White Privilege and the Making of Canada's Injustice System: Setting Precedent for Inequitable Treatment in the Courtroom, Vancouver Island, 1860-1873

by

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ABSTRACT

WHITE PRIVILEGE AND THE MAKING OF CANADA'S INJUSTICE SYSTEM: SETTING PRECEDENT FOR INEQUITABLE TREATMENT IN THE COURTROOM, VANCOUVER ISLAND, 1860-1873

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Canada has a longstanding history of racialized and discriminatory practices against the Indigenous population dating back to the first European invasion. During the establishment of British law on Vancouver Island, "whiteness as right-ness" was woven into the fabric of the developing justice system. Specifically, in the case of murder trials, white assailants were privileged within the courtroom, often evading the death penalty, while Indigenous assailants were hanged for related crimes. Through a careful examination of Chief Justice David Cameron's, Chief Justice Joseph Needham's, and Judge Augustus Frederik Pemberton's records, discriminatory treatment in the courtroom is revealed. These men, in tandem with the juries, oversaw the first courtrooms in Victoria, BC, from 1860-1873, and they treated Indigenous assailants more harshly than white assailants. Their records reveal that discriminatory practices in Canadian courtrooms date back to their formation.

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Introduction

I began this introduction sitting on a plane heading back to what is now known as Canada from a ten-day vacation in Portugal with my boyfriend. I recognize my privilege in being able to afford to fly to coastal Europe while working towards a graduate degree. These are privileges that are not afforded to everyone. My whiteness has acted as an invisible hand, opening doors that may be closed to visible minorities. My position as a white male within Canadian society has given me more opportunities in economic, social, and political situations while giving me a cultural advantage in colonial spaces like public schools, universities, and courtrooms. At birth, I was guaranteed fundamental human rights that have been framed as privileges for others. From adequate housing, clean drinking water, and access to health care, my whiteness gave me priority over others who did not share my skin colour. This privilege continued to protect me during my formative years as I was given full access to education, accessibility to adequately stocked and reasonably priced grocery stores, and more safety around police officers.[1] I have yet to be disadvantaged based on the colour of my skin, my cultural heritage, or the community I grew up in.

Although I knew I experienced privilege based on the colour of my skin, I was not truly aware of the extent that white privilege was systematically ingrained into Canadian society until my early twenties. I became aware of systemic privilege (based on perceived race) in August 2018 after the news broke that Gerald Stanley, a white settler, received no judicial punishment

[1] Although my safety is generally valued more by police officers because I am white, being an openly queer person, I am statistically more vulnerable to police violence (profiling and entrapment) than white heterosexual males. However, my experience is not nearly as severe as the experiences of queer and trans BIPOC (Black, Indigenous and People of Colour). For more, see: Andrea Ritchie, "Police Violence Against Women and Queer People of Colour: Why We Need to Imagine a World Beyond Police," accessed 15 May 2020, https://www.kzoo.edu/praxis/beyond-the-state-and-beyond-police/.

for the murder of Colten Boushie, a twenty-two-year-old man from Cree Red Pheasant First Nation. Stanley's trials altered the way that I thought about my whiteness. It was blatantly clear that Black, Indigenous, and People of Colour (BIPOC), in this case specifically Indigenous people, were being wronged in Canadian courtrooms. The legal system, which failed to provide justice to Boushie, was managed by primarily white men. When the jury's decision was announced, and Stanley was acquitted, I was shocked and disgusted. How could this happen when Gerald Stanley had admitted to shooting Colten Boushie? The media reported that an all-white jury acquitted Stanley of all charges, even the charge of manslaughter. I realized that the Canadian court system was privileging and protecting settler assailants, and, by so doing, perpetuating social inequity in Canada. Some Canadian news outlets and social media users also seemed to be protecting Stanley, the settler assailant, referring to the trials as the "Boushie Trial," a move that criminalized Boushie and his friends. At this time, my now ex-girlfriend encouraged me to speak about my realization of legal discrimination and the function of white privilege in the Canadian courtroom. She said, "write a history that you have an active part in." This thesis is a reflection on Canadian injustice in the court system – it is the result of me making sense of our history and the privilege I inherited.

In this thesis, I display how colonial goals (e.g., sovereignty over occupied lands) and white privilege shaped the Canadian courts – evident from early trials – and continues to shape its operations. "Whiteness," to me, is a continually evolving social construction that determines who qualifies as white throughout space and time. "Whiteness" is associated with lightly pigmented bodies. These racialized bodies are classed as "superior" to bodies with more melanin. The colonial association of "whiteness" with "superiority" has led settler-colonists to classify "dark" bodies as "inferior." Cultural theorist Stuart Hall explains that "culture depends

on giving things meanings by assigning them to different positions within a classificatory system. The marking of 'difference' [is] the basis of symbolic order which we call culture."[2] Indigenous peoples in Canada have been coded by colonists as non-white, as "inferior," and therefore in need of control, management, or "uplifting" by settler-colonists. Canada's culture of "white privilege" is directly tied to binaries such as white/Indian, civilized/uncivilized, cultured/uncultured, superior/inferior.[3] European settlers established and maintained 'social order' (i.e., white privilege), in part, through the selective application of British laws.

My research builds on Indigenous legal histories by showing how "whiteness" shaped legal process and outcome in what we now know as British Columbia (BC). My goal is to share an early history of injustice in the Canadian courtroom using a case study approach. In order to do so, I examined the history of the BC courts, the British North American Act, and the Indian Act to understand how the colonial suppression of Indigenous laws and the imposition of British laws influenced the delivery of justice in Canada.

Armed with the background knowledge on colonialism and whiteness written by community activists and scholars, I turned to the archives. Although I started and will end my thesis with the Stanley murder trial in Saskatchewan, I selected British Columbia because the archival records were racialized. Elsewhere in Canada, as noted by Constance Backhouse, judges did not consistently record the perceived race of victims and perpetrators.[4] Like historian Adele Perry, I will use Vancouver Island as a colonial project to understand how "it fits within a broader context of European colonialism."[5] Vancouver Island, as a colonial project, is "a socially

[2] Stuart Hall, "The Spectacle of the Other," *Representation: Cultural Representations and Signifying Practises,* (London: Sage in Association with The Open University, 1997), 236.
[3] Ibid., 235.
[4] Ibid., 18.
[5] Adele Perry, *On the Edge of Empire: Gender Race and the Making of British Columbia, 1849-1871* (Toronto: University of Toronto Press, 2001), 6.

transformative endeavor that is localized, politicized and partial, yet also engendered by larger historical developments and ways of narrating them."[6] When we identify the inherently interconnected nature of the many colonial projects, we can illuminate how whiteness and discriminatory practices in the courtroom transcend colonially drawn provincial borders.

To understand injustice on Vancouver Island, I analyzed the benchbooks, newspapers, and miscellaneous court records of murder (and one attempted murder) trials heard by David Cameron, Joseph Needham, and Augustus Frederik Pemberton during their collective periods as chief justice/judge of Vancouver Island and British Columbia from 1860-1873. I limited my analysis to Cameron, Needham, and Pemberton as they were among the earliest representatives of colonial justice on Vancouver Island. Their records can hint at the foundations of white privilege in the judicial system; they were responsible for creating BC's courtroom culture.

Judge Pemberton was described to have "mythic control" over the miners on Vancouver Island during the 1850s and 1860s.[7] Not only was he popular with the settlers, but Nancy Parker stated that Pemberton had solid trust and belief in British law and worked to uphold it.[8] Pemberton had little legal training, although this was not uncommon as rules requiring judges to have at least seven years of experience did not come into effect until 1885.[9] He was active between 1867 to 1881 and oversaw the trial of Constable Sullivan in 1873.

David Cameron, a Scottish settler, was appointed chief justice of the colony of Vancouver Island from 1853-1865 and is attributed with developing the original court system on

6 Ibid., 7.
7 Nancy Parker, "Swift Justice and the Decline of Criminal Trial Jury: The Dynamics of Law and Authority in Victoria, BC, 1858-1905," *Essays in the History of Canadian Law: The Legal History of British Columbia and the Yukon,* eds. Hamar Foster and John McLaren (Toronto: University of Toronto Press, 1995), 176.
8 Ibid.
9 Ibid.

the island.[10] Joseph Needham became chief justice of Vancouver Island from 1865-1869; however, little is known about his career other than his political tension with Matthew Baillie Begbie until he left his post in Victoria for chief justice of Trinidad in 1869.[11] I selected Cameron and Needham as they both served as chief justices.

