The Person and the Mirror: On the Colonial Force of Corporate Law

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Abstract

Buried within the everyday deployment of business vehicles by Indigenous governments as a seemingly neutral way to pursue economic development are also legal notions of corporate personhood and representation. While it is occasionally suggested that corporate law is itself part of the problem of colonialism, the idiomatic notions of "representation," "legal personhood," and "business as neutral" form an opaque curtain that hides colonizing tendencies within the legal structures used by Indigenous peoples. This article explores these colonial tendencies at play in Canadian corporate law, showing how corporate law's deployment of the "legal person" sits at odds with Indigenous juridical orders.

Keywords: Corporate law, indigenous law, colonialism, legal personhood, legal fictions

Résumé

Dissimulées dans le déploiement quotidien de différents modèles d'entreprises par les gouvernements autochtones comme autant de moyens apparemment neutres de poursuivre le développement économique, se trouvent des notions juridiques comme la personnalité morale de l'entreprise et la représentation. Bien qu'il soit parfois suggéré que le droit des sociétés fait lui-même partie du problème du colonialisme, les notions idiomatiques de « représentation », de « personne juridique » et de « neutralité de l'entreprise » forment un rideau opaque qui dissimule les tendances colonisatrices au sein des structures juridiques utilisées par les peuples autochtones. Dans cette voie, cet article explore les tendances coloniales en jeu dans le droit des sociétés canadien en montrant notamment comment le déploiement de la « personne morale » en droit des sociétés est en contradiction avec les ordres juridiques autochtones.

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Mots clés: Droit des sociétés, droit autochtone, colonialisme, personne juridique, fictions juridiques

Orienting Remarks: How Does Colonialism Persist?

In their influential work on Native American economic development, Stephen Cornell and Joseph Kalt have championed a certain model of "separating business from politics" as the way Indigenous governments ought to develop their own institutions.[1] This adage has been well applied in Canada as well, as practically all Indigenous governing bodies in Canada deploy complicated corporate structures and tiers as the mainstay of their economic development strategies. And yet the use of these structures, and their necessary "separation" from governing bodies, has brought challenges for many Indigenous governments' economic guidance precisely because these arrangements are conducted under federal and provincial jurisdiction as private law entities. Legal advisors meet the challenge of balancing separation and control by tethering the non-profit societies and economic development corporations of these governments with ties of representation to the Indigenous peoples themselves. As experienced practitioners put it: "A society can be a corporate mirror image of a First Nation, removing all the legal uncertainties related to a First Nation and providing the flexibility to meet the needs of the community and third parties."[2] Buried within the everyday deployment of business vehicles by First Nations as an arms-length way to pursue economic development are also legal notions of corporate personhood, neutrality and representation, as well as ownership and belonging. Thus, while it has also been helpfully noted that the commercial law that governs the economic development of Indigenous peoples harbours part of the problem of colonialism,[3] the idiomatic notions of "business as neutral" by "legal rights-holders" implicit in Cornell and Kalt's programmatic slogan camouflage the colonial force of corporate law with a facade of "access to capital" that is grounded in the conferral of legal personhood under colonial jurisdiction.

While it has been important to *say* that corporate law must be colonial because it underlies capitalist economic orders, it nevertheless remains as something to be *shown* and *explained*: there is nothing self-evident about the relationship between

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1 See Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today," *American Indian Culture and Research Journal* 22, no. 3 (1998) 187; Stephen Cornell and Joseph Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations* (Cambridge, Mass: Malcolm Wiener Center for Social Policy, John F Kennedy School of Government, Harvard University, 1992); and Stephen Cornell and Joseph Kalt, "American Indian Self-Determination: The Political Economy of a Successful Policy," *Joint Occasional Papers on Native Affairs, Working Paper* 1 (Tucson: Udall Center for Studies in Public Policy, University of Arizona, 2010).

2 Merrill Shepard and Marie Sophie Poulin, *Structuring for the Exemption* (Vancouver: CLEBC, 2002), at 6.1.9.

3 See Douglas Sanderson, "Commercial Law and Indigenous Sovereignty: It's a Nice Idea, but How Do You Build it in Canada," *Canadian Business Law Journal* 53, no. 1 (2012): 92; Shalene Wuttunee Jobin, *Upholding Indigenous Economic Relations: Nehiyawak Narratives* (Vancouver: UBC Press, 2023), chapter 5; David Newhouse, "The Challenges of Aboriginal Economic Development in the Shadow of the Borg," *Journal of Aboriginal Economic Development* 4, no. 1 (2004): 34.

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the "forces of colonialism" and the doctrinal operation of Canadian corporate law. This article begins a critical analysis of the specific ways Indigenous peoples are turned towards the legal structures they use, with an eye for the colonizing bases and obscuring effects of the law governing the use of corporate bodies (both non-profit and for-profit). In what follows, we will examine elements of the way that Indigenous peoples' traditions of procuring livelihoods are transformed, in boundary-crossing moments, into forms inscribed by law so as to be legible to contemporary liberal legal orders. As we will see, this "making legible" of Indigenous people as legal persons obscures the formation of specifically Indigenous legal subjects by mirroring and representing the *sui generis* "Indian" or native, and, in doing so, it forecloses upon possible expressions of Indigenous legal orders.[4] To see how Indigeneity is articulated and used by corporate law, the article begins with a look at two prior moments in the history of legal personality: the role of the Roman *persona* as appropriated into English law's *persona ficta* of the "King's two bodies," and the coalescing power of English legal words of Indigeneity. With these background moments clarified, we look at how Indigenous people are turned towards "legal persons" in response to specific aporias in legislation and caselaw that express the Indigenous and "Indian" bodies as *sui generis*. By critically reading this legislation and caselaw, the article draws out the way Indigenous legal subjects are broadcast and transformed in the mirror of colonial law's legal person while also succumbing to a displacement of their jurisdiction. Considering the colonial forces latent within corporate law, the article concludes with some cautious observations regarding the possibilities for mitigating the extent of certain neo-colonial consequences.

At every point of this analysis, however, the reader may notice that the scope of the analysis moves from very general discussions of "Indigenous peoples" to a consideration of the specific engagements with legal personhood of specific nations in caselaw and may wonder whether the analysis holds for other peoples' situations —from the Métis's use of non-profit societies, to the Assembly of First Nations' governance, to the development corporations of the Inuit (such as the Makivvik Corporation or the Nunavut Development Corporation). Part of the activity of settler colonialism in Canada has been to turn Indigenous people singularly towards "economic development" through "development corporations," and thus the analysis herein demands, to an extent, to be taken to these communities such that Indigenous people can ascertain the degrees of law's colonial force or of other paths they may be taking to find relational legal persons.

I. Persona, Legal Body, and Name-Calling

1. The Persona of the Legal Body

The practice of differentiating entities by legal personhood has its origins in Roman law, where *persona* indicated anyone who stood in relation to law. While citizens

[4] See Val Napoleon, "Thinking about Indigenous Legal Orders," in *Dialogues on Human Rights and Legal Pluralism* ed. René Provost and Colleen Sheppard (Dordrecht: Springer Netherlands, 2013), 229.

