada than this spatial distribution. Besides, as Stó:lō writer Lee Maracle once quipped: "Why does a *hat* need so much land?"[4]

Crown lands find their source in a number of colonial legalities, including British royal charters and the confederation acts of this successor state. Since the eleventh century, British law established in the doctrine of tenure that only the Crown could properly own land. This doctrine became Canadian law through the regulatory concept of the doctrine of reception—premised on a void of law in the new territory into which British subjects filled the vacuum with their common law.[5] To this day, the Crown—an entity that has changed radically since first contact (both in Britain and Canada)—presumes to hold underlying title to all lands in the country.

So, that's the story of Crown land. But enforcing ancient British property law in the face of Indigenous territorial authority requires considerable real violence. Therefore, the answer to Lee Maracle's rhetorical question about why a hat needs so much land cuts to the heart of colonization. The Crown, after all, is neither intact nor integral and bears little continuity with the political entity that established the doctrine of tenure or made the first treaties or confederated as a new dominion. But though *the Crown* is an

ambivalent representation of power, *Crown land* is very directly connected with the regulatory powers of governments to sell and reap rewards for the use of these lands. As laid out in the Constitution Act, 1867, the federal government has jurisdiction, for example, over interprovincial and international energy projects, navigable waters, and military forces. Provinces have jurisdiction over the extraction of local natural resources, including oil, gas, and energy projects, as well as forestry and mining. These powers confer the legal authority under settler law to issue permits, licenses, leases, and grants to third parties to extract resources and develop these lands.

For First Nations in Canada, however, the founding of this country had little to formally offer in the jurisdiction basket. All of their lands were divided between the hats. Then, nearly a decade after dominion was granted by Britain, the early Indian Acts were consolidated into *the* Indian Act, 1876, and restrictions on First Nations' authority to govern were laid out in painstaking and exhaustive detail that limited band council jurisdiction to reserves.[6] Though formal acknowledgment of Indigenous governance was not extended, the new colony was in practice a "paper empire" that was not immediately successful at the widespread dispossession it claimed to have achieved.[7] As the provinces were gradually carved out of Indigenous national territories, the authority of the new state was constantly tested, and legal strategies to define and defend Crown lands were devised. In the late nineteenth century, for example, lands treatied between Canada and First Nations were suddenly subsumed under provincial jurisdiction. This development partially unfolded through the court's interpretations of treaties that domesticated U.S. doctrines of discovery.[8]

Treaties did not gain constitutional protection until 1982, when Indigenous peoples' rights to defend their hunting, fishing, trapping, and other traditional practices were acknowledged and affirmed. Further court cases to define Section 35 rights—"the existing aboriginal and treaty rights"—to the land itself placed Indigenous peoples in direct competition with Crowns that may seek to maximize revenues through their sale.[9] In British Columbia, for example, the energy, utilities, and residential sectors account for 58 percent of tenures on Crown land, amounting to around 13 percent of total annual provincial government revenue.[10] So, while the vast area of Crown land on political maps depicts an empty and unoccupied space—save for some Indian reserves, small settlements, and an urban population strung out along the southern U.S.–Canada border—mapping extractive practices offers a much more revealing depiction of the scale of contemporary land alienation. It is not simply a matter, in other words, of lands being stolen, but rather that the nature of alienation may render them impossible to ever be returned. For example, mining claims alone darken Crown lands with activity and investment.[11]

Here in this allotment story, I want to illustrate through a contemporary land struggle a key legal and military mechanism for maintaining the proprietary interest of Crown land, as well as foregrounding contestations against it. One of the most dramatic conflicts

over Crown land is unfolding on the territory of the Wet'suwet'en people in British Columbia. It involves a form of forced removal to access, claim, and exercise control over Crown lands: the injunction.

In December 2018, Coastal GasLink Pipeline Limited, a subsidiary of TransCanada PipeLines Limited, served an injunction to the Unist'ot'en clan associated with the Yikh Tsawwilhggis (Dark House) of the C'ilhts'ëkhyu (Big Frog Clan) of the Wet'suwet'en Nation (one of thirteen hereditary *Yihks,* or clans). The company sought to clear the path for a liquified natural gas (LNG) pipeline to transport diluted bitumen (or "dilbit") from northern British Columbia to the Kitimat port. Two members of the Unist'ot'en are named in the suit—spokesperson Freda Huson and Chief Smogelgem. They filed a response to the injunction stating that, under Wet'suwet'en law, they were under no obligation to offer access to their territory: as they write, "One of the firmest Wet'suwet'en laws holds that one cannot enter another's territory without asking for and receiving the head chief's permission. Trespassing on house territories is considered a serious offence."[12] Yet the province had authorized the use of their lands for a pipeline project that all the Wet'suwet'en hereditary chiefs unanimously opposed. So, how does the injunction resolve this impasse for the state?