Once these agents of law were identified, and their court notes were found, I looked to see if a courtroom precedent was created. I decided to focus on murder trials. Similar murders were selected – the controlled difference being a white or Indigenous perpetrator. This approach allowed me to determine whether individuals were treated differently based on perceived race in the newly established justice system on Vancouver Island. My findings are based on controlled speculation. Controlled speculation is an approach to historical analysis that:

> involves the use of comparative material from other cultural or historical situations to infer crucial information that may be missing or obscured in the historical record of a particular situation; the comparative material is selected from contexts that appear most closely analogous.[12]

During the research process, I dealt with missing vital and obscured information due to access barriers, missing records, and shorthand writing style. These limitations prevented me from being able to complete full transcription of some sources or look at every single case of murder during the time-period. For instance, access barriers prevented me from handling David Cameron's original benchbooks. This obstacle led me to refer to news reporting of the trials, attorney general correspondence, and miscellaneous legal documents. By examining other forms

[10] William R Sampson, "David Cameron," *Dictionary of Canadian Biography*, 15 May 2020, http://www.biographi.ca/en/bio/cameron_david_10E.html.
[11] Ruth Sandwell and John Lutz, "Chief Justice Joseph Needham, The Judge: Who Killed William Robinson," Great Unsolved Mysteries in Canada, accessed 1 May 2020, https://www.canadianmysteries.ca/sites/robinson/murder/castofcharacters/1707en.html. Note also that Begbie was chief justice of BC from 1869-1894 and is associated with the application of British law in small towns throughout the province.
[12] Frederik Gleach, "Controlled Speculation and Constructed Myths: The Saga of Pocahontas and Captain John Smith," *Reading Beyond Words: Contexts for Native Histories*, eds. Jennifer Brown and Elizabeth Viber (Peterborough: Orchard Park, 2004), 141.

of primary material (like news reporting by *The British Colonist*), I was able to utilize controlled speculation to see if Cameron, Needham, and Pemberton's personal views on Indigenous people reflected larger views of perceived race.

Gleach provided four criteria when applying controlled speculation to historical research. First, one should ask if "there is a reason to believe the existence of some practice or institution in the context being studied."[13] In this research, yes, there is reason to believe that racialized and discriminatory practices in the court system were grounded in whiteness with the desire to enforce colonial power in the fledgling colony. Law worked as a form of colonial control by dispossessing Indigenous nations of their own political and legal sovereignty.

Gleach's second criteria asks; "are there other groups that offer comparable experiences? Such as neighboring groups, particularly for questions closed tied to a particular environment."[14] During the 19th century, the Chinese and Indigenous populations experienced similar acts of discrimination by Canadian laws. One example was their exemption from voters and subsequent jury lists in the *Qualification and Registration of Voters Act of 1872.* It was evident that the Canadian government was working to discriminate against many groups of marginalized people during the 19th century.

The third set of criteria asks, "is there a similar phenomenon that has been identified in a comparable example?"[15] Yes, other examples, such as the *Indian Act of 1876,* demonstrated different accounts of discrimination working to advantage white settlers and oppress Indigenous people within the Canadian state. The *Indian Act* is as a racialized piece of legislation that empowered the federal government to govern all aspects of Indigenous life. The act contained

[13] Ibid., 43.
[14] Ibid.
[15] Ibid.

hundreds of provisions and sections that controlled "who was an Indian; what constituted an Indian band; what was an Indian reserve; how Indian reserve lands could be subdivided via location tickets; what legal protections would be given to reserves; and how reserves could be surrendered."[16] Colonial control would later diffuse directly into the legal system with the 1927 amendments to the *Indian Act* that barred Indigenous people from obtaining legal counsel or hiring lawyers.[17] This restriction effectively outlawed them from fighting for their land rights through the Canadian legal system.

The final criteria offered by Gleach asks if there "is there contradictory evidence? In the strictest sense, any contradiction should refuse the comparison."[18] There is some evidence to suggest that some judges sympathetically commuted the sentences of some Indigenous assailants convicted of murder if they felt colonial imposition would only aggravate the situation.[19] Although Indigenous people experienced some instances of sympathy, this is not a contradiction as these instances do not negate the prejudice and discriminatory practices that they received in the courtrooms and social, political, economic, and cultural contexts throughout the century and into contemporary Canada. My thesis focuses on general practice, "the rule" rather than "the exception," revealing that the "founding fathers" of British Columbia's justice system accepted and reinforced white privilege in the courtroom

To reach this conclusion, I asked the following questions of my primary sources:

[16] John Leslie, "The Indian Act: An Historical Perspective," *Canadian Parliamentary Review* 25, no. 2, (2002): 25.
[17] Erin Hanson, "The Indian Act," Indigenous Foundations, UBC, accessed March 14, 2020, https://indigenousfoundations.arts.ubc.ca/the_indian_act/.
[18] John Leslie, "The Indian Act: An Historical Perspective," 25.
[19] Jonathan Swainger, "A Distant Edge of Authority: Capital Punishment and the Prerogative of Mercy in British Columbia, 1872-1880," *Essays in the History of Canadian Law: British Columbia and the Yukon*, eds. by Hamar Foster and John McLaren (Toronto: University of Toronto Press, 1995), 228.

1. What trends existed in the sentencing/court verdicts of crimes committed by Indigenous and settler offenders in cases heard by David Cameron, Joseph Needham, and Augustus Frederik Pemberton?
2. How, if at all, did the court's treatment of Indigenous individuals and settlers compare?
3. Does this comparison reveal evidence of preferential treatment?

In answering these questions, I hope to foster a conversation where white settlers critically self-reflect on their systemic privilege. I hope that my work gives other settlers the tools to actively decolonize their thoughts, their lives, their communities, their workplaces, and their places of worship. Further, I hope that this paper is discomforting for readers. I encourage those who are uncomfortable with the subject matter to sit with it for a while before talking to others.[20] For the white reader: think, reflect, and produce a deeper understanding and awareness of your privilege and how it translates into social, economic, and political power. This very power is what has led to the centuries of violence against BIPOC.

We must remember that history is inherently political. James Baldwin, a Black writer and activist stated that "the great force of history comes from the fact that we carry it within us, are unconsciously controlled by it in many ways, and history is literally present in all that we do."[21] To combat the still-imposed colonial legislation, institutions, and policies that have worked for centuries to disempower and oppress Indigenous people, we must refer to our history. Qwul'sih'yah'maht (Robina Thomas) of the Lyackson First Nation and Associate Professor at the University of Victoria is "concerned that by focusing on reconciliation, we turn away from the

[20] Indigenous scholar Joyce Green argues that one manifestation of settler privilege is "the comfort of not knowing" how "they have benefited from the structures and consequences of colonialism." Joyce Green, "Enacting Reconciliation," *Visions of the Heart: Issues Involving Indigenous Peoples in Canada,* 5th ed, edited by Gina Starblanket and David Long (Don Mills, ON: Oxford University Pres, 2020), 239.
[21] James Baldwin, "Unnameable Objects, Unspeakable Crimes," BlackState, accessed 10 March 2020, http://blackstate.com/james-baldwin-unnameable-objects-unspeakable-crimes/.

crimes of the past and ignore their connections to the present."[22] We must continue to unearth past colonial violence and insist that reparations be made to re-envision our treaty relationships and reinstate Indigenous sovereignty and self-determination

This thesis marks my attempt to unearth past colonial violence that inflects the present. In keeping with the practise of historical theses, I begin my analysis by positioning my study within larger conversations of whiteness, colonialism, and legal studies. In this literature review section, I clearly articulate my contributions to the field. This section is followed by my research findings and subsequent analysis. My analysis interweaves historical legislation and primary source material to provide a storytelling feel to the writing. The history itself unfolds in chronological order. The end of the thesis connects past and present, providing suggestions for mobilizing this information to combat racialized discrimination and white privilege.