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and non-citizens enjoyed status with respect to rights and duties, foreigners (*peregrines*) did not; and yet all were *persona* under Roman law.[5] The word carried both the dramatic and straightforward senses of how persons appeared: the *persona* was the "mask" worn by an actor as well as the character played, being the nominative form of *personare* ("to resound," "to chant loudly," or "to sound through").[6] A person's "place" in Roman society did not add legal status, as the slave, foreigner, and head of household were all "persons," whether or not capable of acting upon rights or duties.[7] However, the common law's absorption of the "person" has rendered it as "a being or entity that is capable of acquiring and exercising legal rights and *becoming subject* to legal obligations."[8] This (legal) person still bears the sense of *presenting* a public face, the mask one wears *as* that person, in both public and private spheres of jurisdiction. Similarly, to become subject to law (i.e., to jurisdiction) requires being *present* to (standing in relation to) the sovereign body, as sovereign power draws out the difference between the rights-bearing person present to law and the not-present, incapacitated subject. Many theorists have identified the potently ambiguous thresholds implicit in the differentiation of subjects from the "person," "legal person" or "legal subject" as the way the sovereign exception appears: the personhood of any "body" in law broadcasts the sovereign sanction it enjoys *as that kind* of rights-bearing person.[9]

Ernst Kantorowicz's study of the *persona ficta* of the body politic in medieval juristic accounts of kingship revealed the doubled aspect of Crown sovereignty in western law, portraying a sovereign body distinct from natural bodies with an exceptional capacity to define *legal* bodies.[10]

> For the King has in him two Bodies, viz., a Body natural, and a Body politic. His Body natural… is a Body mortal, subject to all Infirmities that come by Nature or Accident, … But his Body politic is a Body that cannot be seen or handled, consisting of Policy and Government, … and for this Cause, what the King does in his Body politic, cannot be invalidated or frustrated by any Disability in his natural Body.[11]

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5 Barry Nicholas, *An Introduction to Roman Law* (Oxford: Oxford University Press, 2008), 61.

6 Walter W. Skeat, *An Etymological Dictionary of the English Language* (Oxford: Clarendon Press, 1882), 385; *Compact Oxford English dictionary*, 2nd ed. (Oxford: Clarendon Press, 1991), sub verbo "person." I am indebted to Eric Reiter for drawing attention to the sense of "resound" borne by *personare*.

7 Fritz Schulz, *Principles of Roman Law* (Oxford: Clarendon Press, 1936), 118–21.

8 Kevin Patrick McGuinness, *Canadian Business Corporations Law*, 3d ed., vol. 1 (Toronto: LexisNexis Canada, 2017), 420. See also William Blackstone, *Blackstone's Commentaries on the Laws of England, Book I: Of the Rights of Persons*, ed. David Lemmings (Oxford: Oxford University Press, 2016), chap. 1.

9 See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 15–29, 181–82; Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1985), 274–76; Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018), chap. 4.

10 Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1997). See also Otto Gierke, *Political Theories of the Middle Ages*, trans. F. W. Maitland (Boston: Beacon Press, 1958), 69ff; F. W. Maitland, *State, Trust and Corporation* (Cambridge: Cambridge University Press, 2003), 32–40.

11 Kantorowicz, 7.

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The body politic is the artificial one (that persists), united with the natural body (that passes) in the singular *persona ficta* of the King (the legal fiction of a primordial mask). The *corporeal* legal person becomes literally both an embodiment and representation as the focal body presenting (all) those within it (forming the public sphere). At law, the King's body politic had *more reality* and carried *more substance* than the natural body of, say, Richard or Henry, whose natural bodies pass away ("the Queen is dead, long live the King").[12] Likewise, the Crown and corporation today are no less real for being artificial rather than natural bodies.[13] The "fiction" of the corporation as a legal person is not to be thought of as "merely" fictional: it is an artifice denoting a personhood independent of and irreducible to its members, owners, or managers. Building on Kantorowicz's work, others have elucidated how the corporation has become the sanctioned extension of the sovereign, and in this sense exhibits the sovereign exception.[14] The legal person thus becomes a complex and abstract embodiment that grounds the possibility of presenting and representing different beings (natural or otherwise), and which happens because the sovereign has sanctioned its existence.[15] Because of this extension of the sovereign *into* the beings it sanctions, Barkan notes that "[c]orporations were given exceptional powers to manage, direct, and channel the conduct of the corporate body, its individual members, and the lives of whole populations, … [amounting to] a fundamental reorganization of power between the sovereign and the corporation."[16]

In a similarly important intervention, Welters argues that the core aspects of the corporation's legal personality are not reducible to limited liability or separating ownership from management but, rather, belong to prior attributes of legal bodies: state sanction, perpetual succession, and name.[17] These three principal elements underlie the difference between the corporation's status as a separate legal person and those other entities or relationships that do not enjoy the same status, and they

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12 Mark M. Hager, "Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory," *University of Pittsburgh Law Review* 50, no. 2 (1988): 575.

13 Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991), 3; McGuinness, *supra* note 8, vol. 1, 420–21.

14 See David Williams, "Genealogies of the Modern Crown," in *The Shapeshifting Crown: Locating the State in Postcolonial New Zealand, Australia, Canada and the UK*, ed. Cris Shore and David V. Williams (Cambridge: Cambridge University Press, 2019), 31 at 47–50; Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism* (Minneapolis: University of Minnesota Press, 2013), chap. 1; Henry Turner, *The Corporate Commonwealth: Pluralism and Political Fictions in England, 1516–1651* (Chicago: University of Chicago Press, 2016), 20–22; David Graeber and Marshall Sahlins, *On Kings* (Chicago: HAU Books, 2017), 69.

15 I note this notwithstanding the occasional and varied debates over the primacy of concession theory, pluralist accounts, or non-real *persona ficta.* See Katsuhito Iwai, "Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance," *American Journal of Comparative*, 47, no. 4 (1999): 583–632; Bernhard Jussen, "The King's Two Bodies Today," *Representations* 106, no. 1 (2009): 102; John Dewey, "The Historic Background of Corporate Legal Personality," *Yale Law Journal* 35, no. 6 (1926): 655; Margaret M. Blair, "Corporate Personhood and the Corporate Persona," *University of Illinois Law Review* 2013, no. 3 (2013): 785.

16 Barkan, *supra* note 14 at 28.

17 Michael Welters, "Towards a Singular Concept of Legal Personality," *Canadian Bar Review* 92 (2013): 417.

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make sense of the sanctioning of a rights-bearing subject under law's jurisdiction.[18] Corporate personality is thus only legally cognizable under the legislative regime of default rights, duties, and identities that dictate the conditions of its existence as a subject of that jurisdiction. To grasp what is at stake for the law's subjection of Indigenous people, however, we need to see how legal subjects and legal persons are mobilized to denote and represent Indigenous governments in Canadian society at large, which will involve noticing the specific way that Indigeneity is captured in law.

