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Justice Beyond Legalism: Cultural Appropriation of Totem Poles on the Pacific Northwest Coast

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Article abstract

This paper attempts to illuminate and problematize the marriage of capitalism and colonialism that results in the widespread appropriation of Indigenous expressions of culture, and in particular, totem poles. This project questions our understanding of totem poles as they have been presented in the marketplace and restores some of the intricate legal meanings to these incredible works. Interdisciplinary and international in scope, this analysis draws from Canadian law, American tribal court law, international law, and Indigenous legal orders. First, I examine Canadian intellectual property law and colonial policies of cultural erasure. Next, I explore legalism as a potential route for solutions to this issue. I then conduct case studies of three totem poles. I examine one totem pole as a commodity, one functioning as a piece of art and someone's livelihood, and one as part of a Tlingit legal tradition. This last totem, as a materially appropriated object, provides an opportunity to explore the treatment of totem poles in proper context and also functions as a suggested solution to Indigenous art appropriation, more broadly. My intervention on this last totem reframes these issues in a non-Western legal cannon in order to address these difficult legal questions. My examination of these three totems serves to destabilize our understanding of totem poles sold in the marketplace, and to broaden our understanding of totems as manifestations of Indigenous laws.

JUSTICE BEYOND LEGALISM: CULTURAL APPROPRIATION OF TOTEM POLES ON THE PACIFIC NORTHWEST COAST

Isabelle Lefroy[*]

This paper attempts to illuminate and problematize the marriage of capitalism and colonialism that results in the widespread appropriation of Indigenous expressions of culture, and in particular, totem poles. This project questions our understanding of totem poles as they have been presented in the marketplace and restores some of the intricate legal meanings to these incredible works. Interdisciplinary and international in scope, this analysis draws from Canadian law, American tribal court law, international law, and Indigenous legal orders. First, I examine Canadian intellectual property law and colonial policies of cultural erasure. Next, I explore legalism as a potential route for solutions to this issue. I then conduct case studies of three totem poles. I examine one totem pole as a commodity, one functioning as a piece of art and someone's livelihood, and one as part of a Tlingit legal tradition. This last totem, as a materially appropriated object, provides an opportunity to explore the treatment of totem poles in proper context and also functions as a suggested solution to Indigenous art appropriation, more broadly. My intervention on this last totem reframes these issues in a non-Western legal cannon in order to address these difficult legal questions. My examination of these three totems serves to destabilize our understanding of totem poles sold in the marketplace, and to broaden our understanding of totems as manifestations of Indigenous laws.

Cet article cherche à éclairer et à problématiser le mariage du capitalisme et du colonialisme qui se traduit par une appropriation généralisée des expressions culturelles autochtones et, en particulier, des mâts totémiques. Ce projet remet en question notre compréhension des mâts totémiques tels qu'ils ont été présentés sur le marché et restitue certaines des significations juridiques complexes de ces œuvres incroyables. De nature interdisciplinaire et internationale, cette analyse s'inspire du droit canadien, du droit des tribunaux tribaux américains, du droit international et des ordres juridiques autochtones. Tout d'abord, j'examine le droit canadien de la propriété intellectuelle et les politiques coloniales d'effacement culturel. Ensuite, j'explore le légalisme en tant que voie potentielle pour des solutions à ce problème. Je réalise ensuite des études de cas sur trois mâts totémiques. J'examine le premier mât totémique en tant que marchandise, le deuxième comme fonctionnant comme une œuvre d'art et un moyen de subsistance, et le troisième dans le cadre de la tradition juridique tlingit. Ce dernier totem, en tant qu'objet matériellement approprié, offre l'occasion d'explorer le traitement des mâts totémiques dans le contexte approprié et constitue également une solution suggérée pour l'appropriation de l'art autochtone, plus largement. Mon intervention sur ce dernier totem recadre ces questions dans une perspective juridique non-occidentale afin de traiter ces questions juridiques difficiles. Mon examen de ces trois totems sert à déstabiliser notre compréhension des mâts totémiques vendus sur le marché et à élargir notre compréhension des totems en tant que manifestations des lois autochtones.

Este artículo busca esclarecer y problematizar la unión del capitalismo y del colonialismo y su apropiación generalizada de las expresiones culturales de los pueblos indígenas, en particular, la cultura de los tótems.

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Este proyecto cuestiona nuestra comprensión de los tótems tal que son presentados en el mercado y busca restituir algunos de los significados legales de estas increíbles obras. De alcance interdisciplinario e internacional, este análisis se basa en el derecho canadiense, el derecho de las cortes tribales estadounidenses, el derecho internacional y las órdenes jurídicas indígenas. Primero, examino el derecho canadiense de propiedad intelectual y las políticas coloniales de supresión cultural. A continuación, exploro el legalismo como herramienta potencial para solucionar este problema. Luego realizo estudios de caso sobre tres tótems. Examino el primer tótem como mercancía, el segundo como obra de arte y medio de subsistencia, y el tercero como parte de la tradición legal tlingit. Este último, como objeto materialmente apropiado, brinda la oportunidad de explorar el tratamiento de los tótems en un contexto adecuado y constituye una solución sugerida a la apropiación del arte indígenas, en términos generales. Mi intervención en este último tótem reformula estos problemas en una perspectiva jurídica no occidental para abordar estas difíciles preguntas legales. Mi examen de estos tres tótems sirve para desestabilizar nuestra comprensión de los tótems vendidos en el mercado y así ampliar nuestra comprensión de los tótems como manifestaciones de las leyes indígenas.

Left: Figure 1. Ambiguously labelled totem poles for sale at BC Ferries Gift shop.
Right: Figure 2. *Wonderbird* Totem Pole, Ellen Neel, 1953.

White Spot restaurants commissioned Ellen Neel, the first Kwakwaka'wakw woman to carve professionally, to carve *The Wonderbird Pole* in 1953.[1] The pole was also featured on the company's menus along with *The Wonderbird Legend*, authored by Ellen Neel. *The Wonderbird Legend* was printed on the cover of White Spot menus in the fifties and read as follows:

> In the beginning, the men of the Pacific Coast were brown men and the totems were brown totems made of brown wood. With the coming of the white men came other white things also, and among these white things was a white rooster. The white rooster saw the birds and beasts so wonderfully carved on totems of the Kwakiutl and the Tsimshians. It became his great desire to be the first rooster to be placed on the top of the totem poles. He asked Chief Che-Che-Kin how this could come to pass.
>
> "You will have to do something that no other rooster has ever done before," said the Chief. You will have to do something that neither Kolus the Thunderbird, nor Hwahwasa the silver salmon nor Gwa-tum the great whale has ever done.
>
> Then the white rooster thought and thought. In fact, he thought so hard that he brooded. Now everybody knows what happens when a chicken broods. It

[1] Carolyn Butler Palmer, Lou-Ann Neel & David A Neel, "Ellen Neel: The First Woman Totem Pole Carver—Gallery Guide" (Victoria: Legacy Art Gallery, 2017) at 3-6 [Palmer & al].

> lays an egg. When the white rooster thought so hard that he became broody, he did something that no rooster has ever done before. He laid an egg. A big white egg. The white rooster was very proud of what he had done, and he took the egg to Che-Che-Kin. "I have done what no rooster ever did before, eh, Chief…"[2]

This quote comes from the front page of White Spot menus from the fifties.

The appropriation and mass distribution of Indigenous expressions of culture, whether as toy-sized totems or coffee mugs printed with West Coast Indigenous designs, form a large part of the tourist industry in British Columbia.[3] This appropriation often fosters misrepresentation, caricature, and stereotyping of Indigenous cultures. Appropriation of Indigenous cultural expressions is particularly visible in tourist hotspots like downtown Vancouver and Victoria, which are inundated with souvenir shops that sell sweaters, sunglasses, and shot glasses sporting West Coast Indigenous designs. Tourists flock to these shops, buying souvenirs for their families at home: mini bottles of maple syrup, t-shirts, and conveniently sized replicas of totem poles. These tokens allow tourists and settlers to passively consume what they think is "Indigenous culture," without confronting the reality of violence and dispossession in Canada.

Why is it unacceptable for these souvenirs sporting appropriated designs to be sold without consequences? Moral reasons aside, one legal reason can be found in Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*), as follows:

> 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
>
> 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.[4]

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2 *Ibid* at 5.