Although it is uncommon to find in academic works, I would like to share some recommendations for reading this thesis. If the thesis becomes triggering,[23] I encourage you to take some time away and practise *sufficient* modes of self-care. As Jesse Thistle explains in *Active History*, reading and learning about the horrors of colonial violence and effects of systematic racism can manifest in physical, mental, and emotional conditions. Thistle, a Métis scholar, experienced intestinal issues and had emergency surgery as a result of the vicarious (secondary) trauma from hearing of his ancestors' suffering from the Great Canadian Land Grab and tuberculosis and scrofula epidemics.[24] If you are physically or emotionally overwhelmed by learning about colonial violence, take time away from the reading. Speak with your support

[22] Moira MacDonald, "Six Indigenous Scholars Share Their Views of Canada 150," *University Affairs*, 8 June 2017, https://www.universityaffairs.ca/features/feature-article/six-indigenous-scholars-share-views-canada-150.
[23] A person who is triggered may experience emotional distress following an interaction that brings up traumatic memories.
[24] Jesse Thistle, "Vicarious Trauma: Collecting the Heard," *ActiveHistory.ca*, 3 November 2015, http://activehistory.ca/2015/11/vicarious-trauma-collecting-the-herd.

network, engage in personal, spiritual or religious practises, exercise, or engage with your preferred mode of self-care. An effective way to ground yourself in the moment if you are overwhelmed can be by shifting your emotional state. To do this:

1. Relax – Breathe and release the tension in your body.
2. Detach – Clear your mind of all thoughts.
3. Centre – Drop the awareness to the centre of your body just below your navel.
4. Focus – Choose one keyword that represents how you want to feel in this moment. Breathe in the word and allow yourself to feel the shift.[25]

[25] Marcia Reynolds, "5 Steps for Managing Your Emotional Triggers," *Psychology Today*, 8 July 2015, https://www.psychologytoday.com/us/blog/wander-woman/201507/5-steps-managing-your-emotional-triggers.

Chapter 1: Literature Review

Historical and sociological thought has shaped the ways that scholars have approached Indigenous justice, resulting in a diverse body of literature. Although this thesis is grounded in historical praxis and thought, work from other disciplines must be incorporated to maintain a legally pluralist approach. Legal pluralism, which refers to the idea that multiple legal systems exist within a given field,[26] asks the legal scholar to look past singular narratives of law. Louis Knafla and Susan Binnie argue that:

> legal pluralism is a useful concept for the study of law, society, and the state because it forces both the lawyer and the historian to go beyond the traditional confines of their disciplines, to view the law from where it began (from the ground up), and where it has been generally practised (in the local community). Adding the perspectives of the anthropologist and social theorist to that of the lawyer and the historian, the 'law' becomes a much more dynamic institution, one whose rules and societal processes are in daily practise, constantly in flux, continually challenged, and always in the process of being refined and created.[27]

Legal pluralism acknowledges that the Canadian state is not the only agent of law and demands that other groups receive recognition.[28] Indigenous nations practised their forms of law and governance since time immemorial and continue to today, despite the efforts of colonial dispossession. For example, in British Columba, the Nisga'a and Haida Gwaii nations are recognized by the Canadian government as self-governing nations. While some nations have achieved self-determination and others are in the negotiation process, it is essential to acknowledge that some nation's systems of law and governance continue to exist without the recognition of the Canadian state.[29] By understanding legal pluralism on a basic level, we can

[26] Sarah Hunt, "Witnessing the Colonialscape: Lightning the Intimate Fires of Indigenous Legal Pluralism," (master's thesis, Simon Fraser University, 2014), 11
[27] Russell Smandych and Bryan Hogeveen, "On the Fragmentation of Canadian Criminal Justice History," *Canadian Journal of Criminology* 41, no. 2 (April 1999), 195.
[28] Sarah Hunt, ""Witnessing the Colonialscape: Lightning the Intimate Fires of Indigenous Legal Pluralism," 11.
[29] Ibid., 12.

approach the literature on Indigenous justice and legal histories broadly. My source base is interdisciplinary. This is an intentional choice, reflecting the importance I ascribe to legal pluralism. A scholar who believes in diverse approaches to law, must read across fields – history, anthropology, sociology – to make sense of multiple, culturally-inflected approaches to justice.

Let us begin our discussion of the literature with a historical text. Tina Loo's "Dan Cranmer's Potlach: Law as Coercion, Symbol, and Rhetoric in British Columbia, 1884-1951," attested to the way that whiteness inflected the legal system of Canada. Loo explained that regardless of Canada's emphasis on neutrality in law, Canadian law imposed an order that reflected the attitudes and ideals of "the interest of whites, Anglo-Saxons, heterosexuals, the propertied, the married, and men – or any combination of these groups."[30] By pushing the sociopolitical agenda of, essentially, white heterosexual males through law and justice, Canada continued put systematic racism at its foundations. Constance Backhouse affirmed that perceived race could be manipulated by colonial powers and agents to exploit Indigenous people, what they perceived to be the "uncivilized nation."[31] Loo and Backhouse were leading scholars during the 1990s in showing how the Canadian legal system was racialized.

Historian James Walker's seminal text titled *Race, Rights and the Law in the Supreme Court of Canada: Historical Case Studies* provided a case study approach demonstrated that discrimination had been present in the criminal justice system for centuries. Walker cemented racial discrimination as integral to the inner workings of the justice system by drawing upon the specific court experiences of Black, Chinese, Jewish, and Trinidadian people along with topical

[30] Tina Loo, "Dan Cranmer's Potlach: Law as Coercion, Symbol, and Rhetoric in British Columbia, 1884-1951," *The Canadian Historical Review* 73, no. 2 (1992): 130.
[31] Constance Backhouse, *Colour Coded: A Legal History of Racism in Canada, 1900-1950,* (Toronto: University of Toronto Press, 1999), 13.

analyses of Indigenous experiences.[32]

Walker also illuminated that through public policy, the Canadian government continued to implement racialized legislation to combat influxes of immigration and the pre-existing "Indian problem" to preserve whiteness beginning in the 19th century. For example, the *Indian Act of 1876* worked to restrict Indigenous people's economic activity, marriage and sexual relations, access to proper education through forced attendance at residential schools, and enfranchisement - all on racial grounds.[33] Other examples included the segregation movement during the 19th century within Ontario and Nova Scotia and British Columbia's legislation that prohibited Asian Canadians from working for the public sector, in mines, or from purchasing Crown property.[34]

Further, Walker flagged that these racist practises continued during the World War II era despite "the impact of a wartime conscience" that made Canadians feel uneasy about racial discrimination. [35] He proved that discrimination had been waged against all people of colour in Canada throughout the 20th century and identified the discrepancy between both the Canadian state and citizen's delusions of equality and reality of racial inequalities. This trend continued as scholars exhibited how Canada's legal system was used to protect settlers and to suppress or oppress Indigenous peoples.

Backhouse's "Racial Segregation in Canadian Legal History: Viola Desmond's Challenge, Nova Scotia, 1946," was critical in proving racial segregation in Canada despite a lack of obvious discriminatory laws such as the Jim Crow laws in the United States.[36] By tracing

[32] James W. St. G. Walker, *Race, Rights and the Law in the Supreme Court of Canada: Historical Case Studies*, (Waterloo: Wilfred Laurier University Press, 1997).
[33] Ibid., 25-26
[34] Ibid., 26.
[35] Ibid., 20.
[36] Constance Backhouse, "Racial Segregation in Canadian Legal History: Viola Desmond's Challenge, Nova Scotia, 1946," *The Dalhousie Law Journal* 17, no. 2 (1994).

the history of Viola Desmond's trial, Backhouse explicated the dark history of racialized legal structures that oppressed and attacked people of colour. Backhouse demonstrated that although Canada was claiming not to have discriminatory laws, the state was using its tax laws to discriminate on a racialized basis. Further, Backhouse helped to illuminate the notion that a state does not need to have racially coded laws to have discriminatory practice.[37] Backhouse proved that although laws can appear raceless, they can have discriminatory applications when manipulated by racist agents of the law.