2. *What's in a Name?*

Even when Indigeneity is capaciously articulated in English, the historical force and presence of the vocabularies fashioned to refer to Indigenous peoples continues to be wrought through colonial law. Notice that despite the well-understood pejorative weight of the word "Indian," scholars, lawyers, judges, and legislators see fit to qualify the words "Indian" and "Indian band" as "just legal terms."[19] Even if we work to clarify the usage of expressions such as "First Nation," "Aboriginal people," and "Indigenous people" in terms of who they include or how they refer to people, English speakers are left with the phrases' one-sidedness, amalgamating and erasing different peoples and their territories, languages, histories, and laws, and absorbing their disparate experiences of colonialism into one.[20] Moreover, the legal status of these terms can distract inquiries into colonial law precisely by amalgamating and erasing their non-legal usage. These words circulate consistently only because they denote the legal subjects of colonization and genocide during European imperialism, and they operate to place them in relation to that colonial system—at once amalgam subjects and subalterns identified from the perspective of the colonizer.[21]

While the terms "Indian band" and "First Nation" have had some legislative and judicial interpretation, it is less clear how "Aboriginal," "Indigenous," "First Peoples," or other historically fusing terms, such as Inuit or Métis, are to be interpreted to better reveal their colonial provenance. There is no question that the *Indian Act* has been an active force in maintaining and extending colonization and dispossession, but the intransigence of the Act and its terminology in avoiding repeal and mediating the colonial relationship between Indigenous peoples, "Indians," and territory provides clues about what colonial law requires of these

[18] For an interesting discussion of how the "rights and rights holder" distinction may not be helpful, see Dewey, *supra* note 15; Karen Drake, "A Right without a Rights-Holder Is Hollow," *Osgoode Hall Law Journal* 57 (2020): iii.

[19] The historical weight and pejorative dimensions of "Indian status" as a simultaneously racializing and disposing force are exceedingly well articulated in Bhandar, *supra* note 9, chap. 4.

[20] For a brilliant analysis of the erasure of Cree relations in English, see Tracey Lindberg, "Not My Sister: What White Women Can Learn About Sisterhood from Indigenous Women," *Canadian Journal of Women and the Law* 16 (2005): 342.

[21] On How "the Indigenous" is Made Other and Thereby "Subaltern," see Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossbert (London: Macmillan, 1998), 271–313.

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words: the "Indian band" and "Aboriginal peoples" have remained *sui generis* bodies with *sui generis* rights.[22] This identification of uniqueness, while simultaneously placing and holding Indigenous peoples in relation to colonial law, nevertheless projects something Other, and it will be in the way that corporate law grapples with Indigenous otherness that we can witness its colonial force. At the same time, we may wonder whether these *sui generis* legal categories could be *temporary placeholders* for the work of reconciliation: might the words characterizing the "Indian," "Indian band," "First Nation," "Aboriginal" and "Indigenous" occupy places of unresolved matters between founding nations?[23]

II. Being Turned to Law's Persons

1. Non-Persons and Ambiguous Subjects

While Indigenous people have been legally designated as "Indians" and "Indian bands" in colonial legislation since the 1840s, the first consolidated version of the *Indian Act* in 1876 created the system of registration and re-naming of Indigenous peoples and individuals. This scheme inaugurated the organized differentiation of Indigenous peoples as "Indians" for the purposes of constitutional jurisdiction in subsection 91(24), and those who can be "registered" as an "Indian" have "Indian status" or can be a member of a "band" under the *Indian Act*.[24] Subsection 2(1) defines "Indian" as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian." This legislative identification of "the Indian band" was intentionally designed to exclude the Métis and the Inuit,[25] and to ensure that the power to identify an "Indian band" rested with the state. One might note the capitalization of "Indian" in a way similar to "Canadian" or "French," but also dissimilar from the designation of an ethnicity or racial category. A "band" by contrast, is not capitalized, and is not defined anywhere other than the *Indian Act*.[26] The definition in subsection 2(1) illuminates the role the sovereign has in sanctioning persons and bodies:

> "band" means a body of Indians
>
> (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

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22 See John Borrows and Leonard Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" *Alberta Law Review* 36, no. 1 (1997): 9.

23 See Douglas Sanderson, "Overlapping Consensus, Legislative Reform and the Indian Act," *Queen's Law Journal* 39, no. 2 (2013): 511.

24 *Indian Act*, RSC 1985, s 2; *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 91(24). See also Shin Imai, *Annotated Aboriginal Law* (Toronto: Carswell, 2018), 92, 96–104.

25 The *Indian Act* has not and does not apply to Inuit or Métis people despite case law that includes both the Inuit and Métis within subsection 91(24): *Reference Re Eskimos*, [1939] SCR 104, and *Daniels v Canada*, [2016] 1 SCR 99.

26 As noted below, Huddart JA's comments on the specific "personality" of a "band" suggest that its legal existence is not only its preponderant meaning, but its only one: the word "band" itself is "an important legal term" that "has no ordinary meaning other than the *Indian Act* meaning." See *Gitga'at Development Corp v Hill*, 2007 BCCA 158 at paras 17–18 (hereinafter "*GDC* (BCCA)").

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(b) for whose use and benefit in common, moneys are held by Her Majesty, or
(c) declared by the Governor in Council to be a band for the purposes of this Act;[27]

The "band" is only ever referred to in relation to the Crown's power to set aside land, hold ("Indian") money and declare a "body of Indians" to be a "band." Indigenous people are not designated in relation to a nation, tribe, or clan, or in any terms that might be specific to an Indigenous people (such as Anishinaabe or Nêhiyawak or Stó:lō), further suggesting that law's colonial dominion extends through the curated articulation of these alternative words.

"Indian bands" are not legal persons at law in Canada, and a "'First Nation' is not an entity known to the law."[28] "Indian bands" are not corporations,[29] nor are they unincorporated associations, as they are not created with the consent of their members but by statute.[30] These legal facts should not be surprising, if only because Canada's colonial law has been constituted by placing and recognizing "the Indigenous" as the outsider, such that, strictly speaking, Indigenous peoples as discrete groups are legal subjects without being legal persons.[31] Terms like "Indian band," as *a body of Indians*, and "First Nation," as a kind of polity of "prior inhabitants," elude easy categorization precisely because they are identified as *sui generis* legal terms: they become "unique," restricted to meanings flowing from the *Indian Act* or even as entities "not known to law."