3 Authentic Indigenous, "Authentic Indigenous Arts Resurgence Campaign", online: Authentic Indigenous <www.authenticindigenous.com/> [AIARS]; Amy Mair, "The Rise of Aboriginal Tourism in BC", *BC Business* (3 July 2012), online: BC Business <www.bcbusiness.ca/the-rise-of-aboriginal-tourism-in-bc>. It is important to note that not all of these expressions of culture are appropriated. There are existing mechanisms (outside the Canadian legal system) to "authenticate" products that have been designed, crafted, and produced by Indigenous artists who have received fair compensation for their work. However, these consumer education programs are not widespread.

4 *United Nations Declaration on the Right of Indigenous Peoples*, UNGAOR, 61st Sess, Annex, UN Doc A/RES/61/295 (2007) at s 31 [*UNDRIP*]. The World Intellectual Property Organization [WIPO] has also focused on the rights of Indigenous Peoples with respect to their cultural expressions and other forms of property. See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-*

The *UNDRIP* provides an international basis for Indigenous protection and control over their cultural expressions. In 2016, Canada made a unilateral declaration that it supports the *UNDRIP*,[5] but it is clearly still in violation of the above provision. Though the *UNDRIP*, being a declaration, is not legally binding as a treaty would be under international law, Canada still needs to implement it fully in order to facilitate its goal of reconciliation with Indigenous peoples.

To address Canada's violation of the *UNDRIP*, my paper seeks to compare three manifestations of contemporary Indigenous expressions of culture in the form of totem poles (two of which are pictured above). I will compare a totem pole in the form of a commodity and a totem pole functioning as satire, resistance, and livelihood to examine the power dynamics at play in Canadian society that result in the commodification of Indigenous culture. I then cross the international border and explore a third manifestation of a totem pole: the totems found within the Whale House in a tiny Tlingit village in southeastern Alaska. I then analyze the related tribal court proceedings to illustrate the effective articulation and application of Tlingit law to this matter. I use this tribal court case as both an exploration of the treatment of totem poles as part of Indigenous legal orders, and also as a potential solution to address issues of cultural appropriation. I examine the multiple functions of Indigenous cultural expressions to demonstrate how capitalism and colonialism have put tourists and locals in the position where they are participating in ongoing colonial violence against Indigenous peoples, embodied by the totems.

These expressions of culture were chosen for their ability to function in multiple ways: as art, as commodity, as part of Indigenous legal orders, as resistance to colonialism, and as cultural signifiers on land, among other things. These expressions offer a productive location to consider cultural appropriation because they provide opportunities to look at cultural interactions that cross boundaries of art and livelihood. Not only are these objects being appropriated by a wider settler consumer culture; they are acting as someone's income. By considering the multiple facets of these expressions of culture, I will grapple with multiple layers of the issue of appropriation, rather than simply understanding cultural appropriation as a flattening, single act of colonial violence. Interdisciplinary and international in scope, this analysis draws from the *UNDRIP*, Canadian law, American tribal law, and Indigenous law, and challenges readers to consider Indigenous laws as valid legal orders in Canada on the basis of international law.

I will first discuss the terms and methodology informing my paper. I will then contextualize appropriation of Indigenous cultures in the framework of Canadian intellectual property law, as well as the policies of cultural erasure carried out by the Canadian government against Indigenous peoples. Finally, I will compare three totem poles to examine the commodification of Indigenous cultures, and resistance to that commodification.

1999) (Geneva: WIPO, 2001), online: World Intellectual Property Organization <www.wipo.int/publications/en/details.jsp?id=283&plang=EN>.

5 Canada, Indigenous and Northern Affairs, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online: Indigenous and Northern Affairs Canada <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

I. Terms and Methodology

A few terms require explanation. The term "cultural appropriation" has numerous senses, and it is useful to go through a few of these definitions. Scholar Erich Hatala Matthes includes in his definition of the term: (1) non-members practicing or representing cultural practices; (2) non-members using distinct artistic styles of certain groups, and, (3) outsiders or non-members buying and collecting cultural objects.[6] In this paper, I focus on the second and third definitions outlined in the aforementioned definition.[7] Cultural appropriation can be distinguished from cultural exchange on an equal basis because of the presence of a colonial element, or an imbalance of power.[8] In this work, I focus on appropriated objects and the context in which appropriation occurs, rather than the appropriators. When discussing the "appropriation of Indigenous art" as seen in gift shops in Vancouver and Victoria, I am generally referring to the appropriation of West Coast Indigenous designs, which have been mass-produced and sold as clothing and souvenirs.

In the context of this paper, when using the terms "Indigenous art" and "Indigenous expressions of culture," I am referring to designs, motifs, and styles used by Indigenous artists. However, I refer to totem poles exclusively as "expressions of culture", instead of "art" as I run the risk of trivializing their significance if I consider them simply as art. Prominent Maa-nulth scholar Johnny Mack writes that the appropriation of almost any object results in a radical change in meaning for that object.[9] He claims that totems, which are central to Nuu-chah-nulth governance structures, lose significance when they are appropriated; when placed in a new context, totem poles "are hailed or interpolated into a new conceptual field where they are understood primarily as fine works of art, rather than powerful and constitutive authorities."[10] As a settler, I am doing appropriative work by analyzing the two totem poles pictured above, so I must try to identify and minimize the negative impacts of my work as much as possible. I therefore refer to totem poles as "expressions of culture", and will try to flesh out their cultural significance more fully in the comparative section of this paper.

I must also note that the phrase "expressions of culture" is imperfect. Culture is a vague term. By using the term "expressions of culture", I risk restricting the object

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6 Erich Hatala Matthes, "Cultural Appropriation Without Cultural Essentialism?" (2016) 42:2 Social Theory and Practice 343 at 343 [Matthes, "Cultural Appropriation"]; James O Young, *Cultural Appropriation and the Arts* (Oxford: Blackwell Publishing, 2008).

7 For a broader discussion of cultural appropriation, especially in popular culture, see generally Adrienne Keene, *Native Appropriations* (blog), online: <nativeappropriations.com/>. Keene deconstructs and critiques the popular settler culture's representations of Indigenous imagery and culture, calling for education and awareness about the harmfulness of cultural appropriation. She covers various topics, such as the Washington Redskins and J K Rowling's appropriation of creatures from Indigenous oral stories.

8 Matthes, *supra* note 6.

9 Johnny Camille Mack, *Thickening Totems and Thinning Imperialism* (LLM Thesis, University of Victoria Faculty of Law, 2009) [unpublished] at 1.

10 *Ibid.*

in question to a hazy and imprecise value.[11] I want to be very clear that when I use the term "expressions of culture", I am not precluding the possibility that the object is also an expression of law, or governance, or any other important institution. I want my use of the word "culture" to capture all these possibilities.

Finally, the term "totem pole" merits a brief discussion. Totem poles, also referred to as posts, crest posts, or poles, have proliferated in popular culture.[12] Their many designations reflect their multitudes of meanings and purposes. Totems have been used as markers on land, territorial claims, interior structures to hold up roof beams, memorials of individuals, markers of social standing, and welcome signs, among many other uses.[13] All of these functionalities have been subsumed under one label, obscuring the cultural, legal, and political purposes behind these objects. Furthermore, totems have exploded in the popular imagination, as can be seen in tourist shops, representing "Indigeneity" as a concept, and in fashion, advertisements, and movies.[14] Thus, much of the complexity of totems in their original contexts has been effaced by appropriation. However, this is not to say that totems should not be commoditized. I do not want to reduce totem poles to either a commodity or a cultural artifact. In this work, I hope to question our understanding of totems as they have been presented in the marketplace and restore some of the intricate legal meaning to these incredible works.

