

Filling Up the Land with Pilalt:  
Countering the British Columbia Referrals Process and  
Reclaiming Stó:lō Ways of Being on the Land

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We accept this community governance project as conforming  
to the standard required.

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## Acknowledgements

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George Manuel, renowned Secwepemc leader, once said, “I would rather hand over to my children the dignity of the struggle than to sign a deal they cannot live with.” This quotation can be found posted all around the Cheam council office where I spent many hours working. I thought about this statement a lot over my time in Cheam, and to me it characterizes of **the** issue that defines contemporary Indigenous struggles against colonialism. Manuel asks, What does it mean to “live”? More specifically, he asks an Indigenous audience, what does it mean to live as an Indigenous person? The question in my mind that flows from this is one for all of us: What kind of life are you fighting for?

I came into this project knowing very little about the Cheam First Nation. Early on in our course work for the Indigenous Governance (IGOV) program, our director, Dr. Taiaiake Alfred, told the class of a community that has a reputation for direct action in defense of their lifeways and territories. It is not surprising then that IGOV and Cheam were looking for an opportunity to work together.

In the summer of 2009, IGOV students Jake Wark, Mick Scow, Chris Macleod and I came to stay and work in Cheam under the direction of elder, counselor and former chief June Quipp. My own time in Cheam spanned from late August 2009 to mid November 2009, with a few trips back and forth early in 2010. While a good proportion of our work was done in the council office, we were privileged enough to get to interact on a daily basis with courageous and generous people willing to share their experiences and knowledge. These conversations provided context to the theories learned in the IGOV classroom in a way I never imagined. This learning happened over many meals, on

the river, in the car, in courthouse lobbies (a truly Cheam experience), across the sewing table and over innumerable buckets of coffee of varying strengths.

Through this work I have come to appreciate how limited the many academic research paradigms can be. I have spent more than two months in Cheam, and participated in as many activities as possible, yet I am under no illusion that I know all there is to know about this community. As such, in this work I do not claim to represent anyone other than myself. Nor do I think that I am here to “teach” the people from Cheam anything that they do not already know. Instead, my goal is to articulate the concerns that I heard and saw in the community in a single comprehensive analysis. I have undertaken this work knowing that I am accountable to the high academic and ethical standards of the Indigenous Governance program. In addition, I feel deeply responsible to the Cheam community through the many valuable relationships I have formed there, in particular with our supervisor June Quipp.

### **A Word on Terminology**

When it comes to Indigenous issues in Canada a common debate centres on choices of terminology. The words we employ wield very real power in creating the contextual and material universe that surrounds around us. Therefore, the words that mainstream society uses to describe Indigenous peoples, and the words that Indigenous peoples use to describe themselves, are significant in creating the context in which these struggles occur. Whenever possible I will employ the term “Indigenous” as described by Alfred and Corntassel when they argue:

Indigenusness is an identity constructed, shaped and lived in the politicized context of contemporary colonialism. The communities, clans, nations and tribes we call *Indigenous peoples* are just that: Indigenous to the lands they inhabit, in contrast to and in contention with the colonial societies and states that have spread out from Europe and other centres of empire. It is this oppositional, place-based existence, along with the consciousness of being in struggle against the dispossessing and demeaning fact of colonization by foreign peoples, that fundamentally distinguishes Indigenous peoples from other people of the world.<sup>1</sup>

The strength of this definition is that it allows for the identification of peoples not contingent on the authority or sanction of either colonial society or the colonial nation-state. In contrast, the current fashionable term, “Aboriginal”, originated as a title used when referring to particular political “rights” afforded to Indigenous peoples through state apparatus. Therefore the existence of “Aboriginals” is entirely contingent on the existence and persistence of a colonial nation-state. Cornstassel and Alfred suggest:

Indigenous peoples are forced by the compelling needs of physical survival to cooperate individually and collectively with the state authorities to ensure their physical survival. Consequently, there are many “aboriginals”...who identify themselves solely by their political-legal relationship to the state rather than by any cultural or social ties to their Indigenous community or culture or homeland.<sup>2</sup>

Therefore the use of the term ‘Aboriginal’ within the Canadian context is necessarily a subjugated title. This critique also applies to the popular term ‘First Nations’. For these reasons my usage of both terms will be largely limited to their specific treatment within the Canadian statist context.

In addition, I have chosen to refer to non-indigenous society (myself included) as ‘Settler society’ rather than the more benign ‘Euro-Canadian’. The term ‘Settler’ engages

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<sup>1</sup> Taiaiake Alfred and Jeff Cornstassel, “Being Indigenous: Resurgences Against Contemporary Colonialism,” *Government and Opposition* 40 (Oxford: Blackwell Publishing, September 2005): 597.

<sup>2</sup> *Ibid.*, 599.

the context of colonization in Canada and works to remind us of our unresolved and unjust presence on Indigenous lands. Therefore it is my hope that, by choosing terms such as these, this paper will be a good early step in terms of constructing a more honest and just relationship between likeminded Indigenous and non-indigenous communities.

### **Referrals: BC's Answer to the Land Question**

The last few decades has seen a significant shift in the way that the Crown deals with the controversial issues of Aboriginal title and rights. These shifts in policy are particularly apparent in British Columbia, where apart from a few small areas, the province remains without treaties. Many policies have been undertaken in order to remedy the 'land question', the highest profile of which is the British Columbia Treaty Commission (BCTC). A lesser-known provincial policy when it comes to Indigenous lands is known as the referrals system. The referrals process essentially seeks to pave the way for resource development on unceded territories while ostensibly conforming to the legal duty to consult and accommodate with the Indigenous community on whose territory that development occurs. Though his focus was Africa, scholar Albert Memmi might well have been studying the British Columbia referrals process when he stated:

Accepting the reality of being a colonizer means agreeing to be a non-legitimate privileged person, that is, a usurper... To possess victory completely he needs to absolve himself of it and the conditions under which it was attained... He endeavors to falsify history, he rewrites laws, he would extinguish memories- anything to succeed in transforming his usurpation into legitimacy.<sup>3</sup>

The intent of this paper is to reveal the many failings of the referrals process, with particular reference to the experiences of the Cheam First Nation. First, I will look briefly

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<sup>3</sup> Albert Memmi, *The Colonizer and the Colonized* (Boston: Beacon Press, 1965): 52.

at the case law that established the Crown's duty to consult and accommodate. While these judgments may offer minor protections for Indigenous peoples, I argue that when it comes to Aboriginal rights and title, the justice system has very little to do with justice at all. With this in mind I would argue that to rely on the colonizer's own law for protection in the face of the incredible rate at which Indigenous knowledge and territories are being eroded is, not only overly optimistic, it is -I fear- irresponsible.

In addition, the referrals system maintains colonialism through the reification of the role of the band council as the legitimate representative of Indigenous communities. Within Cheam, like many other communities, a significant divide exists around whether or not the band council is acting in the best interests of their members. My point here is not to point fingers at any particular person or group of people within the band council or the wider political community, but rather to suggest that band councils were, from their inception, structured to divide and disempower Indigenous communities. Within Cheam, this conflict manifests itself through palpable factionalism, between those that favor the protection of territories, and those that place greater value on the pursuit of economic development initiatives, as well as between those that have chosen to work within the system and those who reject it outright. This factionalism is built into the band council system by design, and at least in the case of Cheam, has only been heightened by the referral system. Essentially, the band council system works to make ongoing colonialism invisible by allowing the manipulation of band governance through levers embedded within a system created by the colonizers themselves. Provincial and federal governments to appear distant from the functioning of band politics when in reality they continue to play a fundamental role in the governance of Indigenous communities. The question then

becomes, is it possible to act as self-determining peoples within the current band council system?

Next, I will show that the province's policy responses- in this case the referrals system- cannot be viewed outside of the asymmetrical power relationship between the Crown and Indigenous peoples. While the province has a huge bureaucracy, including staff lawyers to support their actions, Cheam has neither the funds nor the human capacity to keep up with the demands of such policies. In addition, Cheam is struggling with endless legal and political battles around the fishery, as well as a myriad of social issues brought from the ravages of ongoing colonization. Simply, the province cannot be said to be operating in good faith when it comes to Indigenous peoples and their territories, when communities like Cheam do not even have the capacity to even respond to referral letters in the first instance.

Another way in which injustice is built in to the referrals regime is through the many processes that Cheam must participate in and conform to in attempting to assert their claims within the process itself. I will demonstrate how these processes, namely archeological and traditional use assessments serve a colonial task. Despite the rhetoric of 'traditional ecological knowledge', standards of proof still favor Western understandings. How can the Crown claim to be acting in good faith when the best evidence Cheam has in proving their interests is marginalized? Further, what does it say about the Crown's commitment to justice when much of the information that could have been used to determine Cheam's interests has been lost through hundreds of years of the Crown's own actions?



Finally, I argue that the current referrals process is entirely incapable of appreciating and respecting Cheam's distinct and important worldviews including, most significantly, notions of land and appropriate land use. If provincial decision-makers were in fact capable of coming to know and respect the Stó:lō worldview, as they so often claim, the vast majority of developments would not proceed at all. In fact, if these bureaucrats did sincerely respect the Stó:lō worldview, the ethical commitments that this understanding would engender would likely preclude them from being able to work as provincial bureaucrats in the first instance.

This leads to my central thesis; which is, by requiring Indigenous participation in referrals, and all that comes with them, the province is conforming to the centuries old imperative of assimilation. If we understand assimilation to mean "the process of receiving new facts or of responding to new situations in conformity with what is readily available to consciousness,"<sup>4</sup> the true danger of these processes becomes apparent. When we engage in the language and logic of environmental and archeological assessments it is not just that these ways of thinking wash over us and leaves us unaffected. When the way of being and seeing the world embedded within these foreign frameworks becomes the "readily available to consciousness," Cheam's particular worldview is seriously at risk of transformation (assimilation). This kind of transformed subjectivity is made apparent when the sacred relationship between people and trees and salmon- for example- gets spoken of in terms of resources. When does the shift happen from seeing the whole earth as sacred, to understanding sacredness as located in 'site specific' locations such as

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<sup>4</sup> "assimilation." Merriam-Webster Online Dictionary. 2009. Merriam-Webster Online. 23 November 2009 <<http://www.merriam-webster.com/dictionary/assimilation>>.

culturally modified trees? Simply, these processes, which profess to protect places of cultural and environmental importance work to assimilate Indigenous worldviews. While assimilation is a scary goal to be sure, Albert Memmi teaches us that, within the colonial context, attempts at assimilation actually amount to subjugation.

The case of Cattermole Timber's proposed logging within the Elk Creek watershed, part of Cheam's traditional territory, demonstrates that even when Cheam plays by the Crown's rules to the best of their ability, the Crown's commitment to economic development far exceeds its commitment to justice for Indigenous peoples. It seems very clear to me that the Elk Creek case was a kind of turning point; it was about frustrating Cheam to the point where a significant sector of the political leadership and community considered opposing this development futile. Since the Elk Creek controversy, Cheam signed a Forest and Range Agreement<sup>5</sup> with the Ministry of Forests and Range, part of a province-wide initiative that streamlines the process of consultation for potential resource developers and forces compliance with a pro-development position. Sharing the same logic as the BCTC, these Forestry and Range Agreements (FRAs) represent the next stage of colonialism in British Columbia, where the Crown seeks to solve the land question by offering Indigenous groups dismal economic enticements. What does it say about the Crown's commitment to reconciliation, when they first steal Cheam's territory, create horrific conditions of impoverishment, and then claim moral righteousness by offering back a small portion of the wealth that should be, by any standard of justice, rightfully Cheam's in the first instance? Clearly, the province's motivation does not stem from a concern for justice.

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<sup>5</sup> These are now referred to as Forest and Range Opportunities.

I wish that I could offer a more positive vision for Crown/Cheam relations going forward. Following this research, I find it difficult to believe that the province, through the referral process, is interested in anything other than maintaining their sovereign authority over Indigenous peoples and maintaining access to the lands that, for hundreds of years, have brought them great wealth. The central lesson my work offers is that the provincial referrals process as it is currently conceived is not the new more enlightened policy towards Indigenous people that bureaucrats might have us believe; rather, the referrals process is the logical extension of hundreds of years of colonial policy. I would suggest that the referrals regime is perhaps more dangerous than the more overt colonialism of decades past, for it allows the province to claim moral righteousness towards Indigenous peoples without endangering their hegemony over Indigenous peoples and their territories. My final point is a simple one; it does not make sense to centre resistance to assimilationist colonial policies by becoming more like bureaucrats. The overall lesson from talking to people in Cheam, examining Pilalt history and analyzing the referrals system, is a simple one; the best response to a colonial power that seeks to assimilate Indigenous peoples and worldviews requires the renewal, remembering and (re)living of Indigenous worldviews and lifeways. It is time to fill up the land with Pilalt.

### **The Pilalt Universe**

Talking about Stó:lō identity, particularly as a Settler outsider, is an exceedingly difficult undertaking. I approach this task cognizant of the harmful role that non-Indigenous people have had in the (mis)representation, and (de)formation of Indigenous

identities. With that said, evading a discussion of identity would necessarily result in an incomplete analysis of the kinds of colonial oppressions reflected within the referrals system. Further, as a consequence of my attention to Indigenous identities, I may be accused of being an essentialist. It is worth noting that the essentialist charge most often seems to come from non-indigenous commentators who view identity through a kind of post-modern lens. From their perspective, Indigenous identities as I conceive of them within this work (grounded in place), are necessarily biologically determined or static. However, as Linda Tuhiwai Smith suggests:

The essence of a person is also discussed in relation to indigenous concepts of spirituality. In these views the essence of a person has a genealogy which can be traced back to an earth parent, usually glossed an Earth Mother. A human person does not stand alone, but shares with other animate and, in the Western sense, ‘inanimate’ beings, a relationship based on a share ‘essence’ of life. The significance of place, of land, of landscape, of other things in the universe, in defining the very essence of a people, makes for a very different rendering of the term essentialism as used by indigenous peoples.<sup>6</sup>

From this perspective, change or transformation is not the enemy of Indigenous identities; rather, the question becomes, change on whose terms?