This is a site within a structure of colonization where we can observe how Crown land works through a form of simultaneous socialization and privatization of Indigenous lands—the former through the sovereignty claims of the state that render these lands titled to the Crown and the latter through the exercise of jurisdiction to sell those claimed lands to a private corporation. The forced removal of Unist'ot'en people from the path of the pipeline was not so much a failure of the legal system but a realization of its insistence that the proprietary interests of Indigenous peoples are subordinate to the Crown and its regulatory powers. In this case, we also see how Anuk Nu'at'en (Wet'suwet'en law) and the responsibilities it upholds foreground the emptiness of a tenure system that claims to fill a void already governed by Indigenous political and legal orders.

What Is an Injunction?

First Nations are granted little control to authorize economic activity on their lands. Most of the time, companies have already cleared the gate of provincial authorization when First Nations are engaged and consulted.[13] When Indigenous peoples express dissent against these regulatory decisions, a common strategy of containment exercised with increasing frequency is the injunction.[14] In plain terms, an injunction is a legal tool that restrains someone from doing something. Indigenous peoples and industry alike use injunctions to intervene in urgent matters. In fact, some of the most important Aboriginal rights cases in Canada have been launched through the exercise of this legal action, for example, in *Haida Nation v. British Columbia.*[15]

Secwepemc leader Art Manuel called injunctions a "legal billy club" because they are designed to move rightful title holders off their land through force.[16] In terms of the Unist'ot'en injunction, it was the *Delgamuukw v. British Columbia* Supreme Court of Canada decision that affirmed Aboriginal title as an Indigenous interest in the land that is sui generis, distinct from other forms of land title, proprietary, and held communally by the nation.[17] The appellants were Wet'suwet'en and Gitxsan hereditary chiefs, who brought the case to court on behalf of their houses, claiming ownership and jurisdiction over thirty-six thousand miles of their territory governed by seventy-one houses. The very nation that first succeeded in defining Aboriginal title as an underlying proprietary interest was now being removed from these same lands through a low-level lever—the equivalent of an emergency stop cord on a train.

Delgamuukw found Aboriginal title to be "held by Aboriginal nations or polities that are the descendants or successors of the Aboriginal people that were in exclusive occupation of their traditional territories at the time of Crown assertion of sovereignty."[18] The *Delgamuukw* case also raised the bar of Indigenous jurisdiction from a requirement of consultation to consent, as the court stated: "Some cases may even require *the full consent of an aboriginal nation,* particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."[19] Though the burden of proof for Aboriginal title and the cost of bringing a case to court remain substantial barriers, Indigenous peoples' governing authority over their lands opened the door for participation in the resource economy in new ways.[20]

Meanwhile, to get an injunction in Canada, an applicant must simply pass three tests set out in *RJR-MacDonald Inc. v. Canada.*[21] First, the issue must be deemed "serious"; second, the applicant must prove "irreparable harm" is being caused that cannot be remedied with money; and third, the applicant must show that in the "balance of convenience," those requesting injunctive relief are the most disadvantaged. Of course, this third criterion is highly subjective. Time and time again, with few exceptions, the courts appear to have decided that the short-term economic losses of resource companies outweigh the long-term commitment of Indigenous governments to caretake their lands—for example, at Aamjiwnaang, Barriere Lake, and Elsipogtog.[22] Not only has this stopgap mechanism been exercised to remove people from their lands and alienate their jurisdiction, these judgments create precedents defining proper title holders in the process of adjudicating internal First Nation disputes.[23] That is a lot of power for a court action that need not weigh Aboriginal rights, which when treated as a criminal offense can result in jail time and serious fines, even on unceded Indigenous lands.

Who Can Authorize Consent?

From the start of media coverage of the Unist'ot'en blockade against Coastal GasLink, the definition of Wet'suwet'en land as Crown land was everywhere. CBC reported,

"Companies trying to use the area say they're trying to use public roads *to access Crown land,* and some have ferried their crews to nearby worksites by helicopter" (*emphasis added*).[24] But as Tlingit scholar Anne Spice writes, "At Unist'ot'en Camp, the hosts remind visitors, 'this is not Canada, this is not British Columbia: this is unceded Wet'suwet'en territory.'"[25] Here is where injunctions and the concept of Crown land come to a head.