In this paper, I attempt to do comparative decolonizing work with objects as entry points for analysis of political forces acting on Indigenous expressions of culture. In discussing the protection of Indigenous art, I have often found myself moving between a desire to reject Western ways of dealing with appropriation, namely, Canadian law and intellectual property instruments, and an underlying colonial reflex to reframe discussions in the language of law and property. In this paper, I attempt to resist this colonial reflex and instead consider Canadian law and the intellectual property regime as merely a piece of a larger puzzle, rather than the framework informing the whole picture. I root the legal justification for my arguments in Article 31 of *UNDRIP* which calls for Indigenous control over expressions of culture. By making this methodological move to decentre the Canadian State, I hope to contribute to decolonizing resistance against State forms of regulation and oppression.[15]

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11 I would like to acknowledge Val Napoleon for pointing out that the vagueness of the term "culture" can unintentionally obscure or degrade the legal, economic, political, or social value of the object in question. For more, see Val Napoleon, "Looking Beyond the Law: Questions about Indigenous Peoples' Tangible and Intangible Property" in Catherine Bell & Robert K Paterson, eds, *Protection of First Nations' Cultural Heritage: Laws, Policy and Reform* (Vancouver: UBC Press, 2009) at 370 [Bell & Patterson].

12 Aldona Jonaitis & Aaron Glass, *The Totem Pole: An Intercultural History* (Seattle: University of Washington Press, 2010) at 5.

13 *Ibid* at 4.

14 *Ibid* at 7.

15 Jerry H Bentley, "The Task of World History" in Jerry H Bentley, ed, *The Oxford Handbook of World History* (New York: Oxford University Press, 2011) at 1; H Patrick Glenn, "The State as Legal Tradition" (2013) 2:4 Cambridge J Intl & Comp L 704; Mariana Valverde, "The Crown in a Multicultural Age: The Changing Epistemology of (Post)colonial Sovereignty" (2012) 21:1 Soc & Leg Stud 3. Bentley, Glenn, and Valverde demonstrate the pitfalls of limiting oneself to a State-centred methodological approach. As Valverde points out, the shape-shifting tendencies of the "Crown" have resulted in often insurmountable

II. Colonial Context

> "Property becomes part of our very being, and cannot be wrested from us without wounding to the very quick."
>
> Jeremy Bentham
> "Principles of the Civil Code"
> *Bentham's Theory of Legislation*

This section of the paper will contextualize the ongoing appropriation of Indigenous culture in the framework of Canadian intellectual property law and broader Canadian policies of cultural erasure. First, I will explain why Canadian intellectual property rights are inadequate for the protection of Indigenous cultures, as opposed to Article 31 of *UNDRIP*. I will then explain why Indigenous culture is at risk of appropriation in the first place.

Indigenous cultural expressions are often termed "traditional knowledge", and include, among many other things, medicine, visual art, songs, stories, and environmental knowledge.[16] The term "traditional knowledge" itself is a good example of Western misunderstanding of Indigenous cultural expressions, and reveals an impulse to label anything derived from Indigenous nations as "traditional" or "ancient."[17] In contrast with this misconception, pharmaceutical companies use Indigenous medicinal and plant knowledge for research and development of products, and scientists use Indigenous conservation methods to research solutions to environmental degradation.[18] It is important to note that the term "traditional" in World Intellectual Property Organization (WIPO) and UN documents encompasses a broader spectrum of knowledge than just Indigenous knowledge.[19] The document refers to non-Indigenous knowledge as well as Indigenous knowledge. The use of the term "traditional" was debated and negotiated for years, and is a result of much thought and consideration. There is no harm intended by the WIPO. But documents commissioned

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difficulties for Indigenous peoples engaging in State-centred forms of recognition. Centring on the Canadian legal system only serves to validate the Canadian State as a benefactor of justice and excuse its history of racism and oppression. Ignoring the Canadian State and intellectual property rights completely, however, would give an incomplete picture of the issue.

16 Simon Brascoupé & Karin Endemann, *Intellectual Property and Aboriginal People: A Working Paper*, (Ottawa: DIAND, 1999) at 1 [Brascoupé & Endemman].

17 Walter C Fleming, *The Complete Idiot's Guide to Native American History* (New York: Alpha Books, 2003) at 3. See also *R v Van der Peet*, [1996] 2 SCR 507 at para 46, 137 DLR (4th) 289, where the Supreme Court of Canada established a test to determine the crucial elements of distinctive pre-contact societies instead of the relevant existing Indigenous communities, seemingly in order to avoid the influence of settler society. The Court's overemphasis on European arrival prevents Western perceptions of Indigenous culture from evolving past a pre-contact state from a legal standpoint.

18 Leanne R Simpson, "Anticolonial Strategies for the Recovery and Maintenance of Indigenous Knowledge" (2004) 28:3 American Indian Quarterly 373 at 373-75.

19 WIPO, *Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore: A Guide for Countries in Transition* (Geneva: WIPO, 2013) at 2-4.

by the Government of Canada, such as the report prepared by Tonina Simeone,[20] seem to have picked up on WIPO's use of "traditional knowledge" but only with regards to knowledge held by Indigenous peoples. In the context of colonialism, the report's use of the word "traditional" does not reflect a thoroughly debated term, but rather a lack of consciousness regarding the harmful and stereotype inducing association of Indigenous peoples with the past.

Invariably, the commodification of Indigenous culture raises the topic of intellectual property rights, which are the primary tools used for regulating the production and use of knowledge in Canada. Legal scholars Angela Riley and Kirsten Carpenter write, "The experience of cultural appropriation is broad and nuanced, while the law is typically narrow and obtuse."[21] For the most part, Canadian intellectual property laws are rooted in a utilitarian theory or economic understanding of rights.[22] Those with intellectual property rights over a product have exclusive use over the goods and services protected and are able to reap any profit from the sale of their goods and services.[23] This economic understanding of rights was confirmed by the Supreme Court of Canada in *Théberge v Galerie D'Art du Petit Champlain Inc.*[24]

While economic rights over goods and services may be useful to some Indigenous individuals or communities, many scholars and policymakers have pointed out a lack of fit between Canadian intellectual property rights and Indigenous cultural expressions.[25] There are many requirements that bar Indigenous artists from protecting their work using Canadian intellectual property rights. For example, there is almost nothing in Canadian law that would protect Indigenous designs from being appropriated and copied by non-Indigenous artists and sold for profit.[26] Non-Indigenous artists or designers, unlike academic researchers, are under no legal obligation to credit original artwork to the communities and individuals from which it came.[27] For example, in copyright law, protectable knowledge needs to be "original" and "fixed", thus leaving knowledge held in orally transmitted stories vulnerable. Similarly, copyright protection expires fifty years after the author dies.[28] This tenet of copyright law appears harmless, except when the "author" died thousands of years ago or is not ascertainable due to collective ownership. Similarly, certain expression of culture, like a carved mask, is

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20 Tonina Simeone, *Indigenous Traditional Knowledge and Intellectual Property Rights* (Ottawa: Political and Social Affairs Division, 2004).

21 Angela R Riley & Kristen A Carpenter, "Owning *Red*: A Theory of Indian (Cultural) Appropriation" (2016) 94 Tex L Rev 859 at 865.

22 Brascoupé & Endemann, *supra* note 16 at 2.

23 *Ibid.*

24 *Théberge v Galerie D'Art du Petit Champlain Inc*, 2002 SCC 34, [2002] 2 SCR 336, at para 12 [*Théberge*].

25 For an exploration of the lack of fit between Canadian intellectual property rights and Indigenous expressions of culture, see generally Brascoupé & Endemann, *supra* note 16.

26 *Ibid* at 2.

27 This problem is further complicated by the difficulty in differentiating inspiration from appropriation. Should non-Indigenous artists be barred from drawing inspiration from Indigenous cultural expressions? Most art borrows inspiration from other art—that is how artists develop and innovate. However, in the context of colonialism, drawing inspiration from Indigenous expressions of culture can quickly turn into cultural appropriation.

28 *Copyright Act*, RSC 1985, c C-42, ss 6, 23(1).

sacred and not to be shared with the public. Hence, Indigenous communities and artists find that their cultural expressions are not eligible for protection under Canadian intellectual property laws.[29] Even if a certain case met all these requirements, it is very expensive to pursue litigation, and is not always a viable option for artists who see copies of their work being sold without authorization. It is important to note that this brief explanation is not an exhaustive list of the many bars to protecting Indigenous cultural expressions under Canadian property law, which would be beyond the scope of this paper. This paper is meant to contextualize these problems in the broader picture of colonialism and ongoing appropriation under a colonial government.