The legal personhood and legal capacity flowing from the definition of a "band" remain unspecified and unclear, and we must be careful to not conflate the two even though the "band" itself is considered *sui generis*.[32] Despite ambiguous legal personality, it has been variably held that "Indian bands" can sue and be sued[33] and exist separately from their members[34] but cannot hold land in fee simple.[35] It also remains unclear whether "Indian bands" can hold shares or otherwise be "persons" or "owners" under provincial law.[36] Moreover, while the "Indian band" is very clearly a "body" under the *Indian Act*, it has not been judicially interpreted as such with any consistency that would assist anyone in understanding how a band

27 *Indian Act*, *supra* note 24, s 2.
28 *Lac des Mille Lacs First Nation v Canada (AG),* [2002] 24 CPC (5th) 127 at para 6.
29 *Afton Band of Indians et al v Nova Scotia (AG)*, [1978] 85 DLR (4th) 454 at 460. Conversely, corporations cannot be "Indians": *Four B Manufacturing Ltd v United Garment Workers*, [1980] 1 SCR 1031 at 1047.
30 *Keewatin Tribal Council Inc v Thompson (City)*, [1989] 5 WWR 202 at 215.
31 In *Spookw v Gitxsan Treaty Society*, 2017 BCCA 16 at para 64 (hereinafter "*Spookw* (BCCA)"), Harris JA emblematically articulates this "outside" existence: "The way in which the Gitxsan nation organizes itself to engage in treaty negotiation is a matter of internal self-government."
32 For example, children are legal persons but without legal capacity.
33 *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (AG)*, 2012 BCCA 193 at para 75.
34 *Kelly v Canada (AG)*, 2013 ONSC 1220 at para 112; *Commandant v Wahta Mohawks,* [2006] OTC 3; *Willson v BC (AG)*, 2007 BCSC 1324.
35 See *Land Titles Act*, RSBC 1996, c 250, s 1; *Interpretation Act,* RSBC 1996, c 238, s 29; *Land Titles Act*, RSO 1990, c L-5, s 1.
36 Compare the *Business Corporations Act,* SBC 2002, c 56, subs 1(1) and the *Interpretation Act,* RSBC 1996, c 238, s 29. For case law considering legal capacity, see *Telecom Leasing Canada (TLC) Ltd v Enoch Indian Band of Stony Plain Indian Reserves No 135*, [1993] 1 WWR 373 (ABQB); *Martin v BC*, [1986] 3 BCLR (2d) 60.

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exists as a legal subject independent of its specific legislative regime.[37] An "Indian band" can carry out various enumerated activities under the *Indian Act*, implying legal capacity and at least a presumption of some kind of legal presence.[38] However, while the "Indian band" has legal capacity in many ways, it does not have legal personality for all purposes or circumstances, nor does its "band council" have complete authority to act on its behalf in all cases.[39] It is precisely because of this tenuous legal status that "Indian bands" and Indigenous governments use corporate entities (both non-profit and for-profit) to act as legally recognized and authorized persons, often being the only way to give legal effect to activities in Canadian society, from holding property and carrying out transactions to simply *representing* a nation in its dealings under Canadian law.

2. Representation through Legal Entities?

As noted, part of the ambiguity with the English words designating "Indigenous people" stems from the imperial project of racializing inhabitants in specific colonized territories.[40] The recourse to corporate structures, as legal persons, is also a consequence of the colonially rendered ambiguity of the legal personhood of Indigenous people in Canada. Practically speaking, all Indigenous governments in Canada, including those of Inuit and Métis peoples, must use corporate bodies to carry out their economic plans, and in doing so they are not trying to emulate the public–private distinction. The colonial legal paradigm requires the distance of the "arms-length" representation of a nation's pursuit of the conditions of its livelihoods, summed up in Cornell and Kalt's recommendation to "separate business from politics." This separation aims to produce a kind of neutrality of representation in the non-profit societies and corporations that are deployed by Indigenous governments. While their use is thought to be *neutral*, the law governing legal structures in Canada is not able to grasp its own limits in these moments when Indigenous people become subjected to the jurisdiction of Canadian law, thus hiding the force of settler colonialism through the use of these corporate entities. That is to say, the moment that Indigenous governments create a corporate entity under federal or provincial law in Canada, they have become subjected to the legislation and jurisdiction by which those entities have been sanctioned. The sovereign sanction to create the corporate body is, in this sense, a far-reaching

[37] See Newbury JA's discussion in *British Columbia v New Westminster Indian Band No 566*, 2022 BCCA 368 at paras 20–32 (hereinafter ("*NWIB 566*").

[38] Though not exhaustive, various legal capacities seem implied under the *Indian Act*, *supra* note 24: (i) to enter agreements with provincial and federal governments (para 90(1)(b)); (ii) to make, pass, and enforce various kinds of bylaws (subs 81(1)); and (iii) to enter into various kinds of agreements consistent with its powers (subs 81(1)), which would extend to appointing officials (para 83(1)(c)), owning buildings (para 81(1)(h)), borrowing and dealing with funds.

[39] *Tsimshian Tribal Council v BC Treaty Commission et al*, 2005 BCSC 860; *Gitxaala National Council v Gitxaala Treaty Society*, 2007 BCSC 1845. On whether an "Indian band" can sue or be sued in its "own name": *Wewayakum Indian Band v Wewayakai Indian Band*, [1991] 3 FC 420 (TD); or whether a band is representative of an Indigenous people: *Martin v BC*, *supra* note 36.

[40] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" *Journal of Genocide Research* 8, no. 4 (2006): 387 at 388.

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colonial act insofar as it excludes the application and relevancy of Indigenous juridical orders.

One of the most challenging concerns of Indigenous governments is the potential for losing control over their economies precisely because associations are operated "at arms-length" by different legal persons under private law. The nexus of control and access to various rights and entitlements that funnel any participation in the life of their territories is not anything leaders wish to place in hands that are "arms-length," which is why lawyers seek to create just the right balance of ownership and control over organizational structures used to pursue "economic development."[41] In turning to these structures, however, Indigenous people are confronted with the requirement of submitting to the jurisdiction in which the corporate law operates, as their own legal traditions are not seen to provide any way for Indigenous "entities" to exist. Thus Cornell and Kalt's paradigmatic way for Indigenous governments to approach "economic development" mobilizes lawyers to use the attributes of legal structures to create this separation.[42] While their program was conceived to mimic forms of statecraft, encouraging the emergence of specialized bureaucracies and nascent state institutions, their numerous reports and consultations on "Aboriginal economic development" in North America have been parlayed into a notional approach focused on liability, accountability, and the control of Indigenous people.[43] Because of this worry about separation, control, and representation, Shepard and Poulin have described the conundrum confronting Indigenous governments that need to be legally cognizable by Canadian law: "A society can be a corporate mirror image of a First Nation, removing all the legal uncertainties related to a First Nation and providing the flexibility to meet the needs of the community and third parties."[44] If an Indigenous people "chooses to be represented" by an entity "inside" colonial law, it must be a *persona* visible to that law. However, as we will see in *Spookw v Gitxsan Treaty Society*,[45] the non-profit society that mirrors an Indigenous people does so only in relation to the dual structure of "Indigenous government" and "Indian band" that positions the Indigenous people "outside" the representative operation of law, akin to Marx's identification of the role of representation within the political structure of the state: "They cannot represent themselves, they must be represented."[46]

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41 Michael Hibbard and Robert Adkins, "Culture and Economy: The Cruel Choice Revisited," in *Reclaiming Indigenous Planning*, ed. Ryan Walker, David Natcher, and Ted Jojola (Montréal and Kingston: McGill-Queen's University Press, 2013).