The contributions of Backhouse, Walker, and Loo were echoed by legal historians Hamar Foster, Jonathan Swainger, and Nancy Parker. However, these scholars identified the unique experiences of Indigenous people that lived in BC and on Vancouver Island. Their work was inherently legally pluralistic as they recognized not only the multiple levels of competing colonial governments but the local Indigenous nation's legal systems. Further, the historical records of the BC Archives in Victoria were clearly racialized, which helped to prove the ways that Indigenous peoples were denied justice.

Hamar Foster, a leading legal historian, has written articles, chapters, and books on the topic of justice in British Columbia. "'The Queen's Law Is Better Than Yours'" was unique as it provided a direct look at Indigenous people's experiences in the courts. This article effectively traced the legal history of the 19th century by analyzing the activities of influential legal agents like Matthew Baillie Begbie and David Cameron.[38] His case study provided insight into the negative consequences that resulted from the enforced application of British law on Indigenous

[37] Ibid.
[38] Hamar Foster, "'The Queen's Law Is Better Than Yours': International Homicide in Early British Columbia," *Essays in the History of Canadian Law: Crime and Criminal Justice in Canadian History,* eds. Jim Phillips, Tina Loo, and Susan Lewthwaite (Toronto: University of Toronto Press, 1994), 41-111.

people.[39] Foster's work utilized legal pluralism as it discussed ways that Indigenous populations were denied the possibility of practicing their forms of law.[40] Foster's work functioned to nuance legal histories by diversifying the narrative with its dialogue of colonial dispossession.

Similar to Foster's work, Jonathan Swainger's "A Distant Edge of Authority: Capital Punishment and the Prerogative of Mercy in British Columbia, 1872-1880," utilized a case study approach to examine the application of capital punishment. Swainger's article was relevant as he highlighted how Ottawa's representatives were administering capital punishment during the 1870s.[41] Swainger headlined his article with the trial of George Bell, the first white settler tried and executed for a murder charge on Vancouver Island. Swainger stated that in the cases he examined "the judges applied different standards of responsibility depending on whether the accused was white or native," as they expected more civilized behaviour from whites, while they were not surprised by "uncivilized" Indigenous behaviour.[42] This discovery proved that colonial law was able to be manipulated or applied unequally between white and Indigenous assailants in BC during the late 19th century.

Published within the same anthology as Swainger, Nancy Parker's article titled "Swift Justice and the Decline of Criminal Trial Jury: The Dynamics of Law and Authority in Victoria, BC, 1858-1905," expanded the narrative by looking at the jury aspect of criminal trials. The analysis provided a clear history of jury trials through the mid to late 19th century and identified ways that Indigenous people were affected by jury selection.[43] While Foster and Swainger argued that judges influenced the application of law and, by extension, the treatment of

[39] Ibid.
[40] Ibid.
[41] Jonathan Swainger, "A Distant Edge of Authority: Capital Punishment and the Prerogative of Mercy in British Columbia, 1872-1880," *Essays in the History of Canadian Law: The Legal History of British Columbia and the Yukon,* eds. Hamar Foster and John McLaren (Toronto: University of Toronto Press, 1995), 204-241.
[42] Ibid., 210.
[43] Nancy Parker, "Swift Justice and the Decline of Criminal Trial Jury," 171-203.

Indigenous peoples in the courtroom, Parker showed that members of juries were mostly made up of settler men selected if they "were in the opinion of the Selectors or a majority of them."[44] It was evident that the courtroom was a highly discriminatory place that operated through the whiteness of the judges and jurors.

As legal and historical studies evolved, so too did the focus of scholars' work. Once racism in Canada's justice system was established, scholars sought to understand its purpose and its outcomes. Historians Adele Perry wrote on Canada and David Roediger wrote on the United States of America, but both proved that racism was connected to land incentive and dispossession. Historians Lesley Erickson, Jean Barman, and Joan Sangster, and sociologist Carole LaPrairie emphasized discrimination as a form of state control, whereas social scientists Marianne O. Nielsen and Linda Robyn linked a history of state control to the overrepresentation of Indigenous people in Canada's justice system.

Wages of Whiteness: Race and the Making of the American Working Class by David Roediger provided an overview of the development of working-class racism in the United States in the 20th century. His examination drew upon Marxist analyses to argue that "whiteness was a way in which white workers responded to a fear of dependency on wage labour and the necessities of capitalist work discipline."[45] The book's second chapter applied his argument to settler colonialism and how whiteness worked upon European invasion in the United States. Race became an essential tool of colonialism as it differentiated European and Indigenous identities.[46] The colonists used whiteness and its beliefs of white superiority to apply colonial control and land dispossession. Europeans claimed that "Redness" was tantamount to lazy and

[44] Ibid., 178.
[45] David Roediger, *Wages of Whiteness: Race and the Making of the American Working Class* (Brooklyn: Verso, 2007), 13.
[46] Ibid., 21.

that the "Indians were failing to 'husband' or 'subdue' the resources God had provided and […] should forfeit those resources."[47] Europeans believed that it was the duty of the "hardworking white" to man the land.[48] Thus, the white working-class inherited these ideologies as they began to settle in America and perpetuated them as they claimed ownership of Indigenous land. Adele Perry later argued that whiteness worked not only to dispossess Indigenous people from the land but dispel Indigenous communities as well.

Perry's book titled, *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849-1871*, put the focus on the intersection of race and gender and how it impacted the colonial project of BC. Perry's work emphasized the importance of not "totalizing analyses of imperialism as a total monolith" but rather to understand the colonial development of specific geographical areas as unique.[49] By examining the role of white women as saviours of whiteness in the new colony, mixed-race relationships, and colonial constructions of race, Perry demonstrated how British colonists worked to dispossess Indigenous societies and replace them with white communities.[50] Integral to her analysis, Perry illustrated the construction of whiteness and the importance of white women to produce a "civilized" and white society in BC.

Drawing from Roediger's analysis, Perry stated that "interrogating whiteness as a race challenges the assumption that whiteness is normal and brownness, blackness, and redness [are] the problematic 'others' in need of explication."[51] She further argued that by coding whiteness as a racial category, we could understand the drafting of racialized laws and politics that gave preferential treatment to white people.[52] In this case, Perry drew upon the argument that white

[47] Ibid.
[48] Ibid.,
[49] Adele Perry, *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849-1871*, 7.
[50] Ibid.
[51] Ibid., 5.
[52] Ibid.

women were used as a colonial agent to populate whiteness in BC during the mid 19th century. The import of white women to BC had three missions; to reduce the growing homosocial culture of the backwoods and have men adopt Victorian ideals of masculinity, contribute to the local labour market by adhering to traditional British gender roles, and end the trend of mixed-race relationships.[53] Perry's analysis of gender and race revealed the ways that BC's colonial project was primarily to diminish Indigenous societies and replace them with white communities. Perry demonstrated that the role of whiteness was employed in very strategic and deliberate ways by the British Crown to promote white superiority and ensure British settlement in BC. Scholars continued to contribute to the field of Indigenous justice by examining the role of perceived race in the criminal justice system.