While intellectual property rights help secure economic benefits and encourage further innovation,[30] the intellectual property regime runs the risk of further commodifying Indigenous culture by turning unique designs into property. According to Wade Mansell, rights create property from things.[31] In applying intellectual property rights to Indigenous designs, one makes property out of culture. While intellectual property instruments may be useful in some cases, property regimes are upheld by rights holders enforcing those rights against other people, which ultimately benefits some (i.e., property owners, or someone who has taken out a copyright on a particular design) and not others (for example, an Indigenous artist or community who feels their design has been appropriated without their consent).[32] The "co-constitutive nature" of rights and property reveals the ways in which Canadian intellectual property laws are not simply inappropriate for protecting Indigenous expressions of culture, but also adversarial, since they actually put Indigenous cultural expressions at further risk of being appropriated by individuals who can access and utilize intellectual property law to their advantage. The intellectual property regime's gaps, such as its "fixation" requirement,[33] serve as conduits to ongoing cultural erasure and exoticization.

Many scholars have demonstrated that there is a need for protection of Indigenous expressions of culture.[34] Some of these scholars, however, have failed to discuss why Indigenous culture needs protecting. To discuss this topic would be to implicate themselves in the existence of colonial structures governing the lives of Indigenous peoples and the settler society that continues to appropriate Indigenous culture and occupy Indigenous lands.[35] It is much more comfortable not to discuss this

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29 Brascoupé & Endemann, *supra* note 16 at 2.

30 Mira T Sundara Rajan, *Intellectual Property and Aboriginal Peoples: Conflict or Compromise?* (Vancouver: The Scow Institute, 2008) at 3-4 [Sundara Rajan].

31 Wade Mansell et al*, A Critical Introduction to Law*, 3rd ed (London: Cavendish Publishing, 2004) at 42.

32 *Ibid.*

33 See e.g., *Théberge*, *supra* note 24 at paras 24-26.

34 Marie Battiste & James Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000) at 61; Catherine Bell, "Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform" in Bell & Patterson, *supra* note 11 at 65; Brian Noble, "*Poomaksin*: Skinnipiikani-Nitsiitapii Law, Transfers, and Making Relatives Practices and Principles for Cultural Protection, Repatriation, Redress, and Heritage Law Making with Canada" in Catherine Bell & Val Napoleon, eds, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) at 259-60; Sundara Rajan, *supra* note 30 at 25-26; Norman Zlotkin, "From Time Immemorial: The Recognition of Aboriginal Customary Law in Canada" in Bell & Patterson, *supra* note 11 at 343.

35 Simpson, *supra* note 18 at 376.

topic. However, Leanne Simpson, a Mississauga Nishnaabeg scholar, argues that it is crucial, especially for settler scholars, to indicate why Indigenous cultures are at risk of being appropriated.[36]

Though I cannot name all the ways in which the Canadian government has attempted to extinguish Indigenous cultural systems, I can point to a few examples. The residential school system was "created for the purpose of separating Aboriginal children from their families in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture—the culture of the legally dominant Euro-Christian Canadian society."[37] Furthermore, the ongoing occupation of unceded territories removes tools with which Indigenous culture is practised and safeguarded for future generations. Cultural loss from residential schools and occupation of Indigenous lands as well as inadequate forms of protection for Indigenous cultural expressions are some of the forces at play that result in the commodification of Indigenous cultures. In the next section, I will compare three totem poles to illuminate the harmful consequences of commodification of culture as well as the multiple functionalities of Indigenous cultural expressions operating in this landscape.

III. Comparison and Analysis of Totems

A. The First Two Totems: Brought to You by White Spot and BC Ferries

The two totem poles, pictured above, represent an Indigenous cultural expression as a commodity (the *Canada* totem), and another Indigenous cultural expression as an assemblage of resistance, survival, satire, and humour (the *Wonderbird* Totem). The *Canada* totem, displayed without any information about its production, raises questions of ownership and artist recognition, which can be explained by the many gaps in Canadian intellectual property law discussed above, such as copyright law's failure to protect expressions of culture that are not meant to be shared publicly. As mentioned, there is almost nothing in Canadian law that would protect Indigenous designs from being appropriated and copied by non-Indigenous artists and sold for profit.

The *Canada* totem pole, which has no labelling other than a price tag (marked at $12.99), is branded with the word "Canada", indicating to the tourist or purchaser that this particular representation of Indigenous culture is a symbol of all of Canada, belonging to Canada. This decontextualization of a cultural symbol reduces Indigenous cultures to a one-dimensional commodity. Furthermore, this totem pole deterritorializes Indigenous cultures. Totem poles have specific meaning in place. Johnny Mack writes about the importance of totem poles in Nuu-chah-nulth culture.[38] He describes totem

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36 *Ibid*.

37 For an account of how the Canadian government has attempted to assimilate Indigenous peoples and destroy their cultures, see Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at v.

38 Mack, *supra* note 9 at 128-29.

poles as tangible representations of a particular community's history, as well as symbols of the authority of hereditary chiefs. According to Mack, the totem poles bind chiefs to Nuu-chah-nulth governing principles of respect and generosity, and thus represent core governance structures.[39] Souvenir shops selling little totem poles and inuksuk statues across Canada decontextualize these cultural signifiers from their places on land.[40] This deterritorialization is evocative of ongoing land dispossession and the erasure of Indigenous cultures in residential schools.

As an analogy, it is helpful to examine Paul Patton's discussion of Gilles Deleuze and Félix Guattari's work, *A Thousand Plateaus: Capitalism and Schizophrenia*.[41] In this discussion, Patton theorizes how the colonial State converted Indigenous territories into a commodity through a process of deterritorialization.[42] Patton claims that the legal imposition of "Crown sovereignty" in jurisprudence "effects an instantaneous deterritorialisation of Indigenous territories and their reterritorialisation as a uniform space of Crown land."[43] Similarly, this *Canada* totem pole instantly and insidiously captures Indigenous cultures as "Canadian," thus "indigenizing" and naturalizing Canadian culture, the Canadian state, and its violent history. By extricating Indigenous culture from a specific place, Indigenous people are absorbed into the body politic of Canada and all past harms are forgotten, making the reconciliation project complete—at least in the mind of the consumer. Thus, the seemingly harmless souvenir market is damaging because it participates in the narrative that the Canadian state weaves: that land is not really central to reconciliation.

The *Canada* totem, as commodity, does harm by misrepresenting Indigenous cultures, encouraging stereotypes and generalizations, and deterritorializing Indigenous cultures. Ellen Neel's *Wonderbird* totem pole is a stark contrast to the reductive totem-pole-as-commodity. Perhaps most importantly, Ellen Neel's work provided for her family and was a means of survival. She stated, "Totems were our daily fare, they bought our food and furnished our clothing."[44] Her husband, Ted, suffered a severe stroke in 1946, which prompted Neel to take up carving as the main source of income for her family.[45] In 1953, White Spot commissioned the *Wonderbird* Totem and a "legend" to accompany it.[46] With the *Wonderbird* totem, Neel was not simply providing her family with income; she was also mocking White Spot's request for a *Wonderbird Legend*, and through this humour, refusing to allow Indigenous art and peoples to be

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39 *Ibid.*

40 Pierre Legrand, in his article "On the Singularity of Law" (2006) 47:2 Harv Intl LJ 517, pays specific attention to the importance of locality and place in the construction of law. Though he is talking about the construction of state law, his point applies to Indigenous nations' laws and governance. Locality cannot be ignored. Removing Indigenous nations' cultures from place through the commodification of culture undermines those nations' laws and governance and perpetuates ongoing assimilation of Indigenous peoples.

41 Gilles Deleuze & Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Minneapolis: University of Minnesota Press, 1987).

42 Paul Patton, *Deleuze and the Political* (London: Routledge, 2000) at 109-31.

43 *Ibid* at 124.

44 Palmer & al, *supra* note 1 at 5.

45 *Ibid* at 3.

46 *Ibid* at 6.

reduced to one-dimensional and exotic relics from the past. Unlike the vagueness of the *Canada* totem pole, which reduces an Indigenous expression of culture to a placeless (yet) national symbol, Neel's *Wonderbird* muddies the waters of Indigenous totem making, using mockery and playfulness to comment on appropriation of Indigenous culture. Even the rooster's cheeky expression mocks the observer. The rooster's stare counters the colonial gaze which has exoticized Indigenous bodies and art, and commodified Indigenous culture and peoples through production of imagery and consumer culture.[47] Her *Wonderbird Legend*, accompanying the totem, disrupts the colonial narrative of the "discovery" of Canada, satirizing the birthing of a nation (or the laying of an egg). In having a rooster lay an egg, she bastardizes Canada as an unnatural, forced product of the white man.