Just as Linda Tuhiwai Smith suggests, Stó:lō metaphysics and thus identity are fundamentally grounded in place and landscape. The Stó:lō world, known in *Halq'eméylem* as *S'ólh Téméxw*, “is as much a mythological universe as a biological world. The Stó:lō walk simultaneously through both the spiritual and physical realms of

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<sup>6</sup> Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 1999): 74.

this landscape, connected to the Creator through the land itself.”<sup>7</sup> Evidence of this connection is the importance of transformations in the making of the world. Oral histories, known as *Sxwōxwiyám*:

[describe] the distant past “when the world was not quite right.” They describe the time when animals and people could speak to one another and assume one another’s forms. For example, mountain goats on *Lhilheqey* (Mt. Cheam) could take off their coats and become human. Into this chaotic world came *Xexá:ls*, the transformers- the three sons and one daughter of Red-Headed Woodpecker and Black Bear, who lived in the mountains at the head of Harrison Lake. Black Bear’s jealous second wife, Grizzly Bear, killed Red-Headed Woodpecker. The four children- all black bears- left their widowed father and began the process of making the world right through transformations... During their travels, *Xexá:ls* performed many transformations. They turned people who acted wrongly to stone. They rewarded others for their generosity by transforming them into valuable local resources (including the cedar, the sturgeon and the beaver), many of which are ancestors of the Stó:lō people. They fixed those people and animals that they chose not to transform into permanent forms, along with other land features such as rivers and mountains. These transformations thus fixed the world and established the present landscape.<sup>8</sup>

In addition, many stories recount the time when the sky-born people (the *Tel Swayel*) fell from the sky with their “special knowledge and...transformations that brought order to the world.”<sup>9</sup> Like the *Xexá:ls*, the *Tel Swayel* are thought to be the ancestors of many Stó:lō communities. Together, these stories teach that the sacred is not merely limited to specific locations, but rather, that the entire Stó:lō landscape is imbued with spirit and sacredness as a gift from the Creator. The continuing use of “place names in the *Halq’emeylem* language mark this important relationship to the land. *Halq’emeylem* place

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<sup>7</sup> Albert McHalsie, David M. Schaepe and Keith Thor Carlson, “Making the World Right Through Transformations,” *A Stó:lō-Coast Salish Historical Atlas* edited by Keith Thor Carlson (Vancouver: Douglas & McIntyre): 6.

<sup>8</sup> *Ibid.*, 6.

<sup>9</sup> *Ibid.*, 6.

names give the land a voice through the meaning of the names and the stories that are associated with them.”<sup>10</sup>

The destruction of *S’ólh Téméxw* through development has far greater consequences for Indigenous people, for it does not merely risk eliminating places of historical significance; but rather it risks destroying the very contents of the Stó:lō universe; for, according to Stó:lō cosmology, the separation between the human and non-human world is a concept that came with the arrival of Europeans. Therefore, the destruction of a cedar tree- for example- is literally equivalent to the destruction of a family member. For the Pilalt people of Cheam specifically, the mountain goats that roam their territory (or used to roam their territory) are thought to be their ancestors; therefore, the destruction of the mountain goat’s habitat directly threatens the well being of Cheam’s relatives. From this perspective, the archeological models using site specific culturally relevant spots to determine Aboriginal interests entirely misunderstand Cheam’s and the Stó:lō worldview. In the case of particular sites of spiritual significance Vine Deloria Jr. argues “the nature of revelation at sacred places is often of such a personal nature as to preclude turning it into a subject of missionary activities. Thus most Indian tribes will not reveal the location of sacred places.”<sup>11</sup> Later I will speak more to the problems associated with including or integrating these competing Indigenous views within the referrals process.

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<sup>10</sup> June Quipp, *Save the Mountains: Unceded Pilalt Territory Threatened by Development*, pamphlet (November 2003): 2.

<sup>11</sup> Vine Deloria Jr., *God is Red: A Native View of Religion* (Golden, Colorado: Fulcrum Publishing, 2003): 66.

Examining pre-contact Stó:lō intercommunity relations is to give a more complete picture of the consequences of colonization for the Pilalt people of Cheam, and the ways in which the contemporary referral system continues these same colonizing processes. The contemporary debates over rigid territorial boundaries are largely a product of colonialism. Pre-contact Indigenous groups along the Fraser River (the *Stó:lō*) should not be thought of as “entirely self-sufficient units.”<sup>12</sup> Interaction for the purposes of trade, marriages and governance were common. For example, Stó:lō territory is made up of four separate “food processing” zones each with distinct biological/geographical characteristics.<sup>13</sup> Food resources range from plentiful shellfish near the mouth of the Fraser River, to cranberries and wapato<sup>14</sup> in the marshy lowland region. Moving up into the Fraser Canyon, the salmon harvest was most successful and found fishers utilizing the arid climate to employ wind-drying technologies. Finally, the fourth zone includes the “subalpine resources such as blueberries, tubers and game.”<sup>15</sup> It was through families that ownership or stewardship of harvesting spots was passed down; therefore, marriages between groups were common in order to ensure access to each region’s diverse biological resources. In addition, many groups (including the Pilalt) had alternate village sites that allowed for greater access to resources during the winter months. This is not to say that relations between communities were always peaceful; however, it appears that considerable time was spent maintaining relations between communities within the region, and is thus central to the Stó:lō way of life. Once again, the importance of

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<sup>12</sup> Dorothy Irene Kennedy, “Looking for Tribes in all the Wrong Places: An Examination of the Central Coast Salish Coastal Network,” MA Thesis, University of Victoria, 1995.

<sup>13</sup> Keith Thor Carlson, “Expressions of Collective Identity,” in *A Stó:lō-Coast Salish Historical Atlas* edited by Keith Thor Carlson (Vancouver: Douglas & McIntyre): 26.

<sup>14</sup> Wapato is a tuber that can be found in marshy areas.

<sup>15</sup> Carlson, “Expressions,” 26.

recognizing the Stó:lō's historic intercommunity connections will become more apparent when viewed in light of the centuries of divide and conquer tactics used by colonial forces that continue to this day through the referrals system.

Similarly, it is vitally important to look at traditional governance structures of the Pilalt people in order to fully appreciate the consequences of the imposition of the band council system that is reified and maintained through the referrals system. Traditional leadership within Stó:lō communities is very different from how many (both Indigenous and non-Indigenous) view leadership today. In traditional Stó:lō governance “a leader was not a ‘chief’ per se: he did not hold a political office; he could not coerce action or servitude from non-slaves; and he could not extract tribute from others.”<sup>16</sup> In addition, these leaders (*siyams*) “held no legislative, judicial or executive authority.”<sup>17</sup> Essentially, certain individuals were viewed within their communities as particularly capable in leadership, a role that slowly developed into a position of unofficial authority. *Siyams* managed community affairs such as basic infrastructure needs, as well as regulating resources to varying degrees.<sup>18</sup> Essentially, *siyams* owed their leadership to the consent of their communities; and thus, built in to the governance structure was a level of accountability that is sadly missing from the band council system today.

### **You Are on Unceded Territory**

Mohawk scholar Taiaiake Alfred states:

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<sup>16</sup> D. Kennedy, 61.

<sup>17</sup> Stern in Kennedy, 61.

<sup>18</sup> D. Kennedy, 65.



In a de-colonized rationale unbound from the self-supporting internal logic of Canadian property and constitutional law, there is no legitimate basis for British Columbia's existence outside of racist arguments rooted in obsolete social doctrines of European racial superiority, which allow for a claim of legitimacy and authority based on the inherent right of white peoples to impose their order on non-white peoples.<sup>19</sup>

These racist self-serving doctrines that Alfred speaks of are important to sketch out, for they continue to hold significant weight within the contemporary settler imaginary.

Legal scholars John Borrows and Leonard Rotman suggest, “European nations attempted to reinforce their claims to lands in the New World through the doctrines of discovery, occupation/settlement, adverse possession, conquest, and cession.”<sup>20</sup> Despite Borrows’ and Rotman’s opinion that these traditional international legal doctrines have no validity in Canadian law around Aboriginal title, these racist and empirically incorrect doctrines continue to find their way in to Crown policies, legal opinions, and historical narratives.

The doctrine of discovery is rooted in the notion of *terra nullius*, the idea that the ownership of previously uninhabited lands reverts to the sovereign authority of its “discoverer.” The inconvenient fact that Indigenous peoples already populated the “New World,” led to the expansion of the doctrine of *terra nullius* to include territories populated by so called uncivilized peoples.<sup>21</sup> I would suggest that the story of discovery has become entrenched in Canadian political culture, as well as within the mainstream Canadian identity itself.

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<sup>19</sup> Taiaiake Alfred, “Deconstructing the BC Treaty Process,” *Balayi: Culture, Law and Colonialism*, 3 (2001): 39.

<sup>20</sup> John J. Borrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary* 3<sup>rd</sup> Edition (Markham: LexisNexis Canada, 2007): 194.

<sup>21</sup> *Ibid.*, 195.

Closely related to the notion of *terra nullius* is the doctrine of effective occupation. This theory, whose roots trace back to the political treatise of John Locke, uses a Eurocentric understanding of land use and occupation that disadvantages Indigenous title claims in the first instance. This justification is still evident in discussions around the British Columbia Treaty Commission (BCTC), where, because Indigenous land use does not conform to the Eurocentric understanding of land use, territorial title claims are significantly diminished. Similar language is found in the *Delgamuukw* decision involving Aboriginal title. I will examine the *Delgamuukw* decision at greater length later in this paper.

The doctrine of adverse possession has been used to justify the ongoing occupation of Indigenous territories. This theory “basically posits that you can acquire title to part of another state’s land if you openly occupy it for an extended period of time and the original owner acquiesces to your presence.”<sup>22</sup> Even from my short stay in Cheam it is clear to me that the Pilalt people, as a group, have never acquiesced to colonial rule. The trouble is, that within the mainstream public discourse, this false doctrine persists as evidenced by the common “we are here, deal with it” narrative. Even British Columbia’s much lauded *New Relationship* document begins with the statement, “we are all here to stay.”<sup>23</sup>

Early international legal doctrine supports the idea that conquest is a legitimate means through which one sovereign power can gain territory and sovereignty over another formerly sovereign power. This principle of law “could apply in Canada only if a

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<sup>22</sup> Ibid., 197.

<sup>23</sup> Province of British Columbia, “The New Relationship,” (2005) <[http://www.gov.bc.ca/arr/newrelationship/down/new\\_relationship.pdf](http://www.gov.bc.ca/arr/newrelationship/down/new_relationship.pdf)> (accessed March 18, 2010).

declaration of had been proclaimed previously by the Crown, and there was no evidence of this ever occurring in Aboriginal-Crown relations.”<sup>24</sup> Again, the notion of conquest is very alive within the Canadian imaginary. I cannot even count the number of times that I have engaged in a debate with Settler Canadians where their argument ultimately rest on the idea that settlement in Canada is legitimate because early Settlers and Indigenous peoples fought a kind of war that Canada “won” and Indigenous peoples “lost”.

Finally, the international legal doctrine of cession is wielded to absolve colonial governments and societies of their guilt for the ongoing occupation of Indigenous peoples and their territories. Clearly, early colonizers saw the need to meet the legal requirement of cession as evidenced by their pursuit of treaties. However, the terms of many treaties continue to be disputed by Indigenous peoples across Canada. Even the pathetic “negotiated” promises have often been ignored.<sup>25</sup> In British Columbia, where the vast majority of Indigenous communities are without treaty, the province takes the doctrine of cession very seriously as evidenced by the BCTC. In keeping with this international legal doctrine, these treaties are pursued with the principle of “extinguishment” in mind. Despite their best efforts, the land question in British Columbia largely remains unanswered.

Maori scholar Linda Tuhiwai Smith suggests:

*Coming to know the past* has been part of the critical pedagogy of decolonization. To hold alternative histories is to hold alternative knowledges. The pedagogical implications of this access to alternative

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<sup>24</sup> Ibid., 199.

<sup>25</sup> Ibid., 199.

knowledges is that they can form the basis of alternative ways of doing things.<sup>26</sup>

In recounting the history of the colonization of Stó:lō people and territories, my purpose is not to participate in the common colonial practice of telling Indigenous people about their own lived experiences. Rather, this portion of my work is aimed centrally at a non-Stó:lō audience. Drawing on Tuhiwai Smith's insight on critical pedagogies, my hope is to provide this audience with a new foundation on which to envision different ways of acting in the world.

In creating this critical awareness, a good place to start is with the fact that the people of Cheam “never ceded [their] territory, never signed any treaties, never diminished [their] claim to [their] land.”<sup>27</sup> *Xewlitem* (Settler) society's present day dominance in Stó:lō country was an incremental process involving the introduction of foreign diseases resulting in profound population losses, the mass migration of *xewlitem* miners in the pursuit of gold, foreign missionaries tasked with “saving” Indigenous souls, and the profound damage to the salmon fishery through Settler interference, among others. Each and every one of these pursuits took place without the prior consent of the territories rightful owners.

Governor James Douglas, lacking the resources to pursue treaties with Indigenous nations in British Columbia, initiated the reservation system as a means through which to mitigate tensions between Indigenous and Settler people as well as guarantee Settler's access to valuable resources within Indigenous people's territories.<sup>28</sup>

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<sup>26</sup> Linda Tuhiwai Smith, 34

<sup>27</sup> Quipp, “Save the Mountains”, 1.

<sup>28</sup> Keith Thor Carlson, “Indian Reservations,” in *A Stó:lō-Coast Salish Historical Atlas* edited by Keith Thor Carlson (Vancouver: Douglas & McIntyre): 94.

What is rarely mentioned is that Indigenous people's minimal participation in the creation of these reserves was undertaken with the understanding that such agreements had no bearing on Aboriginal title. Historian Keith Thor Carlson suggests that according to Aboriginal testimony, "these earlier treaties did not extinguish existing title, but rather confirmed it and guaranteed its continuance on all remaining land outside the white settlements."<sup>29</sup> In addition, Indigenous peoples were to enjoy unregulated hunting and fishing rights within their respective territories.<sup>30</sup>

This era of colonial governments recognizing Indigenous title- even in a minimal way- came to an abrupt halt when, in 1864, Douglas's successor Governor Joseph Trutch, "unilaterally, and without consultation," shrunk these reserves by 92%.<sup>31</sup> These changes were met with intense opposition throughout Stó:lō territory including from Cheam. A 1874 Stó:lō petition, spearheaded, in part, by Chief Alexis from Cheam, states:

Our hearts have been wounded by the arbitrary way the Government of British Columbia has dealt with us in locating and dividing our reserves...and we have felt like men trampled on, and are commencing to believe that the aim of the Whitemen is to exterminate us as soon as they can.<sup>32</sup>

All around the province similar actions were being taken in opposition to Trutch's policies. For example, "the Shushwap and Okanagans formed a confederacy and nearly went to war in 1877 over the land issue. At Lytton there was discussion about forming a Thomson Union to push for more land. The Chilcotins declared that their entire territory

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<sup>29</sup> Ibid., 94.

<sup>30</sup> Ruben Ware, *Our Homes are Bleeding: A Short History of Indian Reserves* (Union of B.C. Indian Chiefs: Vancouver, 1975): 7.

<sup>31</sup> Carlson, "Indian Reservations," 94.