42 See Canada, *Report of the Royal Commission on Aboriginal Peoples: Volume 5—Renewal: A Twenty-Year Commitment* (Ottawa: Canada Communication Group, 1996), 74.

43 See BC Assembly of First Nations, *Research and Analysis Findings of Canada's First Nations Governance Initiative* (Vancouver: Assembly of First Nations, 2002); Stephen Cornell, Miriam Jorgensen, and Joseph Kalt, *The First Nations Governance Act: Implications of Research Findings from the United States and Canada, A Report to the Office of the British Columbia Regional Vice-Chief Assembly of First Nations* (2002).

44 Shepard and Poulin, *supra* note 2 at 6.1.9.

45 *Spookw v Gitxsan Treaty Society*, 2011 BCSC 1001 (hereinafter "*Spookw* (BCSC)"), and *Spookw* (BCCA), *supra* note 31.

46 Karl Marx, *Marx's Eighteenth Brumaire: (Post)modern Interpretations* (London: Pluto Press, 2002), 101.

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Despite the ongoing Aboriginal title litigation of the 1980s and 1990s that resulted in *Delgamuukw v the Queen*,[47] the Gitxsan sought to assert and negotiate their rights and title through the British Columbia Treaty Process ("BCTP"). The Gitxsan experienced the colonial force of corporate law's jurisdiction-relieving personification when they incorporated the Gitxsan Treaty Society ("GTS"), a requirement for any Indigenous peoples entering the BCTP for the purposes of negotiating with Canada, holding funding for the Gitxsan, and representing the Gitxsan people. While it may be more efficient to have a single body representing the various voices comprising the Gitxsan, its hereditary government, and its "Indian bands," the requirement of a representative body aims to capture this dual governance feature of settler-colonial law in the mirror of law's person. The Gitxsan juridical order is manifest through a hereditary governance structure of some sixty *Wilps* (Houses), *Pdeeks* (Clans), and communities, and which simultaneously consists of six *Indian Act* bands.[48] The hereditary system of governance and elected band governments work in tandem by force of necessity, with the former generally understood as the seat of political authority and the latter as local authorities working within Canadian federalism. The governing body of the Gitxsan is the *Simgiigyet*, which holds and exercises the Gitxsan's Aboriginal rights and title and is composed of the hereditary chiefs of the Wilps along matrilineal lines. In 2008, five hereditary chiefs (along with four of six "Indian" bands—the *Gitanmaax*, *Sik-e-Dakh, Gitwangak*, and *Kispiox*—and the Gitxsan Local Services Society) alleged that the GTS did not have a proper mandate from the Gitxsan people according to its own laws, and that it had not been acting in their interests in the BCTP (while assuming debt of over $21 million through BCTP support loan agreements).[49] The hereditary chiefs were not members of the GTS at any time, as Gitxsan law prohibited them from becoming subjects and ordinary voting members of a society in a way that would render their own laws as mere interests within it and under provincial law: their responsibility as members of the Simgiigyet was to uphold Gitxsan laws while also trying to preserve the Aboriginal rights and title recognized under Canadian law. The hereditary chiefs thus applied to the court for an order to wind up the GTS. However, because they were not members and were unwilling to exercise any rights under provincial law to become members of or participate in the GTS, they had to acquire standing as "proper persons" to apply for the order. The chiefs thus brought an application under section 71 of the *Society Act* to be classified as "proper persons" for the purpose of winding up the GTS.[50] Both the chambers court and the British

[47] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.

[48] There are several excellent accounts of Gitxsan governance and their legal orders. See Tyler McCreary, "Historicizing the Encounter between State, Corporate, and Indigenous Authorities on Gitxsan Lands," *Windsor Yearbook of Access to Justice* 33, no. 3 (2016): 163; Patricia Dawn Mills, *For Future Generations: Reconciling Gitx san and Canadian Law* (Saskatoon: Purich, 2008); Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Ph.D. Dissertation, University of Victoria, 2009).

[49] *Spookw* (BCSC), *supra* note 45 at paras 61–67, 81–83.

[50] *Ibid*; *Society Act*, RSBC 1996, c 433, s 71.

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Columbia Court of Appeal dismissed the application on the grounds that (i) the hereditary chiefs could have and should have exercised their option to become members of the GTS, (ii) the GTS did not have the power to bind the Gitxsan, and (iii) it was inappropriate for courts to get involved in the internal governance of the Gitxsan.

The key finding made by the chambers judge in British Columbia Supreme Court was that membership in the GTS "remained open" because the hereditary chiefs continued to possess the opportunity to become members of the GTS and to advance their concerns from within, but instead they "chose to continue to complain from outside."[51] This finding of fact reveals three ways in which the Gitxsan exist in relation to Canadian colonial law: through their traditional system of hereditary governance, the "Indian band" system, and the provincially incorporated society. The hereditary chiefs' emphasis on Gitxsan law was acknowledged both in chambers and on appeal, with Harris JA noting that "extensive consultation" had been required during a previous restructuring of GTS.[52] Here, the reality of Gitxsan law is gleaned by working back from what is represented, or unrepresented, in the mirroring of the GTS. This curious fact present in the mirror, that "it remained open" for the chiefs to become members of and participate in the GTS, is what leads the court to state that "the way in which the Gitxsan nation organizes itself to engage in treaty negotiation is a matter of internal self-government."[53] Note that the court comes to this because of the mediating effect of the *sui generis* body of the "Indian band." "The judge's analysis of the Bands as being organizational manifestations of the relationship between government and the Gitxsan people is accurate, reflects the fact that the Bands do not form part of the traditional government of the Gitxsan nation, and in my view, was properly taken into account in denying them standing."[54]

The GTS, as the *internal* body of colonial law, can only mirror a set of historical relationships in a way that is consistent with legal personality under colonial law. Indeed, the court specifies the character of this legal person in terms of its role: "The Treaty Process, established by parallel provincial and federal legislation, created an arm's-length entity to assess a First Nation entity's negotiating mandate and to allocate negotiation support funding."[55] This rather stark pronouncement about the relationship of the Gitxsan hereditary chiefs to a treaty society they originally "supported" suggests something other than the certainty that a "separation of business from politics" or "pure representation of interests" would seem to promise—as the political question of Gitxsan title was, at that time, by no means merely "external" to provincial law.[56]

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51 *Gitxsan Treaty Society*, 2012 BCSC 452 at para 41; *Gitxsan Treaty Society*, 2013 BCSC 974.
52 *Spookw* (BCCA), *supra* note 31 at para 51.
53 *Ibid* at para 64.
54 *Ibid.*
55 *Ibid* at para 71.
56 Andrea Woo and Wendy Stueck, "As Evictions Loom, Even a Landmark Court Ruling Can't Bring Certainty on Gitxsan Land," *The Globe and Mail,* 1 August 2014, https://www.theglobeandmail.com/news/british-columbia/on-gitxsan-land-even-a-landmark-court-ruling-cant-bring-certainty/article19897595/.

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3. Separating Business from Politics?