Ellen Neel's other works also made revolutionary contributions to art. Neel's work is defying norms from her own community, where women did not usually carve.[48] Hailed as the first woman totem-pole carver, she makes us see in her work women's often unrecognized contributions to arts and crafts.[49] Her work also represents direct resistance to colonialism, as her career was launched during the prohibition of the potlatch in British Columbia.[50] Neel positioned her art in defiance to the Canadian State's ban on Indigenous cultural practices, stating, "The production of art was so closely coupled with giving of the potlatch that, without it, the art withered and almost died."[51] In examining all these facets of Neel's work, it is clear that her work functioned as a means of livelihood, satire, a challenge to the gendered profession of carving, and resistance to oppression.

The contrast of these totems' functionalities is clear. The *Canada* totem pole is an example of ongoing colonial violence that is produced by and perpetuates deterritorialization, stereotyping, and misrepresentation of Indigenous cultures. Through art that commodifies Indigenous culture and works as national symbols for the Canadian State, colonial violence and its existence is normalized. Ellen Neel's *Wonderbird*, on the other hand, is a counter to these relationships of power that commodify Indigenous culture, using humour, satire, and appropriation of nation-building tropes to resist colonial violence. Neel's work resists passive consumption of Indigenous culture—it is work that forces the observer to take a look at their own position in relation to her art.

It is important to note I am not advocating against Indigenous artists who would like to earn their livelihood by providing products for a popular market.

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47 In fact, Neel's *Wonderbird* should be viewed partly as a commodity as well as a method of survival, satire, and resistance to oppression.

48 Palmer & al, *supra* note 1 at 5.

49 See generally Sherry Farrell Racette's work. She explores the often-unrecognized contributions Indigenous women have made to arts and crafts, in particular in beading work. For an introduction to her work, see Sherry Farrell Racette, "'I Want to Call Their Names in Resistance': Writing Aboriginal Women into Canadian Art History, 1880-1970" in Kristina Huneault & Janice Anderson, eds, *Rethinking Professionalism: Women and Art in Canada, 1850-1970* (Montreal: McGill-Queens University Press, 2012).

50 Palmer & al, *supra* note 1 at 5.

51 *Ibid.*

Indigenous artists should be able to benefit from tourists' curiosity and fascination with the artist's culture, as do artists belonging to other cultures all over the world. As discussed above, Neel's livelihood depended on her carving and other works that integrated her designs with more mundane items. She printed on silk to make intricate scarves, clothing, and bags, and even created a line of Royal Albert china sporting her designs. Neel did not think that printing her designs on commonplace objects was a problem; in fact, she saw an opportunity to bring economic prosperity and visibility to Indigenous peoples through the ethical production of these items.

I support Neel's position that Indigenous peoples should be able to supply the obvious demand for these products. What is problematic is the appropriation of these designs for the enrichment of non-Indigenous peoples, and the passive consumption of these items without an understanding of the history of colonial violence in Canada. It must be noted that many consumers of these souvenirs are simply curious tourists, and they should not be labelled as the sole perpetrators of this injustice. The marriage between capitalism and colonialism should be held accountable for the ongoing violence embodied in these souvenirs. Perhaps, in the meantime, public education and authenticating programs should be implemented to inform consumers about the purchases they are making. For example, "Authentic Indigenous" is a branding tool that marks products made and designed by Indigenous artists. The initiative, spearheaded by Coast Salish artist Shain Jackson, draws heavily from trademark law and is concerned with raising awareness, educating the consumer, and empowering Indigenous artists in the art marketplace. The goal is to certify that Indigenous artists have designed the work and are being compensated fairly for it. It is a Vancouver-based initiative run by Indigenous artists and has been in development for twenty-five years.[52] In this way, Indigenous artists would be supported, and a broader audience would understand the effects of colonialism on Indigenous peoples.

To counter this last argument that the commodification of Indigenous art should be made more accessible and transparent, it must be noted that not all production and sale of Indigenous cultural expressions are considered acceptable. For example, there are certain sacred potlatch masks that are collectively owned by certain families and that signify lineage and family history and "form an important class of inherited privileges."[53] In Coast Salish communities, for example, these expressions of culture cannot be commodified and sold.[54] Unfortunately, not everyone recognizes these community protocols. Many private collectors own masks seized during the potlatch ban in the early half of the 20th Century.[55] Original owners have tried to negotiate for

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52 AIARS, *supra* note 3; David P Ball, "Through Certification, Indigenous Artists Take Back Their Work", *The Tyee* (16 June 2014), online: The Tyee <thetyee.ca/Presents/2014/06/16/Indigenous-Artists-Take-Back-Work/>.

53 Brian Thom, "Intangible Property Within Coast Salish First Nations Communities" (Presentation delivered at the WIPO North American Workshop on Intellectual Property and Traditional Knowledge, 9 September 2003) [unpublished] at 8, online: Hulquminum <http://www.hulquminum.bc.ca/pubs/paper-wipo.pdf?lbisphpreq=1>, citing Wayne Suttles, "Private Knowledge, Morality and Social Classes among the Coast Salish" in Wayne Suttles, ed, *Coast Salish Essays* (Vancouver: Talonbooks, 1987) 1 at 10.

54 *Ibid.*

55 *Ibid* at 8-9.

the return of their masks, but Canadian law does not recognize the masks' original and intended owners.[56] Therefore, it is necessary to approach the production and sale of Indigenous cultural expressions with a nuanced understanding of the complexities informing the commodification of Indigenous cultures.

B. The Third Totem: The Whale House Case

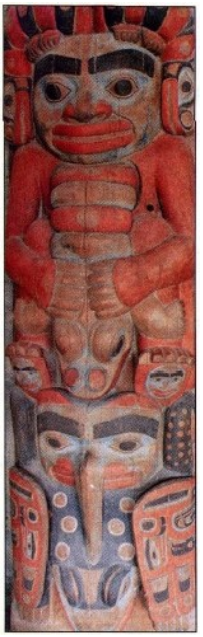

Figure 3. The Wormwood Post—one of four posts from the Whale House. Photo by A de Menil.

To complicate the matter further, I would like to explore a third manifestation of a totem pole: the totems found within the Whale House in a small Tlingit village in southeastern Alaska. I draw on these totems to add an international and comparative layer to the *Canada* totem and the *Wonderbird* totem. The following case reflects the aspirations of Article 31 of *UNDRIP*, which calls for Indigenous control and protection of cultural expressions.

What follows is a detailed description of the events leading up to and proceeding the taking of five items from a locked building in the middle of the night in 1984. I then analyze the ensuing tribal court proceedings to illustrate the effective articulation and application of Tlingit law to this matter. I use this tribal court case as both an exploration of the treatment of totem poles in its proper context, and also as a suggested solution to issues of cultural appropriation.

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[56] *Ibid* at 13-14.