<sup>32</sup> Stó:lō Petition 1874, in Carlson, "Indian Reservations," 95.

be reserved and that no whites were to enter. Along the coast there were sporadic attacks on white settlers and traders.”<sup>33</sup>

In 1875 the governments in Victoria and Ottawa responded by creating the Indian Reserve Commission whose mandate was limited exclusively to addressing concerns about reserve lands. The Commission had nothing to say to the larger issue of Indigenous title.<sup>34</sup> The process was fraught with problems: the province maintained the right to override the Commission’s findings; already privatized lands were off the table; consultation with the Indian agent was sometimes considered adequate. The Commission did little to assuage the concerns of Indigenous groups in B.C. In fact, it is during the Commission’s tenure that the province stepped up enforcement of colonial laws including the regulation of fisheries, forestry practices and mining rights, and began to limit Indigenous activities on lands not reserved. In addition, the province, in full view of the federal government (supposedly bound by their fiduciary obligation), enacted legislation to limit Indigenous peoples’ participation in economic activities such as logging. Ultimately, this failed attempt to address concerns about reserves, together with increasing enforcement of colonial laws worked to create conditions of forced dependency within many Indigenous communities.

Within what is now known as the Fraser Valley, the early 1900s saw a number of significant events that emphasized the many problems of increasing settlement on Indigenous territories. For example, in 1913 the construction of the Canadian National Railway through the Fraser Canyon led to a slide at Hell’s Gate that significantly

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<sup>33</sup> Ware, 12.

<sup>34</sup> Ware, 12.

disrupted the Stó:lō fishery. Further, the construction of roadways near or through reserve lands was met with widespread opposition from Indigenous communities. These kinds of pressures led to the creation of the McKenna- McBride Commission in 1912 with a mandate to “make cut-offs ONLY if the Band consented” (emphasis in original).<sup>35</sup> Despite opposition from Cheam, a significant right-of-way was deleted from the reserved lands, in order to validate the Canadian National railway passing through the reserve.

Today Cheam is a community of approximately 460 members, with just over 200 living on reserve. The reserve lands include an 840 acre plot on the south side of the Fraser River now known as Cheam 1, and a 350 acre section known as Tseatah 2, on the River’s north bank.<sup>36</sup> Through Cheam’s already minuscule land base runs right-of-ways for the Canadian National Railway (CN), high voltage power lines, a gas line, as well as the Agassiz highway. In addition to taking up reserve land, the power lines are a great concern in terms of negative health consequences from Electric and Magnetic Fields (EMFs).<sup>37</sup> One band member told me that these lines also prevent potential future economic development initiatives because businesses are reluctant to build and work underneath these lines. The constant rumble of trains through the reserve has become a central characteristic of life in Cheam. Not only do they negatively impact the quality of life within the community, the trains have also taken the lives of several community members including the highly regarded Chief Albert Douglas.

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<sup>35</sup> Ware, 16.

<sup>36</sup> Statistics Canada, “Community Profiles,” < <http://ceps.statcan.ca/census-recensement/2006/dp-pd/prof/92-591/details/page.cfm?Lang=E&Geo1=CSD&Code1=5909837&Geo2=PR&Code2=59&Data=Count&SearchText=Cheam%201&SearchType=Begins&SearchPR=01&B1=All&Custom=>> (accessed October 30, 2009).

<sup>37</sup> The negative health consequences of EMFs in Stó:lō communities are now being studied by the Stó:lō Tribal Council. See < [http://www.stolotribalcouncil.ca/rights\\_title.html](http://www.stolotribalcouncil.ca/rights_title.html)>.

Those early Stó:lō petitioners were right to suggest that the colonial administrations were trying to exterminate them in order to gain access to their lands; subsequent policies such as residential schools, the racist foster care system, and the banning of cultural practices are evidence of this fact. This brief historical overview establishes clearly and unequivocally that the Cheam people of the Pilalt tribe have never ceded title to their traditional territories; and thus, any economic development that occurs on that territory, without the full consent of the Cheam people is nothing more than the continuation of the more overt colonial violence of decades past.

### **Colonial Laws in Service to Colonial Governments**

On numerous occasions I have heard a number of Indigenous leaders and commentators say, “We are winning in the courts.”<sup>38</sup> This position is also reflected widely in the academic sphere. For example, in a research paper prepared for the National Centre for First Nations Governance, Maria Moratello states, “Indigenous peoples are breaking free from colonial racist structures, and Canadian courts have articulated a series of enforceable legal principles whose purpose is to both protect and actualize Aboriginal and treaty rights.”<sup>39</sup> She goes on to argue that, “these court rulings both direct and guide Crown conduct in consulting and accommodating Aboriginal and treaty rights in a manner which facilitates reconciliation between the Crown and Aboriginal peoples.” The question needs to be asked, what constitutes winning? Moratello’s vision of winning is revealed when she argues that the new consultation regime has the potential for

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<sup>38</sup> Most recently I heard this said a number of times at the 2009 Union of BC Indian Chiefs Annual General Meeting in Harrison Hot Springs on September 16, 2009..

<sup>39</sup> Maria Moratello, “The Crown’s Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights,” *National Centre for First Nations Governance* (February, 2008): 4.



Indigenous peoples to “advance their quest for self-determination within our Canadian constitutional fabric.” With this position in mind Moratello’s overly positive perspective makes perfect sense. She has no interest in challenging the sovereignty of the Canadian state over Indigenous peoples and their territories, nor does she make any effort to define what self-determination for Indigenous peoples actually means when trapped within the confines of the Canadian constitutional framework. Despite constitutional protections, seemingly positive judicial rulings and optimistic analyses by numerous commentators such as Moratello, I would suggest that close examination of the relevant case law when it comes to Aboriginal title and rights reveals that these cases are not the not quite the liberatory panacea that some have hoped.

First, it is important to clarify what “Aboriginal rights” are within the context of Canadian law. The 1996 *Van der Peet* decision suggests that Aboriginal rights derive from the fact that:

When Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.<sup>40</sup>

As the above passage states, Aboriginal rights became constitutionally protected in Section 35 of the *Constitution Act, 1982*, whereby “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” *Van der Peet* laid out a test to determine which practices constitute an Aboriginal right.

“Aboriginal rights” are collective rights that contribute to the cultural and physical

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<sup>40</sup> *Van der Peet*, *supra* note 3 at 30-31.

survival of Aboriginal people; they must be centrally significant to the culture; they include incidental rights needed to ensure the continuation of a specific right.<sup>41</sup>

Particularly relevant to understanding the referrals process in this ruling, is that each rights claim is case specific, and therefore requires consultation with the specific First Nation if there is potential for that right to be infringed.

The 1990 *Sparrow* decision held that “existing rights” includes rights not extinguished through treaty or legislation prior to the enactment of the *Constitution Act, 1982*. Section 35(1) of the *Constitution* “requires the Crown to ensure that its regulations are in keeping with the allocation of priority...the objective is...to guarantee that those plans [development plans for example] treat aboriginal people in a way ensuring that their rights are taken seriously.”<sup>42</sup> However, *Sparrow* also states, “rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*.” To determine whether or not an infringement is justifiable the Crown must ask:

Whether there has been as little infringement as possible in order to effect the desired result; whether in a situation of expropriation fair compensation was available; whether the Aboriginal group in question had been consulted with respect to the conservation measures implemented.<sup>43</sup>

So while *Sparrow* is often lauded as a an important step in the fight for Aboriginal rights, the judgment actually reinforces the centuries-old paternalistic relationship between Indigenous peoples and the Crown, and reifies the sovereignty of the Canadian state by

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<sup>41</sup> Andrea Holly Kennedy, “Deeper than mere consultation: Negotiating land and resources management in British Columbia Post- *Delgamuukw*,” PhD. Dissertation, University of British Columbia, 2009: 81.

<sup>42</sup> *Sparrow*, *supra* note 2 at 1110.

<sup>43</sup> *Sparrow*, *supra* note 2 at 1119.

allowing it to act as the “gatekeeper of Indigenous rights.”<sup>44</sup> The *Sparrow* decision was aimed at reconciling- and thus maintaining- the sovereignty of the Crown with the historical record of pre-contact Indigenous sovereign societies. Flowing from this objective, *Sparrow* laid the foundation for the Crown’s duty to consult; a principle that has been built upon in subsequent court rulings.

In 1999’s *Halfway River First Nation v. BC*, the Court came closer to clarifying the duty to consult and accommodate. The ruling states:

The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, whenever possible, demonstrably integrated into the proposed plan of action.<sup>45</sup>

Also within *Halfway* is Aboriginal people’s reciprocal duty to participate in consultation. The Court held that:

There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions.<sup>46</sup>

The impact of the reciprocal duty is so profound that I have often found myself calling it the “colonial silver bullet.” What the duty essentially means is that if Indigenous communities- for whatever reason- cannot or do not engage with the Crown to a level that they deem “reasonable”, the Crown can go ahead with its proposed plans totally

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<sup>44</sup> Karilyn Toovey, “Decolonizing or Recolonizing: Indigenous Peoples and the Law in Canada,” MA Thesis, University of Victoria, 2005: 18.

<sup>45</sup> *Halfway River First Nation v. B.C.*, 1999 BCAA 470 at para. 160.

<sup>46</sup> *Ibid.*, para. 161.

unencumbered. The community cannot then attempt to stop the development through litigation, for their reciprocal duty to consult was not met. This also limits the ability of Indigenous peoples from refusing to engage in the referrals process out of protest, for non-participation is considered consent. This particular aspect of the duty to consult virtually guarantees the maintenance of colonialism, for it forces Indigenous groups into a structurally asymmetrical relationship with the Crown. In sum, the reciprocal duty to consult maintains the colonized/colonizer relationship.

The Supreme Court of Canada decision in the 1997 *Delgamuukw* case shifted much of the discussion from one of “rights” to the emerging concept of “title.” The Court ruled:

In order to make a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.<sup>47</sup>

If any Indigenous group is granted title by the Court (which to date has never happened), that title is limited in two significant ways by the Crown. First, the Indigenous group can only dispose of their lands through surrender to the federal government. Secondly, any practices on title lands must be in keeping with the “the nature of the relationship between aboriginal people and their lands. For example, “aboriginal people cannot strip mine their hunting grounds, because that would prevent further hunting on those lands.”<sup>48</sup>

While Indigenous groups are restricted in the ways they act on their titled lands, within

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<sup>47</sup> *Delgamuukw* at para. 143.

<sup>48</sup> Environmental-Aboriginal Guardianship through Law and Education (EAGLE), "The Nature and Scope of the Crown's Constitutional Obligations and Fiduciary Duty to Consult with Aboriginal Communities" (Semiahmoo, B.C., 1999): 10.

the *Delgamuukw* decision, the Crown is given an expansive list of justifications for infringement on proven Aboriginal title. These justifications include:

The development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.<sup>49</sup>

Frankly, it is hard to imagine what kind of actions **do not** somehow fit into any of the above categories. In this strange kind of circular logic, the court has determined that colonialism itself is essentially a justification for colonialism.

In sum, the *Delgamuukw* decision only strengthens the legal principle of Canadian sovereignty, for it leaves Indigenous groups responsible in proving their title claims in ways that are recognizable to the western-legal model; secondly, it grants the Crown the power to determine what constitutes appropriate “aboriginal” uses.<sup>50</sup> Finally, the decision created an expansive list of justification for the legal infringement of Aboriginal title. Rather than a “win” for Indigenous peoples, the *Delgamuukw* decision offers little more than the further legal entrenchment of the colonial status quo.

How does this all relate to consultation via the referrals system? Within *Delgamuukw* the Court found that, as a consequence of the Crown’s fiduciary obligation, each possible infringement must be dealt with “on a case-by-case basis.” In addition, the ruling also introduced the notion of the spectrum to the process of consultation. In cases where the Crown determines that the potential infringement is relatively minor, consultation may require only discussions with involved Indigenous groups. In cases

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<sup>49</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 165.

<sup>50</sup> Toovey, 20.

where a strong prima facie case for rights or title seem apparent, the Crown must engage in a process “significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation.”<sup>51</sup>

In subsequent cases the province argued that the *Delgamuukw* decision applied only to lands where title was previously proven- either in court or through treaty negotiations. This was a particularly convenient argument for British Columbia given that almost the entire province is without treaty, the contemporary treaty process is all but dead, and to date no claim of title has been recognized through the courts. This suggests that the province is not interested in seeking a just resolution when it comes to the land question, and is instead centrally focused on maintaining access to valuable resources on Indigenous territories.

On November 18, 2004, the Supreme Court rulings in *Haida* and *Taku* were released and shifted the ways in which the province is now required to consult with Indigenous groups. In the *Haida Nation v. British Columbia (Ministry of Forests)* the Court was asked to rule on whether or not the duty to consult and accommodate aboriginal interests is necessary in cases of yet unproven rights and title; and further, whether or not that duty extends to third parties (most often private corporations). The Court found that the Crown is not bound by a fiduciary obligation in cases where title has not been proven, or treaties have not been made; however, in accordance with the principle of the Honour of the Crown, Indigenous groups must be consulted when economic activity may threaten their potential rights and title. The judgment goes:

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<sup>51</sup> *Delgamuukw, supra*, at para. 168.

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.<sup>52</sup>

The province argued that until a particular claim is proven in Court, there is no mechanism through which the Crown can determine the strength of an aboriginal claim in the first instance. In response, the Court found that the duty to consult is triggered “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”<sup>53</sup>

In *Haida*, the Court found that the Crown must balance the interests of the broader society with the interests of Indigenous peoples. The Court’s instructions on this point state; “the Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.”<sup>54</sup> It is vital to note that this decision does not give Indigenous groups a veto over development within their territories. While the narrative of “balance and compromise” appears reasonable on first glance, it essentially enshrines the colonial status quo for it does not ask much of the colonial power or Settler society. Does it force Settlers to stand by and watch the destruction of their sacred sites; does it demand that

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<sup>52</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 27.

<sup>53</sup> *Ibid.*, para. 35.

<sup>54</sup> *Haida* at para. 45.

they conform to imposed and foreign ways of being? Ultimately, it is Indigenous peoples who are really the only parties required to compromise.

*Haida* found that “balancing interests” in some cases requires accommodation and compensation to Indigenous groups for infringements of their title and rights. However, no legal standard of accommodation is provided. The degree to which accommodation is considered relates to the strength of the Indigenous group’s prima facie case. In addition, the level of infringement must be substantially high for compensation to be considered. Again, the final judgments of whether or not infringement, accommodation or compensation has been sufficiently addressed rests entirely with the Crown. The only permissible recourse available to the affected community is to launch legal action, which is cost prohibitive for most Indigenous groups.