The conundrum is much the same for Indigenous governments using for-profit corporate bodies to pursue "economic development," which is their only option if Indigenous juridical orders remain invisible in Canadian society while legislators and judges do not perceive any overlapping jurisdiction.[57] Cornell and Kalt's separation thesis did not originally specify "legal personhood" as part of the solution, but simply that government institutions, private businesses, and ruling bodies needed to be "separate." Even as the *sui generis* nature of the "Indian bands" as quasi-legal persons signals a further variety of bodies comprising "Indigenous Canada" (i.e. particular First Nations, Aboriginal peoples, Métis, Inuit, their tribal councils and variously discrete kinship groups and relations), these are not "legal persons" that are legally authorized to run businesses.[58] This precarious mode of being a legal subject has driven the turn to complicated corporate structures as the *only* way to create any kind of groundwork for their discrete economies. What is lost in this turn is the displacement of Indigenous jurisdiction over the very fabric of provisioning their livelihoods.

The case of *Gitga'at Development Corporation v Hill* highlights the ambiguities of identity and control in relation to an Indigenous people's government and corporate structures. The Gitga'at have lived along the north coast of central western British Columbia since pre-colonial times. They have governed themselves through a hereditary order of three clans (the *Gispudwada*, *Lx Skeek*, and *Ganhada*), each with its own *simoogit* (hereditary chief). Of these, the Gispudwada is the "highest ranking tribe" and its *simoogit* is the *Wahmoodmx* (the head of all its tribes).[59] The Hartley Bay Band ("HBB") is an Indian band, and it closely resembles the Gitga'at nation, though not identical in its membership because the band and its membership register were constituted under the *Indian Act*. The members of HBB's council are elected pursuant to custom election procedures authorized under ss 2(1) and 74 of the *Indian Act*, and they are not the same individuals as the hereditary chiefs. To engage in "economic development," the Gitga'at Development Corporation ("GDC") was incorporated in British Columbia in 2001, with all shares of the corporation held in trust by the hereditary chiefs for the HBB. Two of the share-holding hereditary chiefs subsequently died in the early 2000s, and the surviving hereditary chiefs transferred the shares held by the deceased to two other individuals. A dispute arose between the hereditary chiefs of the Gitga'at nation and a newly elected HBB band council over the transmission of those shares. The court was asked whether the shares previously held in trust by the hereditary chiefs were held for the benefit of the HBB or for the Gitga'at nation more generally, even though the trust deed indicated the HBB as the beneficiary. At trial, Macaulay J said that identifying the "proper interests" in the shares required an inquiry into the proper representatives of the Gitga'at nation—the band council or the hereditary

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57 Sanderson, "Overlapping Consensus," *supra* note 23.

58 Pursuant to "Financial Administration By-laws" enacted under s 83 of the *Indian Act*, or "Financial Administration Laws" under s 9 of the *First Nation Fiscal Management Act*, SC 2005, c 9.

59 *Gitga'at Development Corp et al v Hill et al*, 2006 BCSC 686 at paras 10–12 (hereinafter "*GDC* (BCSC)"); and *GDC* (BCCA), *supra* note 26 at paras 2–6.

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chiefs. Unlike the court in *Spookw*, however, Macaulay J grasped this inquiry as necessitating "a consideration of aboriginal governance under both the traditional clan system and the *Indian Act*, as well as of the general application of trust and corporate law in the province."[60] The GDC, the corporate body that might serve to mirror the nation's economic planning, is itself comprised of other legal persons, with shareholders, trustees and beneficiaries reflecting hereditary chiefs, band council members and the nation. What stands at a further remove, however, is the Gitga'at nation (or "the community," as Macaulay J articulates it). Because the trial judge's visibility of the Gitga'at nation was limited to its seemingly representative bodies, the place of Gitga'at law surfaces only as something that authorizes its chiefs, which is perhaps why Macaulay J ordered the matter be remitted to the Gitga'at community for a decision regarding the shares, on the basis that they were the "proper beneficiary."[61] In coming to this decision, the trial judge found that the HBB remained a territorially constrained statutory instantiation of the larger and more significant political entity that the GDC served, and that the Gitga'at nation was in this sense "represented" by both the Hereditary Chiefs and the HBB Council.[62]

The HBB appealed to the British Columbia Court of Appeal on the basis that it was the only proper "legal entity" entitled to deal with economic matters on *or* off the reserve. In a technically careful judgment, Huddart JA stated that the term "band" has no other legal sense than by way of the *Indian Act*, signaling the application of that law.[63] Where a trust agreement identified the "Hartley Bay Band" as the beneficiary, Huddart JA noted that only the *Indian Act* band could be the beneficiary and that the HBB band council had the legal authority to represent the band in respect of HBB's collective right in the shares. While echoing Macaulay J's praise for the relative harmony and effectiveness of its "dual governance model," Huddart JA noted that the *legal* reality of those relations is to be construed in terms of federal and provincial enactments. "The fact that the legal representatives of the Band (the Band Council) should choose, for political harmony, to take direction from hereditary leaders, does not change the nature of the legal authority of the Band Council, nor does it establish that there are two separate entities *recognized in provincial law*."[64]

Huddart JA went beyond stating that the Gitga'at First Nation is "not an entity known to law,"[65] emphasizing that the "only mechanism in Canadian law by which collective property rights may be held and enforced is the Band structure."[66] There is perhaps no more revealing recitation of the relationship between corporate law bodies within provincial jurisdiction and those non-law entities of Indigenous peoples outside it than Huddart JA's indication that the existence of the Gitga'at's juridical authority was "extrinsic" to the question of the proper construction of the

60 *GDC* (BCSC), *ibid* at para 2.
61 *Ibid* at paras 8, 56.
62 *Ibid* at paras 8, 16.
63 *GDC* (BCCA), *supra* note 26 at para 17.
64 *Ibid* at para 20, emphasis added.
65 *Lac des Mille Lacs, supra* note 28 at para 6.
66 *GDC* (BCCA), *supra* note 26 at para 21.

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document and the legal relationships of the parties: "when the Gitga'at set up the GDC to assist them with their economic development, they chose to use a vehicle provided under provincial legislation."[67] And as every student of corporate law knows, the difference between incorporating in one jurisdiction over another is called the "choice of jurisdiction": "By choosing to use existing commercial and legal structures, the Gitga'at chose to be governed by existing commercial laws of general application, to the extent Canadian law permits them to make those choices."[68] This rather breathless pronouncement on the technical requirements of provincial commercial law may distract us from concerns over the place of Gitga'at law, but Huddart JA makes the basis of colonial corporate law very clear: colonial law governs the Gitga'at when (i) the Gitga'at *choose* to enter the frame of the mirror by way of the HBB (the only "legally recognized entity"), and (ii) if and only if that colonial law "permits them." "There is no means by which an undefined community without a legal representative could give 'consent in writing' to the sale of shares, 'sign, execute and deliver' the share certificates or receive dividends…."[69]