The small Tlingit village of Klukwan on the shores of the Chilkat River is made up of around 170 people.[57] The community has a complex social structure (see Figure 4).[58] There are two moieties—Eagle and Raven. These moieties exist primarily for marriage purposes. Under Tlingit law, one must marry only a member of the other moiety. Within these moieties, there are clans. The clans are the most important affiliation for Tlingit people. There are several different clans within the Eagle moiety in Klukwan, but all members of the Raven moiety in Klukwan are part of the Ganexteidi Clan. Within each clan are houses, which usually refer to actual physical structures and the nuclear families that inhabit them. The clans, not houses, claim "clan trust property" and custodial rights over certain expressions of culture or "artifacts", but artifacts are stored in individual houses. Furthermore, these expressions of culture are of great significance to the Ravens and the Eagles of Klukwan. Ownership claims are therefore complex, especially when Western concepts of property (such as the "bundle of rights") and inheritance mix with Tlingit concepts.[59]

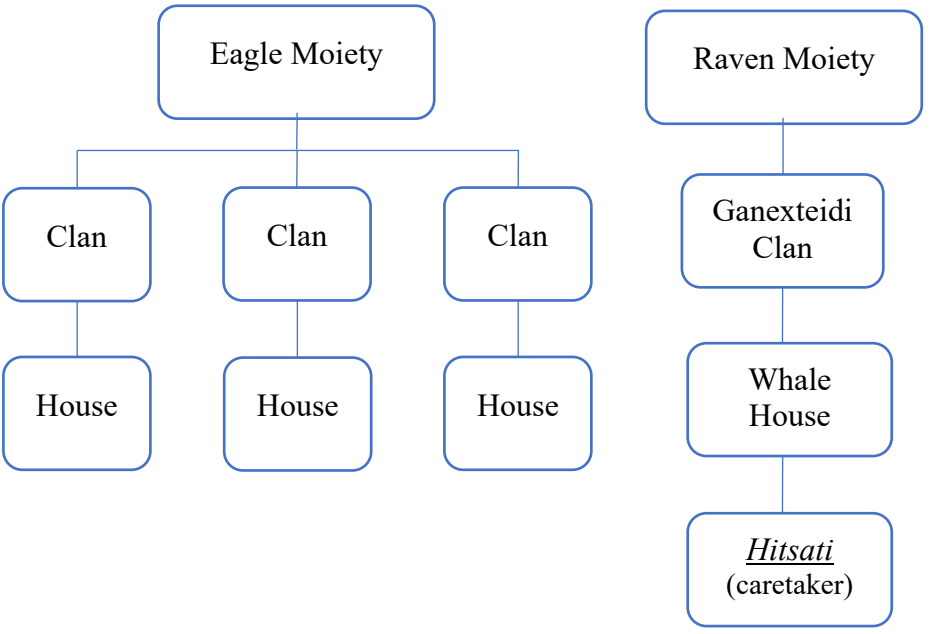

Figure 4. Social Structure of the Tlingit Village of Klukwan.

This case concerns the removal of four house posts (often referred to as totems) and a rain screen from the Whale House of the Ganexteidi Clan ("the Whale

[57] Chilkat Indian Village, IRA v Johnson, (1993) 20 Indian LR 6127 at 6131 (Chilkat Tr Ct) [Chilkat] in Matthew L M Fletcher, American Indian Tribal Law (New York: Aspen Publishers, 2011) at 483-89.

[58] Figure 4 is not a complete depiction of all the Clans and Houses in Klukwan, as the information necessary to complete such a diagram is not widely available. I merely seek to clarify the relationships between the moieties, clans, and houses and their *hitsati* with regards to the Whale House.

[59] *Chilkat, supra* note 57 at 6137.

House artifacts"). The posts and rain screen were carved by a Tlingit individual called Kadjisdu.axtc around the 1830s. George Emmons was an ethnographic photographer who visited Klukwan in the late 1890s and offered to buy the posts and rain screen. He wrote of the pieces: they are "unquestionably the finest example of native art, either Tlingit or Tsimshian, in Alaska, in boldness of conception—although highly conventionalized in form—in execution of detail, and in arrangement of detail."[60] The pieces were priced in the ballpark of several million dollars in the early nineties.[61]

During the trial, testimony was heard regarding how certain property is confirmed as being clan trust property. The process of confirming clan trust property involves presenting it in a ceremony where members of the other moiety (Eagle) are present to witness. Their participation confirms the clan-trust status of property like the Whale House artifacts.[62]

The ownership of the Whale House pieces is murky. The Whale House itself had not been inhabited since the mid-19th Century, when it was a very powerful house. The Whale House posts were commissioned by a community leader in the 1830s to represent the four groups that were being brought together to unify different Ganexteidi houses and constitutionally form the Whale House.[63] The posts tell the stories of the entire clan, not just the Whale House. The house and the posts were dedicated in a ceremony with Eagle members playing a central role, but just as importantly, the Ganexteidi hired members of the Eagle moiety to construct the building. The original structure had actually been destroyed and rebuilt several times, with the posts housed inside it during its varying phases of use, disuse, and construction. The most recent construction of the Whale House was in 1937, 100 years after the original construction. This most recent house was built from cement to protect its contents from fires. The reconstruction was financed and facilitated by members of the entire Ganexteidi Clan and was dedicated in a potlatch in which members of the Eagle moiety once again played a pivotal part.[64] The Whale House was thus symbolically connected to both moieties in both a historic and a more contemporary sense.

Since the creation of the pieces, there have been numerous caretakers, or *hitsatis*. Under Tlingit law, the *hitsati* has the obligation to maintain the property of the house and the clan, and must not sell that property.[65] It does not appear as though the caretaker must be from the Whale House—in fact, at the time of the trial, there were only a few surviving Whale House members. At the time of the trial, Joe Hotch was the *hitsati* of the Whale House. He was a member of the Eagle Moiety, the Eagle Clan, and the Bear and Killer Whale Houses. His father, Victor Hotch, was a member of the Valley House of the Ganexteidi Clan, and had previously been the Whale House

60 *Ibid*.
61 *Ibid.*
62 *Ibid* at 6131.
63 *Ibid* at 6137.
64 *Ibid* at 6133-34.
65 *Ibid* at 6131.

caretaker.[66] It may be relevant to clarify here that, being a caretaker does not involve ownership. One can already see, through these interweaving threads of moieties, families, and houses, how easily claims of ownership could become ensnarled.

Previous attempts to remove the artifacts had been made by anthropologists and art collectors. One of these collectors, Louis Shotridge, was a Tlingit himself.[67] His father was a caretaker of the Whale House at the turn of the 19th Century. After his father passed away, Louis attempted to claim patrilineal inheritance rights to the Whale House items (citing American inheritance law), but the community, citing Tlingit law, unanimously rejected that argument. The Gaanaxteidi saw Shotridge as an outsider with no legitimacy to his claims because he belonged to his mother's Kaagwaantaan Clan.[68]

Joe Hotch recalled two other unsuccessful attempts to remove the artifacts from the Whale House in the seventies.[69] Estelle Johnson, a Tlingit and cousin of Louis Shotridge, attempted to remove the posts and rain screen, encouraged and financed by Michael Johnson (a White art dealer of no relation to Estelle). She had grown up away from Klukwan, but was persuaded to believe by Michael Johnson that she had a hereditary right to sell the artifacts. As the posts held little meaning for her, she took Michael Johnson's offer to pay her handsomely for her support of his acquisition of the artifacts. However, her first attempt to remove the posts was unsuccessful when members from the Klukwan community placed skiffs in front of the door to the Whale House, blocking her way. Michael Johnson then financed a federal court action to determine the "ownership" of the items.[70] Later that same year, Estelle, once again backed by Michael Johnson, attempted to remove the items again. This time, the village siren sounded, and trees were chopped to block the exits of the community. Many members of the community, young and old, acted to protect the items.[71]

In 1976, the village council passed an ordinance prohibiting unapproved removal of "artifacts, clan crests, or other Indian art works."[72] This ordinance was passed in reaction to conflict over the sale of artifacts belonging to another Gaanaxteidi house in the village—the Frog House. A lawsuit followed the sale of the Frog House items, alleging that the sellers did not have the consent of all clan members. A compromise regarding the Frog House items was reached years later: the four posts were returned, but the art collector was allowed to keep the rest of the items sold. The 1976 village ordinance is the law that the defendants were accused of violating.

On 22 April 1984, Bill Thomas, following orders from his uncle Clarence Hotch, broke into the Whale House in the middle of the night and loaded three moving trucks with four house posts and a rain screen. Bill, helped by two other men, drove the

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66 *Ibid* at 6131-32 (Boys were raised under a "strict uncle system", wherein they would move in with the families of their uncles around the ages of 8-12 to learn from them about their laws and clans. "We did what the uncles told us").

67 *Ibid* at 6137.

68 *Ibid;* Marilee Enge, "Who's Laws?" [*sic*], *Anchorage Daily News* (4 October 1994).

69 *Ibid* at 6131.

70 *Ibid* at 6140; *Estelle Johnson v Chilkat Indian Village,* 457 F Supp 384 (ND AK 1978).

71 *Chilkat, supra* note 57 at 6132.

72 *Ibid*.

trucks to Haines, Alaska, where Michael Johnson was waiting in his motel room to inspect the items. The pieces were then transported by ferry to Seattle.