The most recent addition to the case law concerning the duty to consult came with the release of *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* and the companion decision *Kwikwetlem First Nation, et al v. British Columbia (Utilities Commission)*, in February of 2009. These decisions affirmed that the Utilities Commission, as a Crown actor is bound by the duty to consult in accordance with the “Honour of the Crown.” In addition, the decision reaffirms the need for consultation to occur early on in the process. The most important implication from the *Carrier Sekani* decision is that it significantly broadened the kinds of developments that require consultation with Indigenous communities. For example, the Court ruled that the Utilities



Commission was required to consult even though the proposed project did not involve the development of any new power-generation facilities.

This decision leaves a lot of questions unanswered in terms of the kinds of policy changes and decisions that necessitate consultation. It is too early to judge how these decisions have affected the referrals process in Cheam. What seems likely is that, in order to protect themselves from the risk of litigation, proponents and the Crown will expand the kinds of policy changes or proposals that become referrals. This may seem like a positive step for Indigenous peoples in protecting their territories; however, it risks contributing the ever-growing flood of referrals that each community receives. As I will demonstrate later in this work, the resources required to even create an initial response to the huge volume of referrals that Cheam already receives leaves this community unable to protect their territories and interests.

Despite the general optimism from many Indigenous commentators when it comes to the Courts, I would suggest that when it comes to the Crown's duty to consult and accommodate the law remains purposely vague. The result is that it is exceedingly difficult for Indigenous peoples to determine their rights in relation to this Crown obligation, and it leaves the enforcement of this duty largely up to colonial judges. Therefore, upon examining Cheam's experiences within the referrals vis-à-vis the case law, I hesitate to state unequivocally that the Crown has broken the law. However, it is exceedingly clear that through the referrals system, the province continues to violate the spirit of these laws that were, after all, supposedly aimed at reconciliation.

### **“Proposed Development within your Traditional Territory”**

The provincial government estimates that approximately 200,000 decisions per year require some level of consultation with Indigenous communities.<sup>55</sup> During my short time working in Cheam's council office, the huge obstacles to their participation in these decisions became agonizingly clear. On my first day at work then-Chief Sidney Douglas handed me a heaping pile of referral letters that had not been responded to. First, the long task of organizing and sorting the letters alerted me to a significant problem with the referrals as they function today; namely, Cheam often receives letters for identical projects from both provincial ministries and the project's proponents. This practice persists despite the fact that 2004's *Haida* case found that the responsibility to consult rests wholly with the Crown. The result is that already overloaded band workers are doubly overloaded. This problem is particularly acute because Cheam that has not had a stable Title and Rights department for a number of years, largely as a result of limited financial resources. In fact, the situation is so dire in Cheam that the kind of documentary evidence that the Crown demands from Cheam in responding to referrals is exceedingly hard to find in the band office. Until recently, all of this documentary history was housed unsorted in boxes at multiple locations around the reserve. As a result, organizing and making sense of these documents was a good portion of our initial work in Cheam.

Despite the staggering number of decisions requiring referrals, the province has failed to update its consultation guidelines since October of 2002, well after the release of the *Haida* and *Taku* rulings. The province's 2002 consultation guidelines begin by stating, "consultation efforts should be made diligently and meaningfully, and with the

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<sup>55</sup> The New Relationship Business Group, "First Nations Consultation and Accommodation: A Business Perspective," a submission to The New Relationship Management Committee (19 January, 2007), 2.

intention of fully considering aboriginal interests.”<sup>56</sup> This statement might well provide reasons for optimism; in fact there are many similar statements that leave the impression that the province is sincere in its concern about the protection of Indigenous title and rights. For example, the guidelines argue that, “consultation processes need to be effective and timely, carried out in good faith, and whenever possible meet applicable legislative timelines”; and that “the Crown must ensure the adequacy of any consultation activities it undertakes or that are undertaken on its behalf.”<sup>57</sup> However, these guidelines also include a large degree of subjective language that allows the province to conform to the legal standards provided by the Courts, while maintaining the problematic colonized/colonizer dynamic.

The province’s guidelines suggest that the strength of the potential “Aboriginal interest” can be determined by weighing at a number of criteria, such as:

- (a) land near or adjacent to a reserve or former settlement or village sites;
- (b) land in areas of traditional use or archeological sites; (c) land used for aboriginal activities; (d) notice of an aboriginal interest/aboriginal rights and/or title from a First Nation, even where made to another Ministry or agency of the Crown; and (e) land subject to a specific claim.<sup>58</sup>

The Crown demands that, “if decision-makers encounter one or more of these indicators during the consultation process, they need to consider aboriginal interests in their decision.”<sup>59</sup>

Drawing on the *Delgamuukw* decision, the guidelines go on to list a number of factors that may reduce or eliminate the Crown’s duty to consult. They include:

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<sup>56</sup> Province of British Columbia, *Provincial Policy for Consultation with First Nations* (October 2002), 1.

<sup>57</sup> British Columbia, “Consultation Policy,” 18-19.

<sup>58</sup> British Columbia, “Consultation Policy,” 27.

<sup>59</sup> *Ibid*, 27.

Little indication of historical aboriginal presence in the area... land presently alienated in fee simple to third parties; land presently alienated in long-term lease to parties...land developed in a manner that precludes the exercise of aboriginal rights or the enjoyment of aboriginal title as a right of present possession; no indication that a First Nation has maintained, or continued to assert, despite any interference resulting from European settlement, a substantial connection or special bond with the land since 1846.<sup>60</sup>

Again, like with the *Delgamuukw* decision, each of these factors can be broken down to reveal their colonial roots. For example, what does it mean to say there is “little indication historical aboriginal presence in the area”? This reflects a kind of *terra nullius* logic, for it suggests that if there is “little” proof of Indigenous presence then the land must be available for expropriation? Are they actually suggesting that there is a chance that NO Indigenous people have a historical claim to a given area? I think it is safe to say, whether Cheam’s or not, that it is definitely not any Settler people’s traditional territory. In addition, this criterion is problematic because it does not recognize the cumulative effects of development that may have already taken place on these areas in terms of Cheam’s ability to make their case for title or aboriginal interests. For example, as I will more closely examine later in this work, many of the old growth trees in the Elk Creek watershed have already been logged. This logging may very well have already eliminated the kinds of evidence that the Crown demands in order to establish a strong case for title or interests. Essentially, the Crown’s favorite kind of evidence, culturally modified trees, were almost certainly logged. Isn’t this in fact rewarding settler society for past injustices?

Similarly, both the second and third points suggest that already-alienated lands are not up for negotiation, and are not subject to Indigenous claims of title or rights. Again,

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<sup>60</sup> Ibid., 28-29.

what does this say about the Crown's commitment to justice when lands that have been already stolen are used as proof that "Aboriginal interests" do not exist?

Perhaps the most problematic point demands that Indigenous groups "maintained, or continued to assert, despite any interference result from European settlement, a substantial connection or special bond with the land since 1846." Paradoxically, this point recognizes the problem of maintaining Indigenous connections to territory in the face of colonization. The policy claims that if colonial governments were successful in fulfilling their goals of cultural genocide, any potential Indigenous claim of title and/or rights are void. Essentially, B.C.'s current consultation policy allows the Crown to continue to benefit from its centuries-long policies of genocide. Regrettably, according to this 2002 consultation framework (which continues to be in force in BC), all of the above problems arise even before the Crown has begun its interaction with the potentially affected Indigenous community.

If the Crown's decision-maker rules that there is a potential Aboriginal interest, he/she then must consider the potential infringement that may result from the proposed development. If an infringement is deemed likely, the decision-maker must consider whether such an infringement is justified "in the event that those interests were proven subsequently to existing aboriginal rights and/or title."<sup>61</sup> The *Delgamuukw* decision provides the expansive list of justifications for infringement that includes economic development and non-indigenous settlement.

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<sup>61</sup> Ibid., 32.

From here the decision-maker must assess the extent of the infringement. The task of determining the impacts of an infringement rests with the Crown's decision-maker. What makes this person capable of determining the impacts of a proposed development on Indigenous lands, and thus indigenous cultures, spirituality and lifeways? Does this person even have a minimal level of understanding of what Indigenous worldviews actually amount to? How can the Crown ensure that the decision maker even cares to understand the Indigenous perspective in each decision? In addition, even if sincere efforts are made by bureaucrats, there remains significant difficulties related to the translatability of Indigenous ways of being. I will examine this point at greater length in the section dedicated to land use and archeological studies. In sum, with the final decision left to Crown bureaucrats I would suggest that this portion of the process in no way represents any significant departure from the colonial unequal relations of power.

After determining the extent of infringement the decision-maker must decide whether or not significant efforts have been made to “attempt to address and/or reach workable accommodations of aboriginal interests, or negotiate a resolution.”<sup>62</sup> Accommodations can include “treaty-related measures, interim measures, economic measures, programs, training, economic development opportunities, agreements or partnerships with industry and proponents.”<sup>63</sup> These measures bring a couple points to mind. First, these economic enticements are useful to the Crown even if the community ultimately rejects them, for the offer itself can be used in the event of a court challenge demonstrating the Crown made efforts to adequately satisfy its duty to consult and accommodate. Secondly, the kinds of accommodations proposed by these guidelines

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<sup>62</sup> Ibid., 35.

<sup>63</sup> Ibid., 35.

leave no room for Indigenous groups to reject development outright; the only available option is to buy in. For example, Indigenous communities cannot say “accommodating our interests means stopping the proposed development altogether.” Simply, there is no “no” mechanism. The underlying baseline position of the Crown in these processes is always development. It would seem that the province would have us believe that their role is to act as a kind of mediator between Indigenous communities and industry proponents through the referrals process. However, its position on infringement and accommodation reflected in this document alerts us to the reality that the province has clearly chosen a side. Stated simply, the province has a vested interest in the continued development of Indigenous territories, and its notion of appropriate accommodation reflects that.

The 2002 provincial guidelines make repeated references to the potential need to clear proposed actions with legal counsel, for their actions may have larger legal implications for the consultation regime on the whole. For example, in terms of addressing potential infringements the guidelines state, “for anything other than possible minor infringements, decision-makers should consult with senior level ministry personnel, and where necessary, Legal Services Branch, Ministry of Attorney General.”<sup>64</sup> It goes on to demand that, “ministries and agencies must be cognizant of the potential precedent-setting nature of negotiated solutions. Where any negotiated solution is likely to set precedents, the Deputy Ministers Committee on Natural Resources and the Economy must be advised.”<sup>65</sup> These statements illuminate the systemic inequality built into the referrals process. For example, the province has the benefit of running all of its

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<sup>64</sup> Ibid., 34.

<sup>65</sup> Ibid., 36.

proposed actions by staff lawyers for approval. Cheam, like most other Indigenous communities, cannot afford to take each referral to lawyers. In addition, these statements send the message that ministries should approach communities with low-ball offers- if offers are presented at all- for a generous offer will have long lasting financial consequences for the province.

Some provincial ministries have produced their own specific guidelines for consultation with Indigenous groups. These tend to focus mainly on the practical application of the province's broader framework. One such document from the Ministry of Sustainable Resource Management (MSRM) is particularly instructive in terms of the culture that exists within ministries in regards to their dealings with Indigenous communities. Though MSRM has since been folded into the Ministry of Environment and the Ministry of Forest and Range, produced in July of 2004, these guidelines are more recent than the provincial framework. I highlight this particular document because it offers a surprisingly blunt account of consultation on the ground. The document is very clear in its intention to adhere to only the most minimal standard of consultation and accommodation. Essentially, this document instructs ministry bureaucrats in how to use creative language in order to deceive Indigenous communities.

In the section outlining the *Principles of Meaningful Consultation*, MSRM provides seemingly reasonable suggestions for the consultation with Indigenous groups meant to ensure that it is "diligent, reasonable, meaningful, carried out in good faith,



[and] carried out with the intention of considering and addressing aboriginal interests.”<sup>66</sup>

According to this document staff must conform to the following guidelines:

Consultation should be started as early as possible, ideally as soon as an SRMP is being proposed; consultations should be conducted “in person” whenever possible; correspondence must be straightforward, understandable (e.g., use of non-technical terms), and neutral; the planning process must be clearly defined in writing (e.g., what is being proposed; how and when it is proposed to happen; where it is proposed to happen, and what the possible impacts on the land or resources will be); First Nations should be provided with a summary of any documentation of traditional or other aboriginal uses for an area and given an opportunity to offer additional information; all evidence of aboriginal interests that is available to the Crown on “reasonable enquiry,” should be considered in addition to information provided by the First Nation through the consultation process; First Nations should be given a reasonable period of time to prepare its responses on the matter, and an opportunity to present such responses to MSRM. Optimally, the First Nation and MSRM will agree on the time required; MSRM should give full and fair consideration of any views presented by the First Nation; First Nations should be given an explanation of how information they provided to MSRM through the consultation process was dealt with by MSRM decision makers, and an explanation of all decisions made as a result of their input in the planning process; all First Nations in an SRM planning area should be consistently followed up with and sent a notice and explanation informing them of final plan decisions.<sup>67</sup>

While these guidelines might seem unproblematic at first glance, in practice, the province seems to take full advantage of the subjective language they contain. For example, they state that correspondence should be “neutral.” However, as should be clear at this stage, the role of the province in the referrals process is not neutral. Making this claim obfuscates their colonial objectives; it perpetuates the idea that the province is impartial arbiter of just solutions between Indigenous communities and industry proponents.

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<sup>66</sup> Province of British Columbia, Ministry of Sustainable Resource Management: Forests, Lands and Marine Branch, “First Nations Consultation Guidelines: Sustainable Resource Management Planning,” (July 2004): 3.

<sup>67</sup> *Ibid.*, 3.

In addition, this policy claims that communities must be given a “reasonable” time frame to respond to referrals. Unfortunately, the province decides the standard of reasonableness. Does their decision-maker take into account the limited financial and human capacities that plague most Indigenous communities? Does the decision-maker recognize the enormous myriad of other issues that must be addressed by band councils at the same time as engaging in the referrals process? Does the decision-maker account for the large void in cultural knowledge created by hundreds of years of genocidal policies? These issues cannot be remedied with the 30 to 90 day timeframes that the Crown has deemed reasonable.

The most disturbing part of this document is found in a section titled *Preferred Consultation Language*. This section provides a chart that translates the messages bureaucrats want to convey- ones that may raise “red flags- into “preferred language,” language that has almost certainly been thoroughly vetted by staff lawyers. For example, if the ministry wishes to say, “A plan is already set and cannot be modified,” this document suggests using “The general areas and percentages have been established, but we may be able to move some categories around within the plan.”<sup>68</sup> When the ministry aims to say, “That has already been decided”, this script’s suggests using instead “We would like your input on “\_\_\_\_\_”; and “We think we can manage your issues by \_\_\_\_.”” Indigenous groups should know that according to this chart, when the ministry asks, “Does this plan meet your needs? Are you able to support this process? Is there another process that work better for you?” what they mean to say is “We’re hoping this will meet

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<sup>68</sup> Ibid., 39.

your needs and that you will support this process.”<sup>69</sup> The term “hope” in this context is interesting. Bureaucrats are not required to ensure- rather they just hope- that Indigenous interests are sufficiently satisfied in referrals thanks to the Court’s vague instructions around consultation and accommodation.