The Wet'suwet'en land defenders named in the Coastal GasLink injunction have made a permanent home on their ancestral lands, constructing traditional pit houses, gardens, and a healing lodge. The camp itself lies on the GPS coordinates of multiple proposed pipelines. Spokesperson for the Unist'ot'en Freda Huson draws attention often to the integral role of the people to protect the life-giving territory from endangerment—this is what she and many others were raised to understand about their role on the land. As the Wet'suwet'en Nation's original affidavit to the B.C. Environmental Assessment Office regarding the pipeline states, "Each House group is an autonomous collective that has jurisdiction over one or more defined geographical areas known as the House territory."[26] Their jurisdiction is not a human-centered form of political authority but rather forms part of a broader governance system with their relations. As the hereditary chiefs state:

> Within the context of Wet'suwet'en society, this ownership is considered to be a responsibility rather than a right. Hereditary Chiefs are entrusted with the stewardship of territories by virtue of the hereditary name they hold, and they are the caretakers of these territories for as long as they hold the name. It is the task of a head Chief to ensure the House territory is managed in a responsible manner, so that the territory will always produce enough game, fish, berries and medicines to support the subsistence, trade, and customary needs of house members. The House is a partnership between the people and the territory, which forms the primary unit of production supporting the subsistence, trade, and cultural needs of the Wet'suwet'en.[27]

Despite this clear notice regarding governance of the region, Crown land designation helped authorize a series of institutional responses to remove the hereditary stewards of the land. Because this was considered public property, police enforcement was triggered by the legal action to move in and supposedly protect the contract British Columbia had made with Coastal GasLink. Therefore, in December 2018, this Wet'suwet'en governing order was set into physical motion to defend the territory from the injunction enforcement. A neighboring clan, the Gidumt'en, also erected a checkpoint to stop the injunction enforcement against their kin. Gidumt'en Clan spokesperson

Molly Wickham was arrested on her land along with fourteen others by the Royal Canadian Mounted Police (RCMP). The RCMP soon arrived at the Unist'ot'en checkpoint, where the people opened the gate to avoid the violence but made clear their opposition. "I will slide this 2 × 4 over under duress for fear of RCMP action," said a Wet'suwet'en man who slid open the gate.[28]

The Unist'ot'en Camp may act to blockade against industrial infrastructure and development, but as the group describes, the camp is not "a blockade"—rather, "it is a permanent, non-violent occupation of Unist'ot'en territory, established to protect our homelands from illegal industrial encroachments and to preserve a space for our community to heal from the violence of colonization."[29] "This is our house group's work. It's a shared vision and purpose," Unist'ot'en house group member Dr. Karla Tait stated.[30] It is so much deeper than the claim of a hat.

While the injunctions temporarily removed people from the pipeline construction, the work of upholding Anuk Nu'at'en continues. The socialization of Crown lands invests Canadians in a promise of growing prosperity and secure employment that relies on the alienation of Indigenous lands through privatization. The alienation of land, though, also socializes the risk of Indigenous rights to the resource economy. It deepens racial antagonisms between Indigenous peoples and those precariously employed or with ownership stakes in its boom and bust cycles. But the most insecure of all is the political mindset that refuses to consider the horizon ahead—the conditions for life to thrive on the territory—and the protectors with the knowledge to care for it. What the Unist'ot'en struggle can teach us all about the twinned problem of injunction-alienation is that, for Canadians, if Crown land is ours, it is also ours to give back.

NOTES

1. By contrast, public lands in the United States account for only 40 percent of the country. U.S. Census Bureau, *Statistical Abstract of the United States, 1991,* 11th ed. (Washington, D.C.: 1991), 201. But the distribution of these lands is heavily skewed toward twelve western states where 92 percent of federally owned acres can be found. "Federal Land Ownership by State," Ballotpedia, accessed February 28, 2019, https://ballotpedia.org/Federal_land_ownership_by_state.
2. Province of British Columbia, Ministry of Forests, Lands, and Natural Resource Operations, *Crown Land: Indicators and Statistics Report* (Victoria, B.C.: 2011).
3. DIAND, *Resolving Aboriginal Claims: A Practical Guide to Canadian Experiences* (Ottawa: Department of Indian Affairs and Northern Development, 2003).
4. Lee Maracle, "Prequel—Colonialism 101: Dear Harper, A Primer on Canadian Colonialism" (panel at Indigenous Sovereignty Week, Toronto, Ontario, October 25, 2009).
5. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2000); Kent McNeil, "Exclusive Occupation and Joint Aboriginal Title," *U.B.C. Law Review* 48 (2015): 821; and Ian Johnson, *Pre-Confederation Crown Responsibilities: A Preliminary Historical Overview,* Treaties and Historical Research Centre (Ottawa: Indian and Northern Affairs Canada, 1984).