When members of the community realized the items were missing, they contacted the Alaska State Troopers. The items were discovered in a warehouse in Seattle. After months of interviews, investigators concluded that ownership of the items "was so clouded that a crime would be hard to prove."[73] US domestic law did not have the ability to recognize Tlingit forms of ownership. "[T]here is no one person who owns it," said the investigator on the case.[74] However, as I will explain below, the question of ownership was not so murky when viewed through the lens of Tlingit law.

During the investigation, Michael Johnson received an offer of two million dollars for the pieces, a new record (at that time) for a purchase of West Coast Indigenous art.[75] The prospective purchaser was a well-known anthropologist, and his wife, a philanthropist from New York. They intended to donate the pieces to the American Museum of Natural History, after they made the purchase. However, a federal judge ordered an injunction to stop the sale. Since the Alaska State Troopers had suspended their criminal investigation, the Klukwan Council filed a civil suit: *Chilkat Indian Village v Michael R Johnson*.[76]

Interestingly, the US district court found that it lacked jurisdiction, and the district judge ordered that the case be heard in Klukwan's tribal court—a remarkable deference of federal law to tribal law.[77] Klukwan did not have a tribal court, however. It had to be created, drawing from Tlingit and Western family and property law. A Klallam lawyer, Judge James Bowen, was appointed as the judge, after the duly appointed judge and alternate judge recused themselves, as they had been witnesses at trial.[78]

Over four weeks in 1993, an intricate case unfolded. Defendant Michael Johnson refused to participate in the trial, but thirteen other defendants from the community participated.[79] The Tlingit defendants emphasized that they were not associated with the defendant Michael Johnson and did not represent him.[80] Johnson's absence could potentially be interpreted, among other things, as illustrating determination to ignore the existence of Tlingit law or as an attempt to undermine its authority. Regardless of his attitude, Tlingit law prevailed.

Over the course of the trial, many community members and expert witnesses gave testimony. Rules of evidence were relaxed in this case, as is standard in tribal

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73 Chip Colwell, *Plundered Skulls and Stolen Spirits*: *Inside the Fight to Reclaim Native America's Culture* (Chicago: University of Chicago Press, 2017) at 164, citing Marilee Enge, "Whose Laws? A Tangle of Bloodline and Birthrights Is Now a Court's to Unravel" *Anchorage Daily News* (8 April 1993) [Enge, "Whose Laws?"].

74 Colwell, *supra* note 73 at 164.

75 Enge, "Whose Laws?", *supra* note 73.

76 *Chilkat*, *supra* note 57.

77 *Ibid* at 6128.

78 *Ibid.*

79 *Ibid* at 6130, 6142.

80 *Ibid* at 6130.

courts.[81] The only rule of evidence at this trial was relevancy. The case is rich with details of Tlingit law: family trees, the role of *hitsatis*, and matriarchal family obligations were described in great detail. For example, Joe Hotch, who testified three times during the trial, began his testimony by clarifying the importance of the Tlingit regalia he was wearing at the time.[82] He also identified his own lineage and his connection to the Whale House.[83] Through these explanations, Hotch was establishing his own authoritative legitimacy to provide information about these items of great significance.

Many community members testified that the Whale House items played a pivotal role in the community's fabric.[84] Like Hotch, community elders called to the stand began their testimony by making statements in Tlingit. They also provided information about their families, locating themselves within the community's complex network of houses and clans. Multiple elders testified that under Tlingit law, no individual was allowed to sell the artifacts, because they represent the history of the entire Gaanaxteidi clan, not just the Whale House.[85] Furthermore, many testimonies described how the artifacts played a central role in ceremonies in the community. Tlingit and Thunderbird clan member David Katzeek, who is regarded within the community as having tribal-law expertise, explained:

> When you're selling an artifact … you're not only getting rid of a piece of wood … you're getting rid of the music, the song, the dance, and the good, the bad, and the ugly… The worm dish story of a young woman nursing a worm as a pet which became a threat to the entire community … is right up here in the 21st century. If the problem was not resolved it would have ended in the destruction of not just the clan that was involved, but the entire community…. A similar thing 2,000 years later is happening…. This is why we need to keep these things here; this is why we sing the song, and this is why we need them for our ceremonial parties. That's the significance of the artifacts.[86]

The story about the worm that David Katzeek recounted is actually depicted on one of the house posts in the Whale House (see Figure 3). Katzeek's recounting of the story from the post suggests he told the story to remind his community how they had once been divided, mirroring their current division—only this time, the conflict was about the actual material that taught the original lesson. Thus, the Whale House items were identified as being crucial to the survival of the entire community as a whole. A Gaanaxteidi clan member analogized the items to the American flag, asking,

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81 *Ibid.*
82 *Ibid* at 6131.
83 *Ibid.*
84 *Ibid.*
85 *Ibid* at 6134.
86 *Ibid* at 6135. Here, community member David Katzeek is drawing on a Tlingit oral story to bolster his assertions about Tlingit law. This method of identifying and articulating Indigenous law through oral stories has been adapted by Hadley Friedland and Val Napoleon in their case brief methodology. For more, see Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015-2016) 1:1 Lakehead LJ 16 [Hadley & Napoleon].

"Where are you without it?" The above testimonies indicate that the four posts and rain screen are deeply ingrained in community identity, to the point where they could be likened, somewhat crudely, to symbols of patriotism. More productively, the Whale House items could be analogized as a constitutional document—they confirm the unity of the bodies they govern and play a central role in articulating how the community should live together.

On the subject of how the items were regulated by Tlingit law, testimonies overwhelmingly demonstrated that the removal of the Whale House items violated Tlingit law and that the proper restitution would be the return of the items to Klukwan. One elder was able to identify the "rightful heirs" to the Whale House (none of which included any of the defendants).[87] She testified that even if those heirs were identified, it was the Gaanaxteidi clan as a unit that held the authority to make decisions about the custody of the items. A noted Tlingit scholar, Andrew Hope III, gave testimony that the items in the Whale House included stories and songs, and cannot be owned by one individual. Rosita Worl, a well-known Tlingit social anthropologist, testified that objects such as the posts, "cannot be sold, unless for some reason (such as restitution for a crime) the entire clan decides to do so."[88] She stated that the participants in such a decision would include all adult men and "high-ranking" women.[89] She also stated that the penalty under Tlingit law for selling items such as these would be death. Worl, furthermore, noted that nephews are not bound to automatically follow directions from uncles, but should rather use their own judgment.

Judge Bowen found that the Whale House items belonged to the entire Gaanaxteidi clan.[90] Alongside the preponderance of evidence that Johnson and the thirteen family members did not hold any rights to sell the items, Judge Bowen held that the historical resistance to the sale of the items could be considered testimony in itself of the significance of the items to the community. He determined that the Whale House building should be fixed and updated, and the items be brought back to Klukwan.[91] A few weeks later, a large ceremony was held to reinstall the posts and the rain screen in the Whale House.[92] So ended the saga of the Whale House artifacts.

Unlike the BC Ferries totem and Neel's White Spot totem, the totems in the Whale House case do not need to be mined for meaning. Their meaning is evident in the rich court testimony, describing how these posts embody Tlingit law in action—laws emanate from their creation, use, and ownership.[93] The posts themselves may not be written law, but they certainly are a part of Tlingit law—they represent it and are

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87 *Chilkat, supra* note 57 at 6134.

88 *Ibid.*

89 *Ibid.* This delineation between male and female authority reflects an imperfect balance of power in this particular community, as is reflected in most places in our world. I acknowledge that while Tlingit law may be useful for many applications, there is still work that needs to be done to dismantle patriarchal systems of oppression, both within Indigenous communities and in our society more broadly.

90 *Ibid* at 6137.

91 *Ibid* at 6141-42.

92 Marilee Enge, "Clan's Artifacts Returned, Klukwan Celebrates End of Legal Battle", *Anchorage Daily News* (4 October 1994).

93 *Chilkat, supra* note 57.

governed by it. It is striking to compare these totems to the *Canada* and *Wonderbird* totems. These totems come with their own meaning, which is crucially rooted to a specific place and people. When we consider the two other totems next to the posts from the Whale House, it is clear that the commercialization of these meaningful objects has resulted in cultural degradation. These totems, and by extension, all totems, have meaning on land that is lost, when they are deterritorialized.