Lesley Erikson's "Constructed and Contested Truths: Aboriginal Suicide, Law, and Colonialism in the Canadian West(s)" studied over-representation through the concentration and prevalence of crime and Indigenous suicide within the prison system. Erikson detailed examples of how legal professionals, the media, and government officials used accounts of suicide to substantiate their claims that the "pathologically drunken criminal, and suicidal [Indian]" required strict regulation, protection, and, most importantly surveillance.[54] In a 1937 case from Cote Reserve of the Salteaux nation, the Indian agent had insisted that alcohol was not involved in a triple murder-suicide; however, due to the popular conceptions of settlers, journalists fixated on the role of alcohol abuse in the case.[55] This was a nationwide problem, as journalists often portrayed alcohol as the primary contributor to suicide –fueling the stereotypes of a "feeble-minded drunken Indian." In 1890, the *Victoria Daily Colonist* reported that an Indian man had

[53] Ibid., 140-144.
[54] Lesley Erikson, "Constructed and Contested Truths: Aboriginal Suicide, Law, and Colonialism in the Canadian West(s), 1823-1927, *The Canadian Historical Review* 86, no. 2 (December 2005): 599.
[55] Ibid., 608.

committed suicide attributed to "temporary insanity induced by alcohol," and that;

> It is much to be regretted that the Canadian Indian who has been long in contact with civilization is not a very interesting specimen of the genus "homo." Indians had few recognized virtues: Most were addicted to vice, and only a few appeared to be intelligent or communicative.[56]

Erikson's inclusion of this example was incredibly important in proving her argument; the Canadian government benefitted from the socially constructed identity of Indigenous people that painted them as inferior and savage, giving the state more opportunity to implement controlling and repressive policies. Further, Erikson touched on how socially constructed identities transcended ethnicity and were applied to western conceptions of gender for Indigenous men and women and was fully expanded on by Jean Barman in her chapter within *Contact Zones: Aboriginal and Settler Women in Canada's Colonial Past.*

Barman's chapter focused on the ways that Indigenous women's identities were interwoven with their sexualities, and their bodies were exploited by the government and settlers to marginalize them further. Barman explained that during the 19th century, white settlers saw all Indigenous women as prostitutes.[57] During this era, "squaw" was often used as an offensive and demoralizing term used to refer to Indigenous women. The connotations associated with "squaw" worked to trivialize and reduce Indigenous women to "sexually charged and immoral social deviants." Through this, Barman was able to produce many examples of ways that settler men managed and perpetuated racialized and sexualized identifiers for Indigenous women.

When Indigenous women were reduced to sexual transgressors, "male stakeholders" benefitted physically, economically, politically, and morally.[58] Indigenous women were used as

[56] Ibid., 609.
[57] Jean Barmen, "Aboriginal Women on the Streets of Victoria: Rethinking Transgressive Sexuality during the Colonial Encounter," eds. by Katie Pickles and Myra Rutherdale, *Contact Zones: Aboriginal and Settler Women in Canadians Colonial Past* (Vancouver: UBC Press, 2005), 205.
[58] Ibid., 206.

an outlet for settler men to gratify their brutality, exploited by dance halls and brothels to transfer money from one man to another.[59] They were often overpowered, raped, and stripped of their agency by these men.[60] Moreover, as prostitution was illegal, this constructed identity was important for state control within the legal system. Even though prostitution and soliciting sex were sought after by settler men, these same men criminalized the women they purchased sex from. Barman made it clear that the state was not benevolent, but instead deliberately used Indigenous bodies and the criminal code to assert its regulatory authority.

Joan Sangster completed similar work in her book titled *Regulating Girls and Women: Sexuality, Family and the Law in Ontario, 1920-1960.* Sangster examined Ontario rather than BC and traced the importance of the enactment of the *Criminal Code* and the *Indian Act* as a form of regulating women in the Canadian state in the mid-20th century.[61] Her book specifically focused on issues that brought women into the courtroom – both as plaintiffs and defendants - to understand how women used "the law (or defied it) to define their own sexual and family lives, as well as the way some women were classified as defiant or criminal by the law, courts, and helping professions."[62] The book's sixth chapter titled "Native Women, Sexuality, and the Law," is especially illuminating. In this chapter, Sangster traced the state's attempts to regulate and discipline Indigenous women and their sexuality through colonial legal and governance practices.[63] To achieve this regulation, colonial legislation worked in tandem with Christian moralism to attack Indigenous customary law, marriage and family structures, and acts of promiscuity.[64] These attacks not only essentialized Indigenous women's identity as inferior and

[59] Ibid.
[60] Ibid.
[61] Joan Sangster, "Introduction" and "Native Women, Sexuality, and the Law," *Regulating Girls and Women: Sexuality, Family and the Law in Ontario, 1920-1960* (Toronto: University of Toronto Press, 2015).
[62] Ibid., 2-3.
[63] Ibid., 169.
[64] Ibid.

as sexual deviants, but criminalized them as well. Both Barman and Sangster cemented how racist colonial objectives shaped the social construction and sexual regulation of Indigenous women.

Sociological studies have shown that Canada's racist legal history resulted in the over-representation of Indigenous people within the criminal justice system. Carol LaPrairie's sociological study examined the over-representation of Indigenous people in the criminal justice system, by utilizing the data from the 1999 Statistics Canada Aboriginal Peoples Survey to explore key cities throughout the Prairies and Northern Ontario.[65] By using a quantitative approach, LaPrairie was able to build upon the prior literature and demonstrate how the colonial practices of state control led to over-representation in the criminal justice system across Canada.

LaPrairie's quantitative research showed that the over-representation of Indigenous people in the criminal justice system was more prevalent in Western Canada and Northern Ontario than in other parts of the country, with Saskatoon, Saskatchewan being the most disproportionate at ten times the national average.[66] This data would suggest that higher rates of social marginalization occurred in these areas. This research demonstrated the consequences that a long history of political, economic, and social oppression through policies enacted by the state to maintain control had on Indigenous peoples.

This was, however, not just a Canadian issue. Marianne Nielsen and Linda Robyn offered a study that cross-examined New Zealand, the United States, and Canada contemporary statistics and found that Indigenous people remained over-represented within the criminal justice system

[65] Carol LaPrairie, "Aboriginal Over-Representation in the Criminal Justice System: A Tale of Nine Cities," *Canadian Journal of Criminology* 44, no. 2 (2002): 183.
[66] Ibid., 186.

as offenders.[67] Although the system of oppression differed in each country, the colonialist pursuits of white governments resulted in the same criminal injustice crisis. However, the scholars make note that in Canada, the over-representation of Indigenous people in federal prisons continues to rise; although Indigenous people only make up 2% of the adult Canadian population, they rose from 11% to 18% of the federally incarcerated population from 1991 to 2001.[68] These statistics make it blatantly clear that the after-effects of poverty, social marginalization, and economic deprivation enacted through racialized policies continue to reverberate through Indigenous communities today.

Throughout the 2000s, work in Indigenous justice became increasingly written by Indigenous scholars. This marked a significant shift in the ways that stories and narratives were told. John Borrows**,** Lisa Monchalin, and Patricia Monture are among some of the leading Indigenous scholars writing on Indigenous justice. Although their works dealt with different subtopics within the field, there was commonality as they identified how Canadian law and criminal justice must be reformed to represent Indigenous legal traditions better and serve Indigenous people. Of the selected authors, these subtopics dealt with Indigenous law, victimization and over-representation, and racist policing.

John Borrows, a leading Indigenous legal scholar, has written extensively on the application of Canadian and Indigenous law and the need for a multi-judiciary system. In his book titled *Canada's Indigenous Constitution,* Borrows argued that "Canada's constitution is incomplete without a broader acceptance of Indigenous legal traditions.[69] By tracing Indigenous legal traditions, examples of Indigenous law, analyzing bijuridicalism, the role of the courts and

[67] Marianne O. Nielsen, Linda Robyn "Colonialism and Criminal Justice for Indigenous Peoples in Australia, Canada, New Zealand, and the United States of America," *Indigenous Nations Studies Journal* 4, no. 1 (2003): 29.
[68] Ibid., 31.
[69] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), i.

Canadian government in integrating Indigenous law, and the challenges in doing so, Borrows' contributions to the field of legal studies were comprehensive.