Among the more comical areas of this framework is found in the section titled *Building Trust*, which counsels bureaucrats to “demonstrate an open attitude towards First Nations issues, values and objectives,” and to “acknowledge that traditional and ecological knowledge may be valuable in land use planning” in building and maintaining trusting relationships. While all of these suggestions seem positive, the final point in this section counsels officials to “be “yourself”” (scare quotes in original).<sup>70</sup> It seems to me that advising someone to be oneself, if sincere, would not require scare quotes.

### **Referrals and the Reification of the Band Council System**

On top of the clear foundational issues with the province’s consultation regime, there are also many significant problems once the referrals reach the respective Indigenous community. One such problem is that the provincial referrals system relies on and reaffirms the band council system; a system created through federal legislation known as the *Indian Act of 1876*. Even a cursory examination of the *Indian Act* reveals it as a powerful mechanism through which colonial domination was created and is maintained to this day. One of the central ways this oppression is maintained is through the usurpation of traditional Indigenous governance structures and the forced adoption of foreign modes of governance in their place.

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<sup>69</sup> Ibid., 39.

<sup>70</sup> Ibid., 41.

The destruction of the traditional Stó:lō *siyam* system began when the federal government worked to create a ruling class within Indigenous communities to fulfill their colonial ambitions. This process began virtually at contact when government officials “follow[ed] a practice of political and economic favoritism towards selected leading families who were willing to ally themselves with the government.”<sup>71</sup> Next, colonial administrations rewarded these individuals with positions of authority within the Department of Indian Affairs (DIAND, now INAC) hierarchy. Prior to British Columbia’s entrance into Confederation, the Canadian government enacted the 1869 Gradual Enfranchisement Act, which mandated the election of chiefs; however, chiefs maintained power only so long as they held favor with the Governor in Council.<sup>72</sup> Amendments to the Indian Advancement Act in 1880 clearly prohibited “life chiefs” (or hereditary chiefs) from exercising power unless elected.<sup>73</sup> Carlson writes:

After choosing a leader B.C. Aboriginals had to wait while the Indian Agent reported their decision to Ottawa, along with his views as to the “suitability of the candidate.” Ottawa then confirmed or rejected the candidate as it saw fit... Such actions sent clear messages to B.C.’s Aboriginal population: reject the past or have it rejected for you.<sup>74</sup>

After enforcing a Western model of governance and successfully entrenching a privileged ruling class in many Indigenous communities, the Canadian government changed the game once more in 1951 by allowing bands to choose a “customary” option of governance. After dismantling traditional governance structures and enforcing economic dependence, this “discretionary power”, has resulted in few substantive

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<sup>71</sup> Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press): 120.

<sup>72</sup> Kieth Thor Carlson, “Leadership Review: The Indian Act Election System, Traditional Stó:lō Socio-political Structures, and Recommendations for Change,” *Stó:lō Tribal Council* (April, 1993): 6.

<sup>73</sup> *Ibid.*, 7.

<sup>74</sup> *Ibid.*, 9.

changes to band politics. However, these changes are important in that represent a marked shift in colonial policy in that they show the Canadian government's growing interest in giving the facade of a more benign colonialism. As I will demonstrate, this trend continues via the referrals system.

Along with the imposition a western model of governance, and the state-created Aboriginal elite, characteristics of leadership began to be taken-up and assimilated into Indigenous life. Taiaiake Alfred's *Peace, Power, Righteousness: An Indigenous Manifesto* characterizes these new leaders as "managers" guided by four central principles. These include the need to "jealously guard your reputation and status; constantly analyze resources and the opportunity structure; make others aware of their dependence on you; and create a web of relationships to support your power."<sup>75</sup> Alongside the development of a Eurocentric political culture and an aboriginal political elite, the band council system has led to the formation of an economic elite. Boldt argues that "by undermining traditional Indian values of reciprocity and redistribution...these forces (ie., the elective system, privatization, bureaucratization and co-optation) are generating a two class social-economic order on most reserves."<sup>76</sup> As a result, most Indigenous communities experience a vast chasm between the privileged (both economically and politically) and the marginalized; most reserves have little in the way of a "middle class". Just as in mainstream society, the political interests of the marginalized are ignored in favor of the ruling classes. The result is immense damage to

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<sup>75</sup> Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999): 89.

<sup>76</sup> Boldt, 124.

“community harmony of purpose.”<sup>77</sup> Unfortunately, this disparity, both in terms of economic and political power, and the unresponsiveness of those in power, persists in Cheam.

The combined consequence of colonialism, including the legalized subjugation of Indigenous peoples via the Indian Act, has left Indigenous communities like Cheam economically devastated. Poverty has led to a forced dependence on the federal government via Indian and Northern Affairs Canada (INAC) in order to survive. For example, “band/tribal political, bureaucratic, health, educational, and social service infrastructures are...dependant on government grants.”<sup>78</sup> This economic dependence is more than the direct lever through which colonial administrations wield power over Indigenous peoples. The resulting breakdown of Indigenous roles, responsibilities and relationships has led to the myriad of social pathologies faced by many Indigenous communities today including substance abuse, family violence, and overall ill health.

The referrals system prays on this economic vulnerability when the Crown or industry proponents offer paltry financial benefits or revenue sharing. What does this say about the Crown’s commitment to justice when they first create the conditions of poverty that exist today in Cheam, and then offer pathetic enticements in exchange for what little wealth (the land) Cheam has left? What other word for is there to describe this practic but “coercion”?

### **Divisions within and without**

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<sup>77</sup> Boldt, 125.

<sup>78</sup> Boldt, 223.

The reification of the band council system heightens divisions in many Indigenous communities- Cheam among them- between members and within the political leadership, regarding the appropriate level of engagement with the Crown and proponents in resource extraction and development on their traditional territories. In addition, the referrals process creates and exacerbates conflicts between Indigenous communities regarding conflicting title claims. Traditionally, territories were not “owned” in the Western liberal sense. Many areas were shared or communal territories. Both proponents and the Crown continue to seize on these territorial ambiguities and worsen relations between neighboring Indigenous communities through referrals. My research has revealed that in some cases the Crown consults with numerous communities, and interprets a positive response from one of the group as satisfying their duty to consult and accommodate all Indigenous groups. The province undoubtedly knows which Indigenous groups are more favorable to resource development, and goes to them to seek sanction.

For example, in 2003 Resorts West B.C. planned to build a tram up Mount Cheam as a first step in the development of a ski resort. Throughout the years the Crown has been informed numerous times that, when it comes to referrals, no aggregate group (Stó:lō Nation, Stó:lō Tribal Council)<sup>79</sup> represents Cheam. However, in a clear breach of good faith dealings, the proponent in this case attempted to evade consultation with Cheam, and deal primarily with Stó:lō Nation. In June 2003, the proponent approached Stó:lō Nation with a proposal to develop a memorandum of understanding, that would grant Stó:lō Nation certain economic opportunities, and supposedly satisfy their duty to

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<sup>79</sup> Until 2005, Stó:lō Nation was the only tribal council representing Stó:lō First Nations in the area. A split occurred in 2005 which led to the creation of the Stó:lō Tribal Council. Though Cheam is loosely affiliated with Stó:lō Tribal Council (STC), it maintains independence on many issues including referrals.

consult and accommodate. On offer were a percentage of construction contracts, job opportunities, a youth training program, a small yearly royalty, and the land to build a commercial centre. In addition, Resorts West B.C. professed its commitment to “recognize and respect Stó:lō’s history, cultural [sic] and presence in the area of the development... This may including naming, dual naming, of trails, roadways within the residential development, naming of the tram, or the proposed future restaurant at the upper terminal.” (footnote)

In a letter to Clarence Pennier- then president of Stó:lō Nation- Cheam Chief Sidney Douglas stated unequivocally:

The first phase of the proposed Resorts West tram development is square within **exclusive** Pilalt territory. Pilalt claims to this territory have been clearly substantiated in oral traditions and in the literature. Pilalt territorial claims in this area are undeniable and are absolutely unclouded by any other Tribe’s claims to overlapping interests... Cheam is the only village that professes to be exclusively Pilalt. As the only exclusively declared successor to Pilalt, Cheam confidently asserts that only Pilalt has any claim to this territory. Cheam will aggressively defend Pilalt territory against all others who do not profess to be exclusively Pilalt. (emphasis in original)<sup>80</sup>

All aggregate bodies must be held to account in accurately representing their members and surrounding communities. In addition, when proponents and the Crown empower one group to speak for all Stó:lō peoples, in this case directly against the express wishes of Cheam, they must be called out as agents of contemporary colonialism. The pressure to work within aggregate groups is on the increase. A new provincial referrals clearinghouse regime, launched in spring of 2009 by the Integrated Land Management Bureau (ILMB), aims to sign Strategic Engagement Agreements with Indigenous communities in order to

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<sup>80</sup> Sidney Douglas, Cheam First Nation, to Clarence Pennier, Stó:lō Nation, September 11, 2003, Re: Phase 1 Resorts West- Mount Cheam, 1.



guide future consultations.<sup>81</sup> In addition, ILMB's literature repeatedly talks about its hope to deal with aggregate groups rather than individual First Nations.

Another way that divides are created and maintained between communities is through the partnering of resource development companies and Indigenous communities. Cheam is facing an increasing number of referrals coming from neighboring Indigenous communities. For example, Ch-ihl-kway-uhk Forestry Limited Partnership, comprised of eight First Nations, has recently joined with Probyn Log Limited to harvest 227,100 cubic meters over five years within the Chilliwack watershed.<sup>82</sup> Soowahlie First Nation recently formed Th'ewali Forestry Ltd, and partnered with three logging companies in order to capture a larger portion of the profits garnered from nearby logging.<sup>83</sup> The Chehalis First Nation might well be the new shining example of "economic development" in British Columbia. In a recent symposium organized by the Stó:lō Tribal Council (STC), Chehalis' Heritage Resource Advisor Gordon Mohs stated that their approach in prioritizing their response to referrals is, "Show us the money" based on the idea that "Chehalis is a good place to do business."<sup>84</sup> Chehalis' development initiatives are numerous, including gravel extraction, logging, potential joint ventures in land development, carbon sequestration, energy projects such as run of river hydro dams, and

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<sup>81</sup> Thayer Nugent, Resource Coordination Officer of the Integrated Land Management Bureau, Personal correspondence (1 February, 2010).

<sup>82</sup> The Ch-ihl-kway-uhk Forest Agreement, March 30, 2004 <[http://www.for.gov.bc.ca/haa/Docs/ch-ihl-kway-uhk\\_fra.pdf](http://www.for.gov.bc.ca/haa/Docs/ch-ihl-kway-uhk_fra.pdf)>, 5.

<sup>83</sup> Fraser Valley Regional District, "The Chilliwack River Watershed: A Backgrounder," *Chilliwack River Watershed Strategy* <[http://www.chilliwackwatershedstrategy.ca/docs/2005\\_10\\_12\\_CR\\_WS\\_Background\\_Document\\_FINAL.pdf](http://www.chilliwackwatershedstrategy.ca/docs/2005_10_12_CR_WS_Background_Document_FINAL.pdf)>, 19.

<sup>84</sup> Gordon Mohs, Speech at the Sto:lo Tribal Council Consultation and Accommodation Symposium, Harrison Hot Springs, BC, September 29, 2009.

the potential for licensing out the rights to wind and geothermal energy.<sup>85</sup> This might be all well and good had territorial boundaries between Indigenous groups already been clearly established; however, because territories are uncertain (at least in the Western sense), Chehalis' participation in resource development almost certainly puts Cheam's traditional territory at risk.

These kinds of divisions between Indigenous communities are no accident. Colonial governments have spent decades perfecting divide and conquer tactics. However, after immersing myself in the referrals process it became obvious to me that protecting Pilalt territory requires more than just a commitment from Cheam. At the same time, while attending numerous meetings put on by the Union of BC Indian Chiefs and STC, it also became clear just how vast the gulf is between communities in terms of their positions vis-à-vis the referrals process. What this means is that each individual community must make strategic decisions in terms of how much energy they are willing to expel in attempting to build relationships with neighboring communities that may or may not share common goals. In fact, the burden of these kinds of strategic decisions in the face of such overwhelming odds is perhaps the most effective colonizing tool at work in the referrals process. The referrals system favors the colonial status quo because it is an enormous drain on the already sparse human and financial resources of Indigenous communities. Instead of actually practicing their traditions and activities throughout their territories, Indigenous peoples are forced into a process that has little (I would argue no) potential for protecting their territories and respecting their worldviews in any substantial way.

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<sup>85</sup> Ibid.

### More Than a Problem of Methodology

*The entire bureaucracy, the entire court system, all industry hears and uses the colonizer's language. Likewise, highway markings, railway station signs, street signs, and receipts make the colonized feel like a foreigner in his own country. –Albert Memmi*

*Any group that wishes to be regarded as the authority in a human society ...must become the soul sources of truth for that society and defend their status and the power to interpret against all comers by providing the best explanation of the data. – Vine Deloria Jr.*

The current reality is that in order to protect their territories “it is critical that Aboriginal communities identify their interests in a format that can be readily appreciated, comprehended, and acted upon by policy-makers and those empowered as land managers working on behalf of government and industry.”<sup>86</sup> Just as the above Memmi’s quote indicates, forced hegemony of the colonizer’s language is nothing new; in fact, colonial powers have always used language to subjugate colonial populations. Because of this fact, the referrals system reaffirms colonial objectives by requiring Indigenous communities to prove their title through a series of studies include traditional land use research, and environmental and archeological assessments. The problems associated with these studies fall into two broad categories. Firstly, considerable methodological limitations find Indigenous communities at a significant disadvantage from the outset, including the lack of financial and human resources for effective engagement. A more complex and markedly more intractable problem with these processes is they are wholly incapable of fully conceptualizing and accounting for Indigenous perspectives on land use and spirituality, among others. The assumption seems to be that it is actually possible for Cheam to translate their complex

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<sup>86</sup> Rick Budhwa, “An Alternative Model for First Nations Involvement in Resource Management Archaeology,” *Canadian Journal of Archaeology* 29 (2005): 24.

understandings of, and relationship to, their territories into a format that policy makers can understand. The question then becomes, is this translation possible in any meaningful way? And perhaps a more important question is: what are the risks of transforming Cheam's distinct worldview into something understandable to the colonial power? At what point does mimicking the colonizer actually shift to thinking as the colonizer?