6. J. S. Milloy, "The Early Indian Acts: Development Strategies and Constitutional Change," in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J. R. Miller (Toronto: University of Toronto Press, 1991).
7. Brian Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America," in *Despotic Dominion: Property Rights in British Settler Societies*, ed. John Maclaren, Andrew Buck, and Nancy Wright (Vancouver: UBC Press, 2005); and John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," *Canadian Historical Review* 64 (1983): 519–48.
8. Kent McNeil, "Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1880s," *Journal of the West* 38 (1999): 68.
9. Constitution Act, 1867, 30 & 31 Vict. c 3 (U.K.).
10. Province of British Columbia et al., *Crown Land: Indicators and Statistics Report.*
11. Yellowhead Institute, *Land Back: A Yellowhead Institute Red Paper*, https://redpaper.yellowheadinstitute.org.
12. Chantelle Bellrichard, "Defendants Accuse Coastal GasLink of Trying to 'Subvert Authority' of Wet'suwet'en Hereditary Chiefs," CBC News, February 21, 2019, https://www.cbc.ca/news/indigenous/wet-suwet-en-coastal-gaslink-injunction-court-filings-1.5028237.
13. Arthur Manuel, *Unsettling Canada: A National Wake-Up Call* (Toronto: Between the Lines, 2014).
14. There are two kinds of injunctions: a permanent injunction that is awarded after a trial and an interlocutory injunction that is more immediate and used when people think a trial will take too long. This second type of injunction is the one most often used by companies to restrain Indigenous peoples from blockading or by Indigenous peoples to stop development on their lands.
15. Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511 (Can.).
16. Arthur Manuel, *Reconciliation Manifesto: Recovering the Land, Rebuilding the Economy* (Toronto: Lorimer, 2018).
17. Respectively, Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 190, 115, and 140 (Can.). While in the latter case, the court distinguishes Aboriginal title from fee simple property, the chief justice states that it is "a right to the land itself" and clearly a proprietary interest.
18. Kent McNeil, "Aboriginal Title and Indigenous Governance: Identifying the Holders of Rights and Authority" (All Papers Working Papers Collection, https://digitalcommons.osgoode.yorku.ca/all_papers/264/), 17.
19. Delgamuukw v. British Columbia, para. 168 (emphasis added).
20. Tsilhqot'in Nation v. British Columbia, [2014] 2 S.C.R. 257 (Can.). The court also put limits on this right. In *Delgamuukw*, the Supreme Court found that Aboriginal title is not an absolute right but a legal burden on the Crown's title (para. 145). Therefore, the Crown and Indigenous peoples must take one another's interests in the land into account. Aboriginal title is also constrained by the requirement that the land remain intact to preserve Indigenous use ("inherent limit") (para. 125). It is also constrained by potential infringement by the state, although the state must pass a justification test established in the case law on Aboriginal rights (para. 165). See also *Tsilhqot'in*, where the Supreme Court wrote that the state must show that its infringement of section 35(1) rights is justified by demonstrating that "(1) it complied with its procedural duty to consult with the right holders and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest" (para. 125). See also Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" *Constitutional Forum* 8, no. 2 (1997): 33–39; and Kent McNeil, "The Post-Delgamuukw Nature and Content of Aboriginal Title," *Centre for First Nations Governance* (May 2000).
21. RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 (Can.).
22. Canadian National Railway Co. v. Plain, [2012] ONSC 7356 (Can.); Wawatie c. PF Résolu Canada Inc., [2014] QCCA 1840 (Can.); and SWN Resources Canada, Inc. and Louis Jerome et al, Nov. 22, 2013, Madame Justice J. L. Clendening, F-C-279-13 (Can.).
23. For example, Campbell v. British Columbia (Minister of Forests and Range), [2011] BCSC 448 (Can.); and Moulton Contracting Ltd. v. British Columbia, Appeal Decision, [2015] BCCA 8 (Can.).
24. Betsy Trumpener, "RCMP Planning Mass Arrests at Pipeline Protest Camp, Northern B.C. Chiefs Fear," *CBC News*, August 28, 2015.
25. Anne Spice, "Fighting Invasive Infrastructures: Indigenous Relations against Pipelines," *Environment and Society: Advances in Research* 9 (2018): 52.
26. *Wetsuweten Title and Rights and Coastal GasLink* (Office of the Wet'suwet'en, 2014), 2.
27. *Wetsuweten Title and Rights and Coastal GasLink*, 2.
28. Linda Solomon Wood, "Force Is Not Consent," *National Observer*, January 14, 2020.
29. Unist'ot'en, "TransCanada Litigation Threatens Unist'ot'en Territory," November 13, 2018, https://unistoten.camp/press-release-transcanada-litigation-threatens-unistoten-territory.
30. Unist'ot'en, "TransCanada Litigation Threatens Unist'ot'en Territory."