Borrows' overview of Mi'kmaq, Haudenosaunee, Anishinabek, Cree, Métis, Carrier, Nisga'a, and Inuit law worked to reinforce his argument that scholars must not take a fundamentalist approach to Indigenous legal tradition and law. Meanwhile, his extensive examination of Canadian law demonstrated how Indigenous law could be "strengthened through understanding the culturally contingent nature of the common law and civil law's authority in Canada."[70] Borrows' work was honest in acknowledging the policy and legal difficulties it would take in recognizing Indigenous legal traditions in Canada. However, his work argued that it was clear that "reformulations" to Canadian law would better serve Indigenous people and Canadians, strengthen democracy by giving communities more power, and provide accountability between governments.[71]

Indigenous legal scholars further nuanced the field by looking past the overrepresentation crisis. They shifted the conversation from the number of Indigenous peoples imprisoned to structural disadvantages that may have led to arrest and trial. Lisa Monchalin's "Canadian Aboriginal Peoples Victimization, Offending, and its Prevention: Gathering the Evidence" examined the ways that colonialism triggered multigenerational trauma in Indigenous communities, thus contributing to over-representation within the criminal justice system.[72] Specifically, Monchalin looked at the effects of residential schools, and colonizing policies that sought to assimilate Indigenous people into the popular settler culture at the time. Through the Canadian government's dismantling of Indigenous social networks and economic structures

[70] Ibid., 177.
[71] Ibid., 272-273.
[72] Lisa Monchalin, "Canadian Aboriginal People Victimization, Offending and Its Prevention: Gathering the Evidence," *Crime Prevention and Community Safety* 12, no. 2 (2010): 119.

through state-enforced programs like residential schools, Indigenous people's culture, language, and spirituality were shamed and regarded as morally wrong.[73] The state's actions were detrimental to Indigenous life, causing instances of internalization of racist rhetoric and policies, loss of familial and cultural ties, and struggles with family violence.[74] This resulted in an increase of both Indigenous offenders as well as victims within the criminal justice system.

Monchalin's approach to her analysis framed the over-representation problem as a victimization problem rather than criminalizing Indigenous life further. By doing so, her work attributed to the new consciousness among scholars that began to hold the state accountable rather than victim-blaming. Also, by building upon prior pillars of literature, Monchalin brought the history full-circle to understand the ways that victimization was created. For example, she referred to the policies in the Indian Act that were created with the deliberate motive to "keep the racial others excluded and portray Aboriginal people like the suspect, the accused, the victimizer, or the person of interest."[75] Monchalin acutely identified the cycle of racialized stereotypes that ensured that Indigenous people were kept in the courtroom as offenders and victims, not as lawyers or judges.

Monchalin, later published a book titled *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada.* This text further discussed and outlined over-representation and victimization. Monchalin labelled crime as painful, especially when "committed against Indigenous peoples in the residential schools, and […] now because of ongoing colonialism and oppression and the legacy from these experiences compound and make

[73] Ibid., 122-123.
[74] Ibid., 123.
[75] Ibid., 124.

Indigenous peoples even more susceptible to victimization."[76] Rather than framing crime as just an Indigenous activity, crime is framed as an action committed by the Canadian government against Indigenous peoples, an essential step in conceptualizing victimization. She continued to state that Indigenous people are twice as likely to report being the victim of violent assault, six times more likely to be the victims of homicide, and at high risk of being victimized multiple times.[77] Monchalin's work held the government fully accountable by shifting the formally colonial-controlled narrative of the "criminal Indian."

Sociologist Patricia Monture's "The Need for Radical Change in the Canadian Criminal Justice System: Applying a Human Rights Framework" in *Visions of the Heart: Canadian Aboriginal Issues* demanded that rather than producing more reports on racial discrimination within the criminal justice system, the government must instead take radical action. Taking a critical stance, Monture explained that reports, such as the *Royal Commission of Aboriginal People* (RCAP), did very little to produce tangible change and had little effect on the rising over-representation rates of the following decade.[78] Although the RCAP was important in acknowledging the systemic problems within the justice system, it had little real impact. The article stated that scholars and policymakers alike must view this crisis through a human rights framework to achieve justice. Monture explained that although this framework applies the assumption that all citizens experience the same rights and opportunities, it is evident that within the legal profession, this has failed.[79] Thus, introducing a human rights framework to understand the ways that the legal system has failed would provide more answers in understanding

[76] Lisa Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto: University of Toronto Press, 2016), 145.
[77] Ibid.
[78] Patricia Monture, "The Need for Radical Change in the Canadian Criminal Justice System: Applying a Human Rights Framework," *Visions of the Heart: Canadian Aboriginal Issues* (Don Mills: Oxford University Press, 2011), 242.
[79] Ibid., 243.

victimization and over-representation.

Monture made a highly important advance in the literature. Similar to Borrows, Monture stated that Indigenous people do not see the justice system as one that fits them, not only due to cultural differences and an oppressive history but because they do not hold positions of power within the justice system.[80] Indigenous people are often only given space within the criminal justice system as the criminal or the victim. It is very seldom that they hold positions as wardens, correctional managers, lawyers, judges, police chiefs, or commissioners.[81] Unless Indigenous people are given equal opportunities to enter positions of legal power, the criminal justice system will not improve. This is of the utmost importance as Canada's current policing culture is riddled with racist and anti-Indigenous practices.[82]

The contributions of scholars across the disciplines have revolutionized and nuanced the field of Indigenous justice. Their work has demonstrated how Indigenous people have and continue to be racially discriminated against in the Canadian legal and justice system on all levels. The work of Indigenous scholars and their tenacity in working to hold the state accountable has been great. I too seek to hold the state accountable. What is unique about my work is the desire to focus on *whiteness*. I explore how white privilege consistently protected (and continues to safeguard) white assailants. The injustice suffered by Indigenous assailants become clearer in comparison to white assailants. We find there is nothing just or consistent about the application of the law in early Canada.

[80] Ibid., 244.
[81] Ibid.
[82] Pam Palmater studied the “lesser-known” crisis of racialized and sexual violence against Indigenous women and girls by Canadian police. For more information see “Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence Against Indigenous Women and Girls in The National Inquiry," *Canadian Journal of Women and the Law* 28 no. 2, (2016), 253-284.

Chapter 2: Establishing British Law on Vancouver Island

2.1 An Early Legal History

The Indigenous populations of what is now known as Vancouver Island on the Pacific Coast governed their nations with their own complex legal and political systems. Three distinct linguistic groups, Coast Salish, Nuu-chah,nulth and Kwakwakaw'akw, make up the fifty First Nations on the island and have lived on the land since time immemorial. Their legal and political systems began to be disrupted and dispossessed throughout European colonization beginning in the 18th century, with a strong surge during the 19th century during the fur trade and official colonization of Vancouver Island. Of the selected cases, the Indigenous assailants and victims came from the Ts'mysen, Stz'uminus, and Snuneymuxw First Nations.

The Ts'mysen First Nation is a broad term that refers to the Indigenous people of the northwest pacific coast of BC around the Skeena River that speak in the Ts'mysen language family.[83] The Kitselas, Kitsumkalum, Gitga'at, Kitasoo, Metlakatla, Lax Kw'alaams, and Gitxa'ala are the seven Ts'mysen bands.[84] The Stz'uminus First Nation are Coast Salish peoples whose traditional territory lays mainly around Ladysmith, BC (north of Victoria) and borders the Strait of Georgia and Lady Smith Harbour.[85] The Snuneymuxw First Nation are also Coast Salish peoples, and their traditional territory lies on the eastern coast of Vancouver Island and the Fraser River in BC.[86] White peoples first arrived on their territory in 1792 and much of the early interactions with the First Nations were trade based.

[83] J.V. Power, "Tsimshian," The Canadian Encyclopedia, accessed 12 May 2020, https://www.thecanadianencyclopedia.ca/en/article/tsimshian.
[84] Ibid.
[85] Stz'uminus First Nation, "Our Story," accessed 14 January 2020, http://www.stzuminus.com/our-story/.
[86] Snuneymuxw First Nation, "Nation," accessed 14 January 2020, https://www.snuneymuxw.ca/nation.

The Snuneymuxw First Nation describes their history as “one of strength, perseverance, and endurance in the face of injustice, colonial oppression, disease, and prejudice” as they faced the invading colonial forces.[87] Like the other fifty nations from the island, the Stz'uminus and Snuneymuxw First Nations experienced harsh and violent colonial authority. The colonial dispossession of Indigenous nations’ lands, political sovereignty, legal systems, and traditional ways of life benefited the goal of resettling the island with white settlers. The following paragraphs offer a brief look at the initial colonial invasion and establishment of British law on Vancouver Island during the 18th and 19th centuries.