As was discussed earlier, the Court's principle of the reciprocal duty to consult means that Indigenous groups must participate in the referrals process if they want any say in how their traditional territories are developed. This participation comes with an enormous financial burden. These costs include "salaries and travel expenses for research staff, bursaries for community interviews, mapping supplies and appropriate mapping technologies (i.e., GIS and GPS software, equipment and training), and the associated costs of workshops and community validation meetings."<sup>87</sup> A 2007 symposium, hosted by the Carrier Sekani Tribal Council and the First Nations Technology Council (FNTC), examined the differing technical systems used in responding to referrals, including those from the Carrier Sekani Tribal Council, the Tsilhqot'in National Government and the Neskonalith First Nation, among others.<sup>88</sup> Projects ranged from a fairly straightforward multistep process that directed how referrals were to proceed, to elaborate and highly technical systems that include, "GPS downloading tool, web-based communication/discussion interface, syncing protocols for remote data collection, spatial data editing via web interface, 3D viewing and data recording interface and a Cumulative

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<sup>87</sup> David C. Natcher, "Land Use Research and the Duty to Consult: A Misrepresentation of the Aboriginal Landscape," *Land Use Policy* 18(April 2001): 117.

<sup>88</sup> First Nations Land Referrals Forum: September 12-13, 2007, "Final Report," (Prince George, BC) <[http://www.cstc.bc.ca/downloads/Final%20Report%20\(Nov%202007\)-%20First%20Nations%20Land%20Referrals%20Workshop%20Sept%2012%20&%2013%202007.pdf](http://www.cstc.bc.ca/downloads/Final%20Report%20(Nov%202007)-%20First%20Nations%20Land%20Referrals%20Workshop%20Sept%2012%20&%2013%202007.pdf)> (accessed September 20, 2009).

Impact Assessment tool.”<sup>89</sup> Though I am by no means an expert at all things computers, I am also not a total luddite. However, these technologies are well beyond my own technical capacity. I think it is safe to assume that the majority of people, Indigenous or non-Indigenous, would be as baffled as I am. The financial costs of developing and maintaining these kinds of systems are also prohibitive for many communities. For example, the Carrier Sekani Tribal Council estimates that their model, called the Carrier Sekani Geospatial Toolset, cost over \$80,000 to develop with ongoing maintenance costs. The lack of resources available for this type of work in Cheam cannot be overstated. As a result, as with many Indigenous communities in BC, most referral deadlines pass with no response from Cheam.

In recognition of the material inequalities within these regimes recent attention has turned to generating the financial and human resources to aid Indigenous communities in participating in these regimes. The First Nations Technology Council, founded in 2002 by the First Nations Summit (not exactly known as a radical organization) has a mandate perhaps best described as bridging the technological gap for Indigenous communities. The FNTC hosts many workshops aimed at increasing technological access and capacities within communities for a wide-range of projects including band office use, health care, educational centers and business development.<sup>90</sup> In terms of aiding in the referrals process, FNTC seems to mainly function as an information portal linking communities in order to share information regarding their responses to referrals. While this may prove useful in the long term, the immediate needs of Cheam in

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<sup>89</sup> Ibid., 21.

<sup>90</sup> First Nations Technology Council, “Capacity Development Workout Report,” November 20-21, 2008 <<http://fntc.info/files/documents/Capacity%20Plan%20%20Development%20Report%20Nov%202008.pdf>> (accessed March 10, 2010).

stopping development within their territories are not being addressed. Simply, Cheam does not even have the available resources to commit any staff to navigating the FNTC or attend their meetings and workshops in the first instance. Just as with referrals, there is a good chance that even the invitation to these kinds of events will go unread in the office for many months; there is just not the time or the staff.

Additional funding opportunities aimed at improving Indigenous participation in the referrals process includes BC's Traditional Use Study Program that offers funding for communities to catalogue their cultural resources. Other government agencies may provide some one-off funding through Project Funding Agreements. More recently, some Indigenous groups have turned to industry itself for funding to conduct this kind of research.

In discussions with a wide range of political representatives from all over Stó:lō country, many seemed keen on having me construct a kind of framework for navigating these kinds of funding sources in a way that empowers Indigenous communities. However, following my analysis, it is my position that these kinds of funding agreements effectively tie Indigenous communities into a relationship of subjugation vis-à-vis the colonial power. I know this is not the answer that many want to hear, but it is reality nonetheless, for the problems associated with these sorts of funding regimes are numerous. Firstly, procuring this kind of piecemeal funding is a full time job for- at minimum- one staff member skilled at proposal writing. So the community must create this position in the hope that sufficient funding will be made available. Secondly, this

funding is unreliable. How can communities create any kind of strategic long-term plans when they have no assurances that their funding is dependable?

Reviewing the funding criteria of these kinds of initiatives highlights a connected problem; that is, funding is entirely contingent on the good will of the funding body, and as such, recipients must conform to their dictates. The familiar phrases here are deliverables and measurable outcomes. During my time in Cheam I sat in on a meeting between Council and the Department of Fisheries and Oceans (DFO).<sup>91</sup> While I recognize that DFO is a federal ministry and thus beyond the scope my particular inquiry, the meeting was extremely illustrative of the coercive power of funders within these kinds of project funding agreements. DFO was interested in signing a Project Funding Agreement with Cheam that amounted to- at most- \$60,000 per year. The DFO representative was adamant that through “creative wordsmithing” Cheam could use the funds for almost anything they saw fit. However, as the meeting went on, each of Council’s proposals were summarily dismissed for they did not meet DFO’s standard of what constitutes “mutually beneficial.” DFO was not interested in funding a series of community meetings aimed at coming to community-wide definitions of “consultation”, “accommodation” and “compensation.” In fact, the DFO representative’s reaction to this suggestion was quite comical. Upon mention of the words “consultation, accommodation and compensation” she took off her coat, fanned herself and asked, “Is it hot in here?” Next, Council was told that the best “wordsmithing” would never convince DFO to fund the building of a community smokehouse where members could learn how to smoke fish. Apparently a smokehouse is an “economic benefit” and is therefore not allowed.

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<sup>91</sup> Meeting between Cheam Council and Department of Fisheries and Ocean's Representative Jennifer Trotti, Cheam First Nation, September 22, 2009.

By the end of our frustrating meeting it seemed clear to us that what DFO really wanted was for Cheam to create a fishing monitoring program. A similar project had previously been tried in Cheam and was considered by most to be a dismal failure. Such a program serves many of the old colonial objectives. For example, having Cheam members monitoring other Cheam members distances the Crown from the direct levers of control, and thus obscures their central role in ongoing colonialism. In addition, these kinds of programs create resentment and distrust within the community, thus satisfying the colonial imperative of divide and conquer. Essentially, the project funding agreement proposed by DFO and other initiatives like it make monies contingent on the willingness of the Indigenous community to accept the rules as laid out by the funders themselves. This behavior is particularly disgusting given the dire economic straights of most Indigenous communities, as well as the fact that the province and Ottawa owe their wealth to the theft of Indigenous territories in the first instance. There is a word for this practice; it's called blackmail.

Perhaps the single largest problem with these kinds of funding arrangements is that of knowledge ownership. The Province's Traditional Use Studies, for example, require that the project objectives include:

Identify[ing] Traditional Use Sites, including reference to ceremonial and sustenance activities; provide an inventory and database of Traditional Use Sites to the province to aid operational land-use planning and consultation; and build capacity within the First Nation community to collect, maintain and update the inventory.<sup>92</sup>

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<sup>92</sup> Province of British Columbia, Ministry of Forests and Range, *Traditional Use Studies Funding Proposal Format* < [http://www.for.gov.bc.ca/hcp/fia/landbase/standards/traditional\\_use.htm](http://www.for.gov.bc.ca/hcp/fia/landbase/standards/traditional_use.htm) > (accessed March 15, 2010) Section 1.2.



The project must provide “valid/accurate” mapping of traditional use sites, as well as a database of these sites in accordance with the *Ministry of Forest and Range Traditional Use Study Data Capture Specifications and Data Recording Guide*.<sup>93</sup> In addition, in accepting this provincial funding the community must sign what is called a Cultural Heritage Resource Information Sharing Agreement that includes a promise that the community will allow their knowledge to be catalogued in the “Traditional Use Study Database (TUSD) for use by provincial agencies in consultation and land use planning processes.”<sup>94</sup>

Some would undoubtedly argue that it is vital for government ministries to know exact locations of places of cultural importance, so they can be better protected from development. This position, however, requires one to willfully ignore centuries of Crown policy. It was only a few short decades ago when Indigenous children were tortured for practicing their culture, when ceremonies were outlawed and forced to go underground, and when culturally significant objects were stolen for sale to Western museums. Is it any wonder that many Indigenous people are hesitant to hand over knowledge, sites and teachings to anyone, much less the colonial power itself? It is not paranoid to suggest that the Crown has demonstrated a concerted effort to destroy Indigenous peoples; in fact, it can be the only rational conclusion. Why do we expect Indigenous peoples to be so quick to trust now?

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<sup>93</sup> Ibid., Section 7.

<sup>94</sup> Province of British Columbia, Ministry of Forests and Range, *Cultural Heritage Resource Information Sharing Agreement Template* < [http://www.for.gov.bc.ca/hcp/fia/landbase/standards/traditional\\_use.htm](http://www.for.gov.bc.ca/hcp/fia/landbase/standards/traditional_use.htm) > (accessed March 15, 2010) Section 3.0.

In addition to provincial initiatives, industry itself has begun providing funding for these types of traditional use studies and cultural mapping to take place. Increasingly, “Aboriginal communities...approach timber companies who have been awarded Forest Management Agreements (FMA) within the bounds of their traditional territory to support land use research.”<sup>95</sup> However, it should come as no surprise that, just as with state-based funding, industry money comes with a large number of strings attached including prescribed research frameworks and methodologies, and control over how the information is ultimately to be used. One such string generally involves the hiring of outside consultants. Community involvement is often limited to “the administering of questionnaires and land use surveys.”<sup>96</sup> This research most often “[fails] to transfer the necessary skills and experiences to community researchers [and] the dichotomy between those who produce land use knowledge and those who are most affected by it remains, thereby reinforcing the dependencies that have long worked against Aboriginal communities seeking change.”<sup>97</sup>

Just as with provincial funding, the most troubling aspect of industry funding initiatives is the question of knowledge “ownership.” Natcher claims that:

Once removed from community control, industry land managers are free to elicit specific elements of local knowledge (eg., medicinal plant locations) and insert them into management models thereby empirically removing aspects of the local knowledge from community control as well as its cultural context. As a result, land use information is often misrepresented and used inappropriately in ways that do not serve community needs and aspirations.<sup>98</sup>

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<sup>95</sup> Natcher, 117.

<sup>96</sup> Natcher, 118.

<sup>97</sup> Natcher, 118.

<sup>98</sup> Natcher, 118.

Perhaps even more troubling is Natcher's forecast that "by textualizing and making land use information available to industry planners, the text becomes the authoritative source rather than the holders of the knowledge, thus rendering control over access, use and application to external forces."<sup>99</sup> This is also a clear possibility for the information gathered from provincially funded studies. I do not think it is unrealistic to foresee a day when "consultation" with Indigenous groups requires nothing more than a visit to the province's information clearinghouse.

Despite their lofty rhetoric, the real motivations of the province in addressing the land question become evident when we look at the provincial body known as FrontCounter BC. This service aimed at "individuals or small-to-medium-sized natural resource businesses...advocates for timely decisions and responses, and help a client navigate - from start to finish - what can sometimes be a maze of licenses, permits and registrations."<sup>100</sup> Specifically, FrontCounter BC helps to:

Guide clients through required authorizations; help clients complete strong application packages; Interpret land information, maps, management plans; follow-up and track the status of applications filed; liaise between ministries, agencies, and governments; begin referral processes with First Nations; help identify and market economic development opportunities.<sup>101</sup>

This service includes access to the GeoBC Gateway that acts as "the provincial geographic information warehouse; a comprehensive registry of rights and interests in Crown land; and the authoritative province-wide topographic, planimetric, aerial

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<sup>99</sup> Natcher, 118.

<sup>100</sup> Province of British Columbia, FrontCounter BC, *About FrontCounter BC* (accessed 6 January, 2010) <<http://www.frontcounterbc.gov.bc.ca/about.html>>.

<sup>101</sup> Ibid.

photography and image data sources.”<sup>102</sup> I assume that the GeoBC Gateway also includes the cultural mapping Indigenous communities must provide in exchange for traditional land use mapping funding. However, I cannot be certain of this point because, despite my many time consuming and frustrating attempts, access to a large portion of this information (especially as it relates to Crown land) is strictly limited to representatives of the province. To this point, ILMB assures me that Indigenous groups and industry are granted identical access to this collected information, that industry and Indigenous groups are on equal footing.<sup>103</sup> The idea that certain information is kept from industry and available only to the Crown might be reassuring if we were to believe that the province is acting as a neutral intermediary between the interests of industry and Indigenous communities. However, as I demonstrated earlier, the province admits that it remains committed to the further development of Indigenous lands.

If the province was actually concerned with developing trusting relationships and good faith consultations with Indigenous peoples, why is this mapping information and technologies not readily available to Indigenous communities? Thayer Nugent, a Resource Coordination Officer from the First Nations Initiatives Division of the ILMB, stated in an email:

The Crown Lands and Resources division staff (ILMB), who review Crown Land applications in depth, do provide assistance to First Nations when requested. Land Officers can often provide different types of mapping data or produce revised maps if it would help with understanding a project.<sup>104</sup>

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<sup>102</sup> GeoBC Gateway, *Who We Are*, (accessed 6 January, 2010) < <http://geobc.gov.bc.ca/>>.

<sup>103</sup> Thayer Nugent, Resource Coordination Officer of the Integrated Land Management Bureau, Personal correspondence (1 February, 2010).

<sup>104</sup> Ibid.

The fact that I have yet to find any evidence of this sort of collaboration between ILMB and Cheam is not my central concern. I wonder, why should communities trust the very institutions that have enacted decades of oppression against them? Indigenous people are not blind to the reality that the province has a vested interest in further alienating them from their territories. What has the province ever done to demonstrate that they can be trusted to help Indigenous peoples now?