There is no clear line between what is right and what is wrong when it comes to cultural appropriation and commodification. Commercialization of these expressions of culture has been facilitated by both Indigenous peoples and non-Indigenous people. As I have mentioned, this examination is not calling for a halt to all commodification of Indigenous cultures. My position is not that Indigenous cultures and their expressions are not delicate relics that should be put away in a cabinet; in fact, my position is quite the opposite. Indigenous cultures and laws are robust and have withstood attempted annihilation.[94]

The instinct for cultural fetishizing, demonstrated by the generations of art collectors (and the exorbitant prices of the posts) in the *Chilkat Indian Village, Ira v Johnson*[95] (*Chilkat*) case gets at the root of the problem: there is not much acknowledgement that these posts have any meaning beyond the aesthetic. Indigenous expressions of culture are considered exotic and collectible, but not powerful. When asked, years later, whether he would have done anything differently, the art collector Michael Johnson expressed that he wished he had tried to remove the totems and rain screen from the Whale House ten years earlier, claiming he would have been successful then. One reflection he expressed regarding his behaviour was that the ordeal had left him "financially ruined."[96] As far as I know, he did not express remorse for the harm he had inflicted in the community. Perhaps these art collectors acknowledge a part of these pieces' significance in terms of cultural or spiritual history. But if they do not acknowledge their meaningfulness to Tlingit community and law, they erase the significance and even the existence of Indigenous laws. This is a persistent problem—a colonial myth—that Indigenous laws and governance do not exist.[97]

Usually, Indigenous laws and governance systems are subsumed under colonial laws and structures due to centuries of oppression of Indigenous systems of governance. Even when Indigenous law is admitted to exist, for example in *Tsilhqot'in Nation v British Columbia*[98]—it is subsumed under colonial law. For example, colonial law bends the rules of evidence to allow oral testimony in court.[99] In doing so, courts are suggesting they are enabling the "reconciliation" of Indigenous legal orders and

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94 Hadley & Napoleon, *supra* note 86 at 17-18.

95 *Chilkat*, *supra* note 57.

96 Enge, "Whose Laws?", *supra* note 73.

97 Hadley & Napoleon, *supra* note 86 at 17; Rebecca Johnson & Lori Groft, "Learning Indigenous Law: Reflections on Working with Western Inuit Stories" (2017) 2:2 Lakehead LJ 118 at 118-20; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

98 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [*Tsilhqot'in*].

99 The Supreme Court of Canada in *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at para 53, 153 DLR (4th) 193 affirmed oral history as evidence. Furthermore, oral evidence formed a large part of Tsilhqot'in proof of title: see *Tsilhqot'in*, *supra* note 98 at para 57.

colonial law. However, that oral testimony does not represent Indigenous law, or the enmeshing of Indigenous and colonial law. Instead, that oral testimony simply becomes a mechanization of colonial law. Perhaps that battle is won, but ultimately, Canadian colonial law continues to assert its dominance over Indigenous legal orders.

The *Chilkat* case provides a rich exploration of what totem poles can represent in their proper context. It is especially important to consider this example of a totem pole, given the pervasive trend of decontextualizing totems from their place on land. The case also reflects the aspirations of Article 31 of *UNDRIP*, which provides legal justification internationally for the claim that Indigenous peoples have the right to protect, control and develop their own expressions of culture. Furthermore, this case is an excellent example of how tribal courts in the US enable the articulation and application of Indigenous legal systems.[100] It is also a rare instance of federal US courts deferring to tribal law. It is, to an extent, a triumph of Indigenous law and epistemology over Western conceptions of property and ownership. Beyond a symbolic level, this case was a triumph for Indigenous law because Indigenous law was articulated and applied. This matter was successfully resolved, with all parties (except perhaps Michael Johnson) satisfied with the outcome. It took place in a place of "legitimacy" from both a western and a Tlingit perspective. The case depicts clear ways of using Indigenous law to resolve conflicts: it reveals clear articulations of Tlingit legal authorities, procedural law, family law, and property law. The case defies anyone who believes Indigenous laws do not exist. Indigenous laws are real, they are powerful, and they are ready to be taken up and applied.

Analyzing the Whale House case accomplishes two things. First, it offers a third manifestation of a totem pole "as art"—it brings complexity and unsettles our conceptions of art. Examining this case offers a much richer understanding of certain totem poles without damaging our ability to appreciate their aesthetic value. This case reveals, indisputably, that there is law in art, offering further evidence that Canadian intellectual property law is largely inappropriate for the governance of Indigenous expressions of culture. Second, the Whale House case also provides a potential solution to the problem of appropriated Indigenous cultural expressions, though it is not a perfect solution. Undeniably, there are substantial differences between the physical removal of material objects and the copying of an image from a carving to t-shirts. However, I believe analogizing a material theft to the appropriative use of Indigenous art is useful in articulating the extent of the cultural and legal harm. My examination of the laws and procedures in the Whale House case is a "way in" to imagining how these issues can be understood and addressed appropriately and legitimately and in accordance with Article 31 of *UNDRIP*. My presentation of the Whale House case is not prescriptive, but rather aspirational. By examining the Tlingit laws found in the Whale House case in the context of the larger problem of cultural appropriation, I am expanding our ability to imagine what is possible within law.

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[100] I am not endorsing US tribal law wholesale, but rather comparing its potential for better outcomes to the limited legal avenues in Canadian law. This case reflects the ideals of Article 31 of *UNDRIP*.

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By paying attention to the multiple functionalities of the totems—the expressions of culture, this analysis uncovers how Canadian law acts as the sieve through which colonial violence seeps and evades capture, in direct contradiction of Article 31 of *UNDRIP*. By looking at specific objects that resist appropriation like Ellen Neel's *Wonderbird*, however, this examination contributes a richer understanding of how Indigenous cultures resist colonial violence, and are not simply victimized.

This paper broadens the frame of the issue of appropriation and makes connections between disciplinary fields. Scholars tend to look at the issue of appropriation of Indigenous art from disciplinary boxes: a narrow, intellectual property perspective, or an artistic perspective, or a philosophical perspective. Using a multidisciplinary and internationally-minded approach, I have attempted to capture a more inclusive picture to consider different meanings totems have that must be taken into account when examining cultural appropriation. We cannot simply approach these issues from either a legal, artistic, or philosophical lens, because totems have many different significances: they are part of legal orders, they make claims to land, they tell stories, they are constitutional, and they convey family histories, among many other functions. This article shows how we may ensure that we take into account this full picture, not just the applicable black-letter law.

Examining the three treatments of totems with an international scope revealed the many different functions and meanings of these expressions of culture. While their commodification may be disheartening, there are many instances of totems manifesting their meaning in context. Scholar Aaron Glass gives us something positive to contemplate:

> what is most interesting is that in many places on the coast, Indigenous people are reclaiming the totem pole to serve the function it was meant to serve, as markers of family ancestry and claims to the land. All these other forms are circulating globally and in cyberspace, but totem poles are thriving on the coast to do the work of advertising native claims. In a way that sort of counters the spread of these vapid and de-cultured poles in other contexts.[101]

In this paper, I considered the ways colonial power continues to appropriate Indigenous culture to illuminate a complicated and multilayered landscape. I explored Canadian intellectual property law, colonial policies of cultural erasure, and ongoing commodification of Indigenous culture to examine how Indigenous art and cultural expressions tell a different story than one of dispossession and domination. Despite the threat of cultural appropriation, I believe Indigenous cultural expressions are able to respond with resistance, gendered defiance, humour, and satire.

Discussions about cultural appropriation can quickly turn into highly theoretical or morally charged arguments. I have tried to bring dimension to what is

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[101] Heather Ramsay, "Totem Poles: Myth and Fact", *The Tyee* (31 March 2011), online: <thetyee.ca/Books/2011/03/31/TotemPoles/>.

often flattened by theoretical discourse by rooting my analysis in real life examples. As we have seen, Indigenous art can be harmfully commodified by capitalism, but Indigenous artists like Ellen Neel can also make use of capitalism to create their own livelihoods and provide for their families. My analysis does not provide a clear-cut answer about "what should be done" to solve these problems, or what is right and what is wrong. But by using tangible examples, I hope to have allowed readers to gain some insight into this multi-layered and extremely complicated legal landscape, and offered some difficult questions to grapple with the next time they walk by a souvenir shop.