In March of 1778, the Nuu-chah-nulth peoples were met by James Cook at Nootka Sound on the west coast of Vancouver Island on Cook's search for the Northwest Passage. The land was then surveyed in 1792 by George Vancouver, and the Hudson's Bay Company (HBC) remained in colonial control of the Island until 1849.[88] British law in BC during the 19th century was undeveloped. During the 19th century, there was a lack of settler men to fill legal positions and a lack of formal legal training opportunities and legal codes. In the first half of the 19th century, much of the land west of the Rockies, partly known as New Caledonia, was under the authority of the HBC. Scholars have described the early colonization of Vancouver Island as “one of a struggle between two sharply conflicting approaches, one devised and imposed by theorists and officials in London, and the other originating in local experience and economic circumstances.”[89]

The British Parliament introduced two statutes, the *Canada Jurisdiction Act of 1803* and the *Criminal Civil Jurisdiction Act of 1821*, to establish some level of law enforcement in the

[87] Snuneymuxw First Nation, “History,” 14 January 2020, https://www.snuneymuxw.ca/nation/history.
[88] Editors of the Encyclopedia Britannica, “Vancouver Island,” Encyclopedia Britannica, 15 January 2019, https://www.britannica.com/place/Vancouver-Island.
[89] Richard Mackie, “The Colonization of Vancouver Island, 1849-1858,” *BC Studies,* no. 96, (Winter 1993): 4.

colonies.[90] These statutes "authorized the appointment of local justices of the peace. […] Although they had some practical effect upon the administration of justice east of the Rockies, it has been assumed that in New Caledonia and the Columbia, they were a 'dead letter'."[91] As the HBC remained to hold colonial power on in New Caledonia, the island's legal processes were mainly handled by men of authority among the company's ranks. They were not men trained in colonial law. Though, with the increasing threat of American expansion from the south, the *Oregon Treaty* was introduced in 1846 which made Vancouver Island a British colony. A few years later, in 1849, Vancouver Island was declared a charter colony which introduced the rule of British law.[92]

In that year, Richard Blanshard was appointed governor of the island. However, he resigned only three years later in 1851 due to the calamitous underdeveloped system of law and lack of salary.[93] Formally trained as a lawyer, Blanshard enacted British rule west of the Rockies in order to establish proper legal order.[94] Shortly after, James Douglas was appointed governor and established several policies and some land treaties in an attempt to formalize and legalize British colonial rule.[95] According to Foster, James Douglas "personified conservative determination to establish British constitutional practises which was more important in evolution

[90] Hamar Foster, "Law Enforcement in Nineteenth-Century British Columbia," *BC Studies*, no. 63 (1984): 7.
[91] Ibid.
[92] Alan F.J. Artibise, "Vancouver Island," The Canadian Encyclopedia, last modified 4 March 2015, https://www.thecanadianencyclopedia.ca/en/article/vancouver-island.
For more information on the history of Vancouver Island as a colony see: Barry Gough, "Crown, Company, and Charter: Founding Vancouver Island Colony: A Chapter in Victoria Empire Making," *BC Studies* no. 176 (2012): 9-54 and Jean Barmen, *The West Beyond the West: A History of British Columbia* (Toronto: University of Toronto, 2007).
[93] Hamar Foster, "Law Enforcement in Nineteenth-Century British Columbia," 13.
[94] James Hendrickson, "The Constitutional Development of British Columbia and Vancouver Island," *British Columbia: Historical Readings*, eds. W. Peter Ward and Robert A.J. McDonald (Vancouver: Douglas and McIntyre, 1981), 245-74.
[95] This thesis will not discuss the treaties at length. More can be found at; University of Victoria, "Vancouver Island Treaties," 12 February 2020, https://hcmc.uvic.ca/songheesconference.

to nationhood."[96] In the age of settlement and colonization, it was vital for the British government to cement themselves as the authoritative power in North America. However, with a lack of centralized power on the west coast, this process was slow and disorganized. For instance, the end of the gold rush in 1858 at Fraser River ended a significant component of BC's economy and caused colonial leaders to confront a new racialized social sphere that lacked structure and rules. With a lack of work and income, the "many persons of mixed blood […] were being squeezed by the resistless agency: of encroaching civilization […] [and] posed a potential threat to law enforcement."[97] With the influx of 30,000 men who travelled from the United States, through Vancouver Island, and onto the mainland, the British had to "act to assert its control over the Mainland by creating […] the Colony of British Columbia.[98] Though, the individualistic nature of the separate governments of Vancouver Island and British Columbia during the 19th century made the application of law and governance complicated.

Before 1866, the island and the mainland remained separate colonies. Following the *Act of Union* in 1866, which amalgamated Vancouver Island with British Columbia, two chief justices remained in power, Joseph Needham of Vancouver Island, and Matthew Baillie Begbie on the mainland. This resulted in a struggle of power between the two chief justices as Needham argued that since there was no official call for the elimination of the island's courts, they remained valid; meanwhile Begbie saw all the legal institutions of the "old colony" as no longer necessary.[99]The *Courts Declaratory Ordinance*, passed in 1869, sustained both the court's powers and jurisdictions of the island and the mainland, separately.[100] This remained the

[96] Hamar Foster, "Law Enforcement in Nineteenth-Century British Columbia," 10.
[97] Ibid., 22.
[98] Bob Reid, "The Colony of Vancouver Island: 1849 to 1855," *The Scrivener* 12, no. 3, (2003): 72.
[99] W. Kaye Lamb, **"**Documents Relating to the Effect of the Act of Union of 1866 Upon Judge Begbie's Status and Jurisdiction," *BC Historical Quarterly* V, no. 2, (April 1941): 134.
[100] Ibid.

structure of the courts until 1870, when Needham resigned and became the chief justice of Trinidad, leading to the merging of the courts and Begbie's new title as Chief Justice of British Columbia.[101]

The years prior to 1909 are hazy in the historical legal record, and historian Hamar Foster has spoken to the fragmentation of BC's legal history.[102] Some important developments to law on Vancouver Island are essential to contextualize for this thesis. To begin, Douglas summoned the first elected assembly in 1856, introduced the BC Supreme Court in 1858, and attempted to maintain English criminal justice practises on the island with few modifications.[103] Despite a reliance on England's legal and governance models, some amendments were proposed by Douglas in order to 'better suit' criminal justice on the island specifically. For instance, as a means to "promote the ends of justice", the *Indian Criminal Bill* was introduced in 1861 to give the Board of Commissioners the power to "try all native people, except those charged with murder and be empower[ed] to order corporal punishment."[104] In other words, Indigenous offenders would not have the right to be tried by a jury.[105] The goal was to reduce the time for trials and cut expenses.

Justice of the Peace, John Sebastian Helmcken, opposed the act.[106] Helmcken stated that the proposal was "unfair, illiberal and unjust" arguing that "Indians should be tried just the same as white[s] […] [because] they were no less human beings."[107] However, Attorney General Cary argued in favour of the bill. He criticized the jury system by stating that "during the two years and-a-half in which he had fill the position of Attorney General, he had never known a correct

[101] Ibid., 135.
[102] Hamar Foster, "Law Enforcement in Nineteenth-Century British Columbia," *BC* Studies no. 63, (1984), 23.
[103] Ibid., 119-20.
[104] Nancy Parker, "Swift Justice and the Decline of the Criminal Trial Jury," 175.
[105] Jury trials were typically used for capital crime cases and serious cases of assault in BC during this time.
[106] Ibid.
[107] Ibid.

verdict in Indian cases to be rendered" as the "minds [of juries] were usually made up beforehand."[108] The bill, including "the authorization for the commission to order flogging, passed in the assembly but were not signed into law."[109] This exchange offered excellent insight into the way that colonial legal agents were trying to create differential treatment for Indigenous people in the criminal justice system.

It was inherently problematic that the Attorney General of British Columbia was attempting to introduce a bill that would try some people differently than others based solely on their perceived race. Further, it would have deprived Indigenous offenders of the legal right to be tried by a jury of their "peers" (hardly), a fundamental component of British, and later Canadian law. However, Cary's arguments for this were intriguing as he argued that the juries' biases often led to incorrect verdicts being laid against Indigenous offenders.[110] Perceived "Indianness," Cary suggests, led to mistreatment by white juries. Justice, it seems, was the privilege of those who were classed as white.