Though highly unlikely, it may be possible to provide the required financial and human capacity to significantly increase Indigenous participation in the referrals process. Perhaps, one day, funders will provide money for land use studies without strings attached. Maybe Indigenous voices will become centered in discussions around land use. Some claim that the exponential growth in the number of studies that include Indigenous knowledge, or what is popularly termed Traditional Ecological Knowledge (TEK) is evidence of this shift. However, opinions remain split over whether or not the inclusion of TEK has resulted in any substantive shifts in power dynamics within these kinds of project assessments. I would posit that the colonizing imperative reflected in the referrals system cannot be overcome simply by greater inclusion of Indigenous peoples and the parts of their knowledge sanctioned by non-Indigenous scientists. Anthropologist Paul Nadasdy asks, “if people are embedded in different systems of cultural meaning that possess their own internally defined criteria of validity, then what are the prospects of communication across boundaries of knowledge systems?”<sup>105</sup> This brings us beyond the more commonly identified socio-economic barriers to meaningful Indigenous

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<sup>105</sup> Paul Nadasdy, *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon* (Vancouver: UBC Press, 2003): 62.

participation, and gets at the far more intractable problem of profound difficulty in reconciling of our divergent worldviews.

The first problem of irreconcilability within traditional land use and archeological assessments begins with coming to definition of what TEK (as conceptualized within these particular research paradigms) actually amounts to. Nadasdy suggests that the use of words such as “tradition”, “ecological” and “knowledge” are fundamentally imbued with politics and necessarily reflect the asymmetrical power relations between the colonizer and the colonized. As a result these terms “constrain people’s thought and action in significant ways... [by] structuring the way that people can act upon and think about TEK and its relation to science.”<sup>106</sup> This is perhaps best thought of as a cognitive constraint. This insight allows us to see that non-indigenous peoples engaging with notions of TEK need not be overtly racist for their actions to be problematic, but rather we must understand that they come to their positions full of ideological assumptions about the world. For example, to most of non-indigenous society the term “traditional” connotes pre-modern practices emblematic of a simple culture. As Settlers we have been taught this, consciously or unconsciously, our entire lives. The problem is that this understanding “allows the dismissal of more recent practice, however consistent it may be with the local practices and beliefs as “inauthentic,” giving non-native resource managers and others the power to define, in important ways, what constitutes “authentic” native culture and to judge and act upon the behavior of aboriginal people accordingly.”<sup>107</sup> In addition, this cognitive constraint allows non-indigenous people to

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<sup>106</sup> Paul Nadasdy, “The Politics of TEK: Power and the “Integration” of Knowledge,” *Arctic Anthropology* 36 (1999): 4.

<sup>107</sup> Nadasdy, “Politics,” 4.

claim that if Indigenous peoples no longer conform to this static (and racist) definition of Indigeniety, then we are no longer morally obligated to consider their interests in policy decisions or otherwise. Essentially, the misunderstanding and marginalization of Indigenous perspectives comes, often times, from the unconscious messages transmitted through cultural programming. The inclusion of Indigenous voices within these processes does little to alter this fact.

The concepts of the “environment” and the “ecological” are faced with a similar cognitive constraint within the process of translation. In Western thought, the environment is viewed as something distinct from humans. Nadasdy claims:

In the absence of a strict separation between humans and the environment, the very idea of separating “ecological” from “non-ecological” knowledge becomes nonsensical. This is powerfully illustrated by native elders who, when asked to share their knowledge about the “environment,” are just as likely to talk about “non-environmental” topics such as kinship or respect as they are to talk about animals and landscapes. Every time researchers and bureaucrats dismiss or ignore these parts of an elder’s testimony as irrelevant, they are actually imposing their own culturally derived standards of relevance.<sup>108</sup>

Again, Indigenous and Settler societies have very different views on the definition and role of knowledge. Prominent Indigenous scholar Vine Deloria Jr. suggests that Indigenous knowledge, as transmitted through the oral tradition:

represented not simply information on ancient events but precise knowledge of birds, animals, plants, geologic features, and religious experiences of a particular group of people... Tribal knowledge was not fragmented data arranged according to rational speculation. It was simply

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<sup>108</sup> Nadasdy, “Politics,” 4.

the distilled memory of the People describing the events they had experienced and the lands that they lived.<sup>109</sup>

In contrast, Western thought treats knowledge much like a hobbyist treats his stamp collection; like knowledge can be collected and viewed from a distance in isolation from the knowledge of other things. Deloria suggests, “fragmentation of human knowledge by science means that most explanations must be constructed on an ad hoc basis with the hope that the use of the scientific method will guarantee that all bits of data are ultimately related.”<sup>110</sup> The fragmentation of knowledge committed by Western science means that it is viewed largely outside of the socio-political context from which it’s meaning is derived. The result is the treatment of TEK “as a set of discreet intellectual products which are completely separable from the cultural milieu that gives them meaning, knowledge is depoliticized.”<sup>111</sup> So, for example, when bureaucrats evaluate and judge the validity of Indigenous knowledge, the full context of colonialism disappears. From this perspective, these bureaucrats and resource managers are not political actors, but charged with the evaluation of certain inalienable truths about the world. This fact puts Indigenous perspectives at a serious disadvantage.

Not only is it seemingly impossible to reconcile these divergent worldviews within governmental regimes, I would also suggest that when Indigenous peoples participate in them they also face an insidious form of assimilation that, rather than embracing Indigenous identities, actually works to erase them. Leanne Simpson clearly argues this point when she states:

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<sup>109</sup> Vine Deloria Jr., *Red Earth, White Lies: Native Americans and the Myth of Scientific Fact* (Golden, Colorado: Fulcrum Publishing, 1991): 36.

<sup>110</sup> Deloria, “Red Earth”, 37.

<sup>111</sup> Nadasdy, “Hunters”, 122.



When language is made into a text, it is translated from Indigenous languages into English, locking its interpretation in a cognitive box delineated by the structure of the language that evolved to communicate the worldview of the colonizers. It is also stripped of its dynamism and its fluidity and confined to a singular context. It is void of the spatial relationships created between Elder and youth. It becomes generalized and depersonalized. It is separated from the land, from the words of spirits, from its source and its meaning, and from the methodologies for transmission that provide the rigor that ensures its proper communication. It becomes coerced and manipulated into a form that cannot possibly transform or decolonize.<sup>112</sup>

It seems to me that the inclusion of TEK within land use studies and the like, while seemingly a positive move, is really trying to skip a step in the process of decolonization. Simply hearing Indigenous perspectives is not enough. The shift must first happen within the minds of Western-trained land managers and bureaucrats. This shift would require them to act directly against their own self-interest. I am not sure how long Indigenous peoples are, or should be, willing to wait around for that to happen.

### **Elk Creek**

The profound injustice built into the provincial referrals system is perhaps best demonstrated by the logging of the Elk Creek Watershed in 2003. Prior to its logging, Elk Creek was “home to at least four red-listed endangered species: the marbled murrelet, the spotted owl, the mountain beaver and the pacific giant salamander.”<sup>113</sup> In addition, the watershed contained “some of the oldest and largest douglas firs in BC, some even

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<sup>112</sup> Leanne R. Simpson, “Anticolonial Strategies for the Recovery and Maintenance of Indigenous Knowledge,” *American Indian Quarterly*, 28(2004): 380.

<sup>113</sup> Heather Pauls, “Chilliwack’s Elk Creek: Community residents protest the logging of one BC’s most ecologically sensitive areas,” *The Ubysey Magazine* 85(24 October, 2003): 6.

reaching heights of 280 feet and 28 feet around the base at shoulder height.”<sup>114</sup> With trees like that it is no surprise that industry was keen to get their hands on Elk Creek.

The Creek itself provided water to the City of Chilliwack from the early 1900s until 1997. Because the watershed is no longer providing drinking water to the City, the MOF does not- to a large extent- consider the impacts of logging on water quality. However, it comes as no surprise to the people of Cheam that logging increases the levels of debris and silt in water and as a consequence negatively impacts salmon stocks. This problem was particularly acute during my time in Cheam, when the community was suffering through the worst salmon season in recent memory. Though a more in-depth examination into the fishing crisis is beyond the scope of this work, it is worth stating that the preservation of salmon stocks plays a fundamental role in the realization of self-determination for Pilalt people.

In January of 2002, the Cheam received notice from Cattermole Timber of the proposed amendments to Cattermole’s 2001-2005 Forest Development Plan. This new plan involved timber harvesting within the Elk Creek watershed, directly within Cheam’s traditional territory. Cheam was given 60 days to respond. A similar letter was sent from the Ministry of Forests.

The following month Cheam councilor Sidney Douglas met with Cattermole representatives, and informed the company of Cheam’s opposition to their project. In

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<sup>114</sup> Ibid, 6.

December of the same year then-Chief June Quipp informed Cattermole of Cheam's strong prima facie case for rights and title to Elk Mountain and its tributaries.<sup>115</sup>

In early 2003 the Chilliwack Forest District was provided with strong evidence of Cheam's interests in the hope of triggering the strongest possible level of consultation. This evidence included a 1965 interview of Albert Louie, Chief of Yakwekwioossee, conducted by ethnographer Oliver Wells. As part of his testimony Louie says:

Name of Elk Mountain- that's part of Cheam Mountain. There is no name on this end, but they call that THEETH-uhl-kay. THEETH-uhl-kay means, you know, the Indians used to go up there and practice to be doctors- and if you go up there you see them big holes in the rock, like that (indicating chasm) where thunder used to come out of. They wanted to get that power to bring it out. An old Indian who used to live in Cheam, Harry Edwards' grandfather- when he died there was lightening all night because he dreamed about those holes in the mountain. That's THEETH-uhl-kay.<sup>116</sup>

In addition, Cheam provided testimony from Elder Joe Aleck. He states:

You know our people lived all over this territory and Elk Creek that is a *xwelitem* (settler) word too eh and it's, a long time ago there was many animals here bears, deer, moose and a lot of Elk, a lot of Elk on this side of the mountain, so that became Elk Creek, and there is a big falls there, where the water comes, and to this day there is some, well there is still a lot of water coming down there, and there is some old growth trees there, and allot [sic.] of the, I would say, CMTs culturally modified trees are there, there are a lot of cedar trees there that have as you look at it the bark has been taken off, and f you look at the ground people have been taking roots off the ground, and this is our special place too, not only Elk Creek and the mountain there, but all of Cheam, all parts of that mountain is our sacred area, and I must say to go a little further and say that our people not only traveled along the river or in the valley here but in the mountains there is trails up on top of the mountains, there is trails up on top of the mountain...<sup>117</sup>

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<sup>115</sup> June Quipp, Cheam Indian Band, Letter to Len Blackstock of Cattermole Timber December 19, 2002.

<sup>116</sup> Sidney Douglas, Cheam Indian Band, letter to Leonard Feldus of the Chilliwack Forest District, March 19, 2003.

<sup>117</sup> Sidney Douglas, Cheam Indian Band, letter to Kerry Grozier of the Chilliwack Forest District, April 14 2003: 3.

...another thing about Elk Creek, same as Mount Cheam we use it as a sacred mountain where our people go to fast 4 day fast or, to seek our vision...to find out exactly why we are here, why was I given this thing, what am I going to use it for, so the mountain is used for that, for vision questing or for fasting...<sup>118</sup>

...we talk to this day about the big palaces of our leaders and maybe you could say that the caves are like our palaces for our special people maybe, especially the people we hold very dear and sacred to us maybe that's where we asked them to stay, and you can almost oversee the whole valley, you can oversee the river, if anyone is coming especially if they are not friendly people, and why they are coming, and also it's a shelter...a lot of our winter homes were up towards the mountains.<sup>119</sup>

...our people, especially the higher siems had a special burial place, more than likely it would say that the cave is one of them...I wouldn't be surprised if they found burial ground around there, not only there but all the way up, our people lived all along the mountains and all along the river but mostly along the mountains, maybe we had the warriors and the workers down by the river...same as a longhouse you built a longhouse facing the river, the first people are the workers and it goes all the way back and the last would be your yewel siem, so if the raiders came there [sic] first people can protect all the families.<sup>120</sup>

In April of 2003, Grozier provided Cheam with an archeological assessment conducted by consultants at Aegis Archeological Associates. Their assessment identified two bark-scarred cedar trees commonly referred to as “culturally modified trees.” In response, Cattermole agreed to abide by the archeological recommendations and leave a “ten meter no cut zone around the two trees.”<sup>121</sup> If the results weren't so devastating, the notion of ten meter no cut zones would be laughable. Those with even a cursory knowledge of Indigenous worldviews should recognize the absurdity of this apparent attempt to satisfy Cheam's interests in Elk Creek. At the conclusion of this letter, Grozier informed Cheam that the consultation process would conclude in ten days.

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<sup>118</sup> Ibid., 5.

<sup>119</sup> Ibid., 6.

<sup>120</sup> Ibid., 6.

<sup>121</sup> Kerry Grozier, Chilliwack Forest District, letter to Sidney Douglas of the Cheam Indian Band, April 2, 2003.

Again, on April 23<sup>rd</sup> Sidney Douglas on behalf of Cheam Council sent a letter to Mr. Grozier reminding him of his legal duty to consult. The letter reads:

Cheam confirms having provided you with more than sufficient evidence to establish a *prima facie* claim to Aboriginal title to the complete area that is the subject of the above-noted proposal. Cheam, as successor to the Pilalt Tribe, has raised the absolute and legally binding duty on the Crown and other third party interests to fully consult with us because of the intended infringement that would occur to our Aboriginal Title. Because of the strength of our claim to Aboriginal Title, our position is that our actual consent is required in order that this project can proceed... Notwithstanding our short site visit last week, we wish to emphasize in the strongest possible terms that there has been inadequate and insufficient consultation with us regarding the Elk Creek-Cattermole project... Unless and until there is a good faith effort to fully and adequately consult with us and to meaningfully attempt to accommodate our concerns, there is absolutely no chance of this project receiving our consent.<sup>122</sup>

Cheam did provide the province with a strong case outlining the significance of the Elk Creek area to their people. However, as I outlined earlier, the Courts have never explicitly stated what would constitute a *prima facie* claim strong enough to require an Indigenous communities' *consent*. Despite the strong words of Sidney Douglas within this letter, as well as a credible case for title, the authority in making such a determination ultimately resides with the provincial government. In reviewing this case I constantly found myself asking, "what else could Cheam have possibly provided that would have convinced the provincial government of the strength of their claim?" This question highlights the problem once more; the referrals process is about Indigenous peoples *convincing* bureaucrats who come from a very specific worldview, with entrenched commitments to the status quo.

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<sup>122</sup> Sidney Douglas, Cheam Indian Band, letter to Kerry Grozier of the Chilliwack Forest District, April 23, 2003.