The point of using corporate entities is to thus "give effect" to activities inside the jurisdiction of colonial law, to be (i) recognized as a person "representing" political non-person entities, and (ii) entitled to give legal effect to activities recognizable at law. The Indigenous polity must be recognizable and legible as a particular kind of entity *before* being able to engage in this representation exercise. That is, the Indigenous polity that could be "reflected" in the mirror of a non-profit society by way of its "Indian band" ceases to exist in its own way precisely by submitting to the jurisdiction of the province, being consigned to the "outside." This requirement is undeniably colonial. Further, the Indigenous polity that exists alongside its Indian band counterpart will struggle to express itself in commercial relations in Canada insofar as the use of corporate structures demands that legally effective representative relations proceed through a *sui generis* entity. The separation thesis creates an entrance into capitalism that has all but ensured socio-economic segregation and maintaining the discourse of development economics.[70] Here, the person is the mirror, but what is in the mirror is not a reflection of Gitga'at, but the HBB; the colonial legal apparatus thereby presupposes the moment of "choosing" to abandon its own juridical order in favour of the colonial one. That such choices present no choice is perhaps yet another way that corporate law masks its colonial force, but the question remains whether corporate law can

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67 *Ibid* at para 14.
68 *Ibid* at paras 14–15.
69 *Ibid* at para 19.
70 As some observers have noted, the duality of public and private seems to underscore the rhetorical pull of "development economics" touted by policy makers: Martin Mowbray, "Localising Responsibility: The Application of the Harvard Project on American Indian Economic Development to Australia," *Australian Journal of Social Issues* 41, no. 1 (2006): 87; Newhouse, "Aboriginal Economic Development," *supra* note 3 at 111ff. Some scholars have similarly stepped away from the duality in helpful ways, particularly: Douglas Sanderson, "Commercial Law and Indigenous Sovereignty," *supra* note 3; Douglas Sanderson, "The Residue of Imperium: Property and Sovereignty on Indigenous Lands," *University of Toronto Law Journal* 68, no. 3 (2018): 319–57; Shiri Pasternak, "Assimilation and Partition: How Settler Colonialism and Racial Capitalism Co-produce the Borders of Indigenous Economies," *South Atlantic Quarterly* 119, 2 (2020): 301.

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see Indigenous juridical orders in terms other than as anthropological facts that exist beyond its representations.[71]

III. *Sui Generis* Bodies and Ambiguous Personification

Based on the tenuous relationship between Indigenous people and their instantiations under colonial law, one wonders what kind of legal persons Indigenous people are permitted to become when they transact its corporate-commercial frame. The "dual governance structure" does not create any legal relations, and so the *sui generis* "Indian band" stands in front of the "mirror" of a set of corporate relations with questionable personhood. One only ever reaches the Indigenous people if the framing and positioning of the mirror brings them into view, and when it does, it is based on the unique "Indian band" that colonial law has positioned in front of the mirror.

This potent reflecting and erasing of the ambiguous personhood of the "Indian band" is evident in the British Columbia Court of Appeal's recent decision in *British Columbia v New Westminster Indian Band No 566*.[72] The Qayqayt First Nation ("QFN") subsists in the lower mainland of British Columbia, and it has been pursuing a specific claim for unlawfully taken reserve lands. Even though it does not currently have "reserve lands," it is an Indian band under the *Indian Act*, called the New Westminster Indian Band No 566 ("NWIB"). The QFN financed the pursuit of the specific claim by securing certain insurance policies issued by a British insurer to the QFN *as* the NWIB, and the policies have been held and the specific claim pursued in its name. The British Columbia government assessed a tax on the insurance premiums payable by the NWIB pursuant to s 4 of the *Insurance Premium Tax Act* (the "IPTA").[73] The NWIB challenged the assessment on the grounds that it is not a "person" under the IPTA, and, even if it were, it would be exempt under paragraph 87(1)(b) of the *Indian Act* (which exempts an "Indian" or "Indian band" from any taxation on its personal property situated on a reserve). The chambers judge granted the petition on the grounds that the NWIB is not a "person" (and hence not a "taxpayer") within the meaning of the IPTA because Indian bands are *sui generis* in that they are "unique" and unlike other rights-bearers. The chambers judge noted, however, that the s 87 exemption would not be available to the NWIB in the event it was a "person" because it did not have a reserve on which to locate the insurance policies.

The Court of Appeal dismissed the British Columbia government's appeal, but on opposite grounds, holding that the NWIB was a "person" for the purposes of the

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71 While some courts have indicated that the self-defining of Indigenous peoples is germane to issues, such an approach would seem to take the statement of Indigenous governance structure as facts about Indigenous juridical orders, that is, as "facts" to be shown and placed "on the record": see Bradley Bryan, "Legality Against Orality," *Law, Culture & Humanities* 9, no. 2 (2013): 261. Consider in *R v Desautel*, 2021 SCC 17, at paras 31–33, 46, where the court interprets its own jurisprudence as saying that *Aboriginal* rights "incorporate both [Aboriginal and non-Aboriginal] legal perspectives." It remains to be seen whether this "incorporation of perspective" will extend to non-Aboriginal rights and help courts to step across into Indigenous traditions to witness shared jurisdictions.

72 *NWIB 566*, *supra* note 37.

73 *Insurance Premium Tax Act*, RSBC 1996, c 232.

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IPTA, and that the NWIB was ultimately exempt from tax by virtue of paragraph 87(1)(b) despite not presently having its own reserve lands. While the court's ruling on the exemption presents a lucid and agile analysis, it is the court's analysis of the NWIB's "personhood" that is most illuminating for our purposes. Newbury JA notes that the question of the NWIB's personhood begins not from anything intrinsic to "a body of Indians" but from the legislative regime in which these become visible: the IPTA is a "law of general application" under s 88 of the *Indian Act* that applies to the NWIB, such that the real issue is whether the NWIB as an "Indian band" is a "person" within the meaning of "taxpayer" under the IPTA. Newbury JA points out that the sense of the word "person" includes a band's implied "capacity to enter contracts, to sue and be sued" under the *Indian Act*, disagreeing with the chambers judge's view that a band's "'communal interest' in association with the interests of other members… removed a band from the definition of 'juridical person' or 'person'…. It seems to me, in other words, that a band can be both a unique entity *and* a 'person.'"[74] Interestingly, what remains absent from view during the consideration of the NWIB's legal personhood is the QFN and *its* specific claim. While the QFN's reality is noted, its juridical existence is effaced even in consideration of the significance of the Aboriginal rights held by the QFN in its specific claim. At no point does the relationship between the QFN and the NWIB enter into the analysis of the status of the legal person, even if they present the same dual governance as in *Gitga'at*, which is presumably because the place to begin the analysis is from within the legislative realm of colonial law. One may ask how the QFN's juridical order has any bearing, but it is precisely the point: the "Indian band" is the *sui generis* entity that stands to be reflected in corporate law instruments and bodies, and its relationship with or lack of representation of an Indigenous people arises only if it bears on the representing of an "Indian band" in the mirror of legal personhood.