Vancouver Island experienced a "gradual maturing" of the judicial system during the 1860s and 1870s with an increase in laws including the *English Judicature Acts*, an increase in employed judges, and the reorganization of the courts for higher efficiency.[111] Most importantly, BC's confederation in 1871 led to legal changes as BC adapted to Canadian legislation and policies, which constituted the transfer of jurisdiction over criminal law over to Ottawa.[112] Although confederation did not rid the BC legal system of its flaws and inconsistencies, it helped to provide a grounding for more consistent and regulated legislation and mandates in the

[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] Hamar Foster, "Law Enforcement in Nineteenth-Century British Columbia," 21.
[112] Ibid.

courtroom. Changes included the introduction of the *Speedy Trials Ac*t in 1888 and the *Criminal Code* in 1895.[113] Formal legislation and confederation did not eliminate clashes between governmental and judicial officials as they attempted to build the criminal justice system from the ground up.[114] These clashes over the delivery of justice only contributed to the overall disordered socio-political climate on Vancouver Island during the second half of the 19th century.

2.2 Nature of Mid-19th Century Trials

While the Vancouver Island and British Columbia justice systems developed rapidly and changed throughout the 19th century, so too did the processes for trying offenders for capital crimes. By examining murder, one of the most severe capital crimes one could commit under British law, much is revealed about the unstable and highly politicized justice system on Vancouver Island. Specifically, the era saw competing notions of the "rights of Englishmen" and "due process" as law reform was a priority for white settlers that were trying to establish British dominance.[115]

Before and after Vancouver Island was amalgamated with the colony of BC, the law demanded capital punishment for criminals convicted of murder. This rule meant that individuals who received guilty verdicts were sent to the gallows to be hanged. Prior to their hanging, "due process" within the court systems was provided, meaning that the accused – regardless of perceived race – was tried under the tenets of British law. Once arrested by police officials, the accused was brought to a county jail to await their jury trial. Although the role of juries in the courts was a point of debate by lawmakers and judges during the 19th century (due to their time-consuming nature), they continued to play a significant role in the courts until 1869 with the

[113] Nancy Parker, "Swift Justice and the Decline of the Criminal Trial Jury," 183.
[114] Hamar Foster, "Law Enforcement in Nineteenth-Century British Columbia," 21.
[115] Nancy Parker, "Swift Justice and the Decline of the Criminal Trial Jury," 171.

introduction of the *Speedy Trials Act*. This act implemented by the federal government received acclaim by local agents of law for lowering the instances of jury trials for lesser criminal charges as a way to relieve the courts of an "onerous burden of jury trials."[116] Murder, however, continued to be tried with the jury system.

At first, as per Matthew Baillie Begbie's proclamation in 1860, jurors could be selected regardless of their nationality, though, this move was motivated by the lack of British people on the island during this time.[117] Only twelve years later, in 1872, BC introduced the *Qualification and Registration of Voters Act*, which stated that "nothing in this Act shall be construed to extend or include or apply to Chinese or Indians," meaning that Chinese or Indigenous peoples were disenfranchised.[118] With the deliberate and legal exclusion of Indigenous people from elections,[119], their political standing in the new province of Canada was less than that of white settlers. Later in 1876, it was determined that only names on the voter's list were to be used when selecting jury members, meaning Chinese and Indigenous peoples could no longer act as jurors.[120] Although not reflective of the entirety of the 19th century, it was evident that the discriminatory voting regulations had a secondary outcome that barred Indigenous people from gaining power in the courtroom. The exclusion of Indigenous jury members gave white settlers the ability to decide the verdicts of all murder cases, regardless of who was involved in the trial (e.g., Indigenous or non-Indigenous perpetrators).

Following the trial, the jury would announce their verdict. The judge would then order the sentence and determine how to punish the accused. It is important to note that a judge could

116 Ibid., 172.
117 Ibid., 173.
118 Ibid., 178.
119 This secondary status would be reaffirmed by federal law, specifically the *Indian Act*, four years later. Canada, *An Act to Amend and Consolidate the Laws Respecting Indians [The Indian Act of 1876]*, Indigenous and Northern Affairs Canada, https://www.aadnc-aandc.gc.ca/eng/1100100010252/1100100010254.
120 Nancy Parker, "Swift Justice and the Decline of the Criminal Trial Jury," 178.

recommend clemency for a lesser charge or complete acquittal. (although capital punishment was the norm in murder trials). The governor of Vancouver Island was in charge of granting such clemency before BC's union with Canada. Ottawa assumed power over execution processes after 1871, when the *British North America Act* came to apply in BC. This caused tension between law officials in BC and Ottawa as the distance between the two made it difficult for efficiency in the courts due to a lack of telegraphic communication and the lack of the railway system.[121] Regardless, Ottawa assumed power over life and death sentences. After someone was found guilty of murder, legal officials took the following steps:

> the presiding judge would forward to the [colonial] secretary of state the trial transcript with a specified date of execution, a record of the jury recommendation as to whether the accused deserved mercy, and a personal report of his own view of the case and the accused. In turn, the secretary of state transferred the material along with any petitions for mercy to the department of justice, where the deputy minister reviewed the case and then briefed the minister, who then did likewise the cabinet. This cabinet briefing usually took the form of a recommendation on how the case should be handled, and while discussion might ensue, the cabinet usually adopted the minister's advice. The minister then reported the cabinet's deliberations and recommendations to the governor-general, who then decided officially whether the case warranted merciful treatment.[122]

Following this lengthy process from BC to Ottawa, which usually kept the prisoner in jail for months, their sentence could receive commutation, or the date for execution was set, or the prisoner would be granted clemency and receive a lesser charge.

As the justice system evolved, so too did the procedures of murder trials. The power to execute or to grant clemency shifted from British Columbia to Ottawa. However, the racialization of power within the courtroom did not change. As different chief justices came to power, new judges emerged, and new attorney generals were appointed, their whiteness shaped the courtroom culture. These high-power figures worked alongside other white agents with

[121] Swainger, "A Distant Edge of Authority: Capital Punishment and the Prerogative of Mercy in British Columbia, 1872-1880," 209.
[122] Ibid.

courtroom power, such as juries, and established a courtroom culture grounded in racist practise and committed to protecting colonizers. Given that Indigenous peoples could only appear as perpetrators or victims, they had few opportunities to advocate for meaningful structural change from the inside-out.

The following five murder cases showcase how racist beliefs and practices influenced operations of the BC justice system from 1860-1873. They also demonstrate how white settlers with power normalized discriminatory practises, establishing a courtroom culture that protected other white settlers while penalizing Indigenous peoples.

Chapter 3: Chief Justice David Cameron

On 19 July 1860, the *British Colonist* published a warning that cautioned both white and Black men against visiting "Indian lodges" to avoid possible death.[123] The media reported that Allache, an Indigenous man of the Ts'mysen (also referred to as Tsimsean, Tsimshian, or Chimsean) nation, had fatally stabbed a young Black man named Thomas Brown.[124] Allache "was one of the hundreds, and often thousands, of 'Northern Indians' who regularly camped on or near the Songhees lands adjacent of the colonial capital."[125]

This trial has been studied by scholars like Hamar Foster, as it resulted in the first capital punishment on Vancouver Island. This case also suggested the racialization of court justice in what would become Canada. The following two trials of Allache and George Snelling showcase that perceived race worked within the courtroom to protect white assailants while applying racialized practises to Indigenous and white assailant's trials.

Allache's trial and subsequent guilty verdict garnered much attention from the locals of Victoria, especially Alfred Waddington. Waddington, who wrote on the injustice of Allache's trial, was a man with political influence who later earned the title of "respectable old fool" from John A. McDonald.[126] Waddington earned his high respectability by revealing his characteristically entrepreneurial spirit during his participation in the Gold Rush in California in 1850, and later at the Fraser River of BC in 1858. Being well-educated, Waddington quickly climbed the socio-political ladder and was elected to the island's House of Assembly in 1860.[127]

[123] "A Warning," *British Colonist* (Victoria, BC), 19 July 1860, 2.
[124] Ibid. The exact band that Allache belonged to was unspecified in the written English records consulted during the course of my research.
[125] Hamar Foster, "'The Queen's Law Is Better Than Yours'," 70.
[126] Tina Loo, *Making Law, Order, and Authority in British Columbia 1821-1871* (Toronto: University of Toronto Press, 1994), 136.
[127] Ibid