Following this letter, I found no evidence that the Crown or the proponent ever officially responded to Cheam's significant concerns. In June 2003, the Ministry of Forests forwarded a letter that signaled an end to their consultation with Cheam. Kerry Grozier reaffirmed his position that "consultation seeks to address your concerns on the proposed forest management and development activities within your asserted traditional territory *in a manner that complies with the law*" (emphasis my own).<sup>123</sup> He writes that consultation was initiated via letter in late January, followed by "three separate meetings...and two field trips...with members of the Cheam First Nations regarding this proposal."<sup>124</sup> Unfortunately for Cheam, Grozier- like all provincial decision-makers- are well aware of the Court's very low standard on consultation, or lack of clarity in articulating the legal principle of consultation. Simply, Grozier's behavior demonstrates that the Crown's commitment is to colonial laws, and not to principles of fairness or justice. By attending five meetings in total, while perhaps satisfying their legal obligations, is a mockery of the notion of meaningful consultation.

This letter also lists the "aboriginal interests" that were considered in his decision. Grozier suggests that the claimed "hunting and gathering" interests are accommodated here by using harvesting methods known as small patch cuts and partial cutting. I suppose the animals in Elk Creek are not much bothered by helicopters. Grozier writes off Cheam's claim that the proposed area contains a quarry site for slate, by suggesting, "there were no signs of cultural modifications and while raw slate may have been removed from these areas there was no conclusive evidence found of on-site

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<sup>123</sup> Kerry Grozier, Chilliwack Forest District, letter to Sidney Douglas of the Cheam First Nation, June 13<sup>th</sup>, 2003, 1.

<sup>124</sup> Ibid., 1.

manufacturing.” Why Grozier makes this particular distinction remains a mystery to me. Either way, Grozier does not foresee the proposed development as having any significant impact on these slate exposures thanks to the use of helicopter logging.<sup>125</sup> Similarly, using the archeologist’s data- and ignoring Cheam’s evidence- the MOF identified two culturally modified trees that would be protected using a “clearly marked” buffer zone.

In addition, this letter also informed Cheam that the archeology team, hired by Cattermole Timber, found “no evidence of occupation such as village sites, burial mounds or other archeological features or resources.” The archeologist also stated that it would be unlikely that any archeological resources would be found in the proposed area.”<sup>126</sup> Once again the oral testimony provided by Cheam was ignored in favor of outsiders trained in Western science.

After informing Cheam in no uncertain terms that further alienation from their territory was imminent, Grozier chooses “to explain briefly some future opportunities that may be available to the Cheam community under the Ministry of Forests Revitalization Plan.” This plan basically allocates a portion of available timber resources to signatory Indigenous groups as well as providing some level of revenue sharing. This is how the province operates: first, alienate Indigenous peoples from their territories and create conditions of poverty which leave them vulnerable to these sorts of agreements; these agreements then legalize further land theft and co-opts Indigenous peoples into consenting to their own ongoing oppression. Is this the spirit of reconciliation that the province is so keen to talk about?

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<sup>125</sup> Ibid., 2.

<sup>126</sup> Ibid., 2.

In addition to official channels of dissent (ie- the band council), a significant number of Cheam members, as well as a substantial group of non-indigenous allies, took to direct action in order to protect Elk Creek. A letter-writing campaign was launched aimed at Kerry Grozier of the Chilliwack Forest District. According to a Freedom of Information request submitted by the Western Canada Wilderness Committee, during the public consultation process (separate from Indigenous consultation) Mr. Grozier received over 700 letters with near unanimous opposition to logging.<sup>127</sup> In addition, on October 2<sup>nd</sup> 2003, former Chief June Quipp informed CN of their plans to blockade the railway that runs through their reserve to demonstrate their opposition to the logging of Elk Creek, as well as the proposed development of Mount Cheam. As promised a small group, consisting of mostly Cheam band members, blockaded the tracks using two pick-up trucks. In a move very familiar to the people of Cheam, the RCMP rolled in with a disproportionately large show of force including SWAT teams, dogs, and tactical units. Arrests were made, breaking one woman's arm in the process. The blockade lasted two nights and was forced to end in accordance with a Supreme Court order. June Quipp negotiated a meeting at a nearby community hall for the next day with the Minister of Forests and Range Mike de Jong.

The meeting ended with only Mr. de Jong's assurances that he would bring the issue to cabinet. He was not willing to provide any real commitment to reexamine the Grozier's decision. Not surprisingly, the Minister's response ended there. A police representative, however, did negotiate a week long moratorium on logging in the watershed. Unfortunately, the brave efforts on the part of the people of Cheam and their

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<sup>127</sup> Pauls, 6.



allies were largely in vain, for logging resumed as before once the cooling off period ended.

It is no coincidence that Cattermole waited until after it began logging to apply for yet another amendment asking for sanction to build a 300 meter logging road and a helicopter log landing to access the western most section of cut block 101A. I find it difficult to believe that Cattermole did not foresee the necessity of a sizable access road early enough to include it in the original development amendment. This seems to be an extremely underhanded move on the part of Cattermole to capitalize on the fact that each MOF decision is made independent of previous decisions. It is also convenient for Cattermole that building this road was extremely profitable in that it required logging a very valuable area that they had not previously been granted permission to log.

The decision-maker in this instance, Squamish Forest District Manager L. Paul Kuster, states his “plan review is focused on the factors and information pertinent to the proposed road and helicopter log landing. It is not to re-examine the FDP Amendment #3 decision that approved the timber harvesting plan in the Elk Creek drainage.”<sup>128</sup> This gets at the problem of the accumulative impacts of development, a problem that is not given sufficient attention within the referrals process. Each development cannot be viewed as existing in a vacuum when the accumulative effects of these decisions amount to the alienation of Pilalt people from their territories.

Another incredible example of this kind of underhandedness came from the proposed development of Mount Cheam by Resorts West BC that I referred to briefly

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<sup>128</sup> L. Paul Kuster, “Rationale for my decision on Cattermole Timber’s Forest Licence A19202: 2001-2005 Forest Development Plan (FDP) Amendment #26 Elk Creek Drainage,” Ministry of Forests: 1.

earlier in this work. This referral came in while the people of Cheam were already fighting for Elk Creek. The proposal being considered by the MOF included the construction of a tramline up Cheam's sacred mountain. The application before Lands and Water BC was for one tram only, despite the fact that the developer, Resorts West BC, was actively promoting the development of a full-scale ski resort including "three separate theme villages, each to have hotels, restaurants, spas, and retail commercial space, timeshare and convention facilities."<sup>129</sup> In a letter to the legal representatives for the proponent, Head Councilor Sidney Douglas stated:

We categorically reject your absolutely incredible suggestion that the proposed tram is a stand alone development that is unconnected to a ski resort development. This is absolutely false and amounts to either an outright lie or a gross misrepresentation of the facts...the hope remains that you will now go away and leave us alone.<sup>130</sup>

Proponents and the Crown make a lot of noise about respecting Indigenous peoples and building trusting relationships with them, but it is little more than a public relations campaign. They can claim all they want that these projects are separate- and indeed they are in the narrowest sense. However, on the ground, the decisions on Elk Creek and Mount Cheam together would mean the almost complete alienation of Pilalt people from their sacred mountains.<sup>131</sup>

The official rationale allowing for logging in the Elk Creek watershed repeatedly refers to the fact that the trees being cut are already second growth. Somehow the fact that these trees only decades or hundreds of years old rather than thousands of years old

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<sup>129</sup> Resorts West BC, "About Us," (accessed March 9, 2010) < <http://www.resortswestbc.com/>>.

<sup>130</sup> Sidney Douglas, Cheam Indian Band, letter to Gary Youngman Re: Resorts West, April 23, 2003.

<sup>131</sup> Thankfully this development has not gone ahead, due to the fact that the developer, Resorts West BC, lacked the capital to proceed.

is apparently supposed to provide comfort to the people of Cheam. My frustration at these repeated suggestions cannot be overstated. This justification, firstly, rewards the Crown and Settler society for past centuries of unjust dislocation of Indigenous peoples from their territories. I wonder where the decision-makers may have gotten the idea that hundred-year-old cedars are less important, according to an Indigenous worldview, than much older ones. Secondly, and perhaps more troubling, is that it is impossible to see where this kind of insane logic ends. After immersing myself in the on-the-ground workings of the referrals process it is entirely conceivable to me that in twenty years proponents and decision makers will say “Don’t worry; we aren’t threatening any old growth. These are already third growth trees. These are fourth growth. These are fifth growth. The Pilalt are not using this land anymore (probably because it is full of loggers and helicopters) so let’s build a road. Now that the road is built, let’s turn it into residential lots. Now that huge mansions cover the mountain we can easily add a ski resort.”

It seems to me that the Elk Creek case was used as a kind of testing ground used to gauge the level of resistance to future development of the mountains within *Solh Temexw*. In the face of Cheam’s confident claim to Elk Creek; in spite of providing the best evidence available to them; despite widespread support from the non-indigenous community; and in defiance of Cheam’s direct action, logging went ahead in the Elk Creek watershed. It seemed that after months of struggling, Cheam’s council capitulated. Given the frustration I feel after being immersed in the referrals process for only a few short months, I cannot say that I entirely blame them. After this long contentious battle it seems entirely reasonable to claim, “they are going to go ahead with the development

anyway, so why don't we see what we can get." In exchange for Chief and Council's tacit acceptance of the MOF's amendments, Cattermole agreed to provide Cheam with logs for the construction of a new longhouse. Sadly, Cattermole cannot even be said to have acted honorably in this instance for, as I heard from many involved in this negotiation, they failed to deliver on all of the promised logs.

### **Worse Than Assimilation**

The central question I sought to answer when approaching all facets of referrals was, is it possible to engage in this process while maintaining an Indigenous identity? Essentially, is it possible to be an Indigenous person living as an Indigenous person while also participating in these processes? In the above analysis I have demonstrated that the referrals process in BC finds continuity with the assimilationist policies of decades past; and therefore, participating in it means forgoing important parts of, not only Indigenous territories, but also important parts of Indigenous minds and hearts. As Alfred and Corntassel suggest:

Contemporary Settlers follow the mandate provided for them by their imperial forefathers' colonial legacy, not by attempting to eradicate the physical signs of Indigenous peoples as human *bodies*, but by trying to eradicate their existence as *peoples* through the erasure of the histories and geographies that provide the foundation for Indigenous cultural identities and sense of self.<sup>132</sup>

This couldn't be more true of the referrals process. However, I would suggest that the consequences of engaging in the referrals process are perhaps worse than assimilation.

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<sup>132</sup> Alfred and Corntassel, 598.

Tunisian-born scholar Albert Memmi suggests, “the crushing of the colonized is included among the colonizer’s values. As soon as the colonizer adopts those values, he similarly adopts his own condemnation. In order to free himself, at least so he believes, he agrees to destroy himself.”<sup>133</sup> However, Memmi also teaches us that this “negation of one’s existence” is not possible, for “even if he agrees to everything, he would not be saved. In order to be assimilated, it is not enough to leave one’s group, but one must enter another; now he meets with the colonizer’s rejection.”<sup>134</sup> Colonial society could never allow for the complete assimilation of Indigenous peoples, for to do so would collapse the categories (colonizer and colonized) altogether and threaten their position of power vis-à-vis the colonized. For example, the fact of assimilation would directly contradict the very mythological foundations on which Canada is built; that is, that Indigenous peoples are inherently inferior, backwards, savage and that Settlers are superior and thus destined to rule here. Hundreds of years of colonial education and false histories obfuscating the reality of the Settler as usurper would be laid to waste, and the illegitimacy of Settler rule would appear. This is not to say that some individuals may succeed in assimilating into the Canadian Settler society; however, as Memmi writes:

A collective drama will never be settled through individual solutions... In order for the assimilation of the colonized to have both purpose and meaning, it would have to affect an entire people; i.e., that the whole colonial condition be changed. However, the colonial condition cannot be changed except by doing away with the colonial relationship.<sup>135</sup>

When I started this project I had hoped that I would be able to provide Cheam with a number of suggestions in terms of how to better engage with referrals, or even set

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<sup>133</sup> Memmi, 121-122.

<sup>134</sup> Memmi, 124.

<sup>135</sup> Memmi, 126.

up a kind of framework engagement agreement. However, given the many foundational problems I have identified within the process I do not see how any participation will ultimately lead to any semblance of self-determination for the people of Cheam. Once again I return to the George Manuel quote that I began this work with. He said, “I would rather hand over to my children the dignity of the struggle than to sign a deal they cannot live with.” Participating in the referrals process is analogous to signing a deal. Choosing to engage with the colonizer, on terms almost entirely dictated by the colonizer, will not result in self-determination. It begins with recognizing, even if coerced, the legitimacy of the Crown on Indigenous territories; it strengthens the Indian Act-created band council system; it creates divides both within and between communities; it diverts valuable energy and financial resources; it forces compliance to a Western view of land and land use; all this and Cheam’s territories continue to be destroyed. Stated simply, greater engagement will only result in the further erosion of Cheam’s territory, as well as the Pilalt way of life.

There are important steps, however, that can be taken that will directly challenge these colonial imperatives embedded within the referrals process, and as a side effect may also serve to bolster Cheam’s *prima facie* title claim, and thus strengthen the duty to consult in the process. For example, the current *BC Consultation and Accommodation Guidelines* suggest that, in determining the strength of the Aboriginal claim, provincial bureaucrats must consider “land used for aboriginal activities.”<sup>136</sup> While decision-makers seem to have a track record of ignoring or undermining Cheam’s testimony when it comes to historical use of certain territories, they will have a far harder time at denial

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<sup>136</sup> Province of British Columbia, “Consultation and Accommodation,” 27.

when there are Pilalt people using and living in their territories beyond the borders of the reserve. Again, my enthusiasm for these projects as strategies specifically aimed at the referrals process is tempered by the fact that Canadian law has determined that the ultimate authority in making land use decisions rests with the Crown. This is always the elephant in the room when we talk engagement strategies. Instead, I see the emancipatory potential of this “fill up the land with Pilalt” strategy as coming out of reconnecting to territories and reinvigorating relationships with the natural world, and not from the Crown’s response to the strategy.

In addition, my analysis reveals that the colonial power benefits from the disconnection of Stó:lō people from each other. Individual communities are forced to compete over Western-style borders. Some communities reject development while others are doing the development themselves. The desire and hope for unity, at least between Stó:lō communities, was very apparent to me in meetings with all kinds of political leaders during my time in Cheam. However, any sort of unity cannot come from undemocratic and simplistic Western models of political organizations. Genuine unity needs to be built around the answer to the question, “what are you ultimately fighting for?” It needs to come from the “community harmony of purpose” that has been destroyed by colonialism. Creating relationships based on those principles would be decolonizing.

Through the referrals system in BC, colonial society benefits from the dislocation of Stó:lō people from the land, from Stó:lō people and each other, and from Stó:lō people

and their way of being in the world. The answer then is not to become more like the colonizer. The answer is, simply, to become more Stó:lō.



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