Concluding Reflections: The Mirror and the Other

We can now draw some conclusions about the colonial forces at play "separating business from politics" by summing up the relationship between the corporate mirror, the entity it reflects and represents, and those who stand outside the frame of the mirror but nevertheless in relation to those standing before it. The courts suggest that there are two "jurisdictions," but the spaces through which these legal orders overlap is the tenuous *sui generis* legal subject of bands and legally recognized Indigenous bodies. Indigenous peoples are encouraged to "separate business from politics" by separating themselves in two distinct ways: first, the "Indigenous people" must step into an embodied position to be acknowledged and recognized as legal subjects, as *persona* in that older, Roman sense; second, these *sui generis* legal subjects must separate themselves into another proper legal person that can transact under and within the colonial law's jurisdiction of "business." In this way, when the Gitxsan become legible and cognizable only in relation to the authorities (band councils) that allow for the creation of a non-profit society, the

[74] *NWIB 566*, *supra* note 37 at paras 54–55.

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governing orders of the Gitxsan become doubly alienated into different legal entities that are subject to different jurisdictions. The Gitga'at nation is differentiated from the Hartley Bay Indian band, and then again from the Gitga'at Development Corporation Ltd. The Qayqayt First Nation is presumed to stand in relation with the New Westminster Indian Band No 566, and the latter's entities and transactions are read entirely as matters involving the "general application of provincial law."

The separation thesis achieves a certain kind of neutrality, but by *neutralizing* the very existence of the identity of Indigenous peoples into representable legal interests. The legal person created to give effect to this "separation" is the mirror itself, replete with the image represented within it. The "person" it represents is of course intended to be the "Indigenous" people… but we have seen otherwise. The "Indian band," as that unique legal subject, is that quasi-person determined by forces of colonial history reflected in the mirroring of corporate entities and transactions. The proper legal person that Indigenous peoples seek with the help of their legal counsellors involves stepping into this "legal subject" of the legally identified "Indian band" so as to then become available for reflection in a corporate mirror, which is nothing other than the sanctioned mask of a corporate entity under colonial law. This "stepping into" is really a "stepping across" legal orders that continually strips Indigenous peoples of their juridical orders.

The foregoing critical analysis of corporate law has sought to grasp the ways in which its elemental forces sustain the colonial project of separating and removing Indigenous people from their juridical traditions and territories. It is not to say that these Indigenous juridical orders no longer exist, quite the contrary.[75] Indeed, robust Indigenous juridical orders continue to exist despite the role of settler colonialism in removing and attenuating the Indigenous relationship with their own laws and territories. There are ways to think through and act along with the Indigenous laws at work in territories that may assist us in confronting this colonial force, from a consideration of a possible "radical federalism"[76] that is infused by multi-juridical and legally pluralist spaces,[77] to work from within the colonial law that may mute the effacing effect of corporate law's person (such as with a "conflict of laws" approach).[78] However, in order to move into those spaces in which the

[75] There is a voluminous literature on Indigenous legal traditions: see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance," in *Oxford Handbook of Criminal Law*, ed. Markus D. Dubber and Tatjana Hörnle (Oxford: Oxford University Press, 2014) 225–47. See also the work of the Indigenous Law Research Unit: https://ilru.ca.

[76] Jeremy Webber, "Federalism's Radical Potential," *International Journal of Constitutional Law* 18, no. 4 (2020): 1324.

[77] Another considerably diverse and nuanced body of work. See, e.g., Patrick Macklem, "Indigenous Peoples and the Ethos of Legal Pluralism in Canada," in *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*, ed. Patrick Macklem and Douglas Sanderson (Toronto: University of Toronto Press, 2016), 17; Kirsten Anker, "To Be Is to Be Entangled: Indigenous Treaty-Making, Relational Legalities and the Ecological Grounds of Law," in *Entangled Legalities Beyond the State*, ed. Nico Krisch (Cambridge: Cambridge University Press, 2021), 59; Don Couturier, "Judicial Reasoning across Legal Orders: Lessons from Nunavut" *Queen's Law Journal* 45, no. 2 (2019): 319.

[78] See Frankie Young, "Positioning Indigenous Law in the Legally Pluralistic State of Canada," *Cambridge Law Review* 6, no. 1 (2021): 30; Ghislain Otis, "Individual Choice of Law for Indigenous

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deep diversity of Canada's juridical landscape can become visible, the way Canada grounds the persistence of the colonial project in common law and civil law legality must be grasped in the legal technicalities through which Indigenous people are removed from the frames of law's mirrors. Clarifying the colonial force of corporate law can assist the inquiry into the persistence of colonialism, as many others are showing in other legal contexts.[79]

To date, the *sui generis* legal subjects named in law have existed as a kind of placeholder for Indigenous people to step out of their legal orders and into colonial ones. But, by and large, settlers have yet to learn how to step out of the colonial legal order and into Indigenous ones, which is what legal pluralism, Indigenous juridical traditions, and "transsystemic" law require. The foregoing has taken steps to unmask a colonial edge to Canadian corporate law that requires that Indigenous people take these steps into legal personhood. Eyes open, we might seek other starting points for approaches that do not force the taking of those steps, if only so the *sui generis* nature of such placeholders might become stepping stones for colonial legal subjects to step across into Indigenous juridical orders.

Undertaking decolonization can be possible to the extent that these corporate forces can be seen, recognized, restrained, altered, or even simply re-purposed in ways more consistent with, for lack of better terms, specific Indigenous juridical orders.[80] It is possible to cease requiring their use by Indigenous peoples while also learning to see alternative jurisdictions with the authority for *identifying* and *naming* juridical forms with the mandatory character of law. Robert Nichols has eloquently gestured to evolving and appropriating Indigenous practices that work recursively with their own traditions in a robust way he calls "expressivist resignification."[81] The work of expressively re-signifying legal personality requires listening and learning on the part of non-indigenous settlers and Canadian governments and a willingness to be reconciled with colonial forces while supporting the re-emergence of Indigenous law in a multi-juridical "Canada."

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People in Canada: Reconciling Legal Pluralism with Human Rights," *UC Irvine Law Review* 8, no. 2 (2018): 207.

79 See, e.g., Deborah Curran, "Legalizing the Great Bear Rainforest Agreements: Colonial Adaptations toward Reconciliation and Conservation," *McGill Law Journal* 62, no. 3 (2016): 813; Johnny Mack, "Hoquotist: Reorienting through Storied Practice," in *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community*, ed. Hester Lessard, Rebecca Johnson, and Jeremy Webber (Vancouver: UBC Press, 2011); Val Napoleon, "Gitxsan Legal Personhood: Gendered," in *Interrupting the Legal Person*, ed. Austin Sarat (Bingley: Emerald, 2022); and Robert Nichols, *Theft Is Property!: Dispossession and Critical Theory* (Durham: Duke University Press, 2019), 147–50.

80 Val Napoleon and Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories," *McGill Law Journal* 61, no. 4 (2015): 725.

81 While more theoretically oriented, the closing observations in his book would seem to suggest that a kind of coexistence among two solitudes is not only possible but is happening; whether governments reconcile themselves to this remains to be seen. See Nichols, *supra* note 79 at 157–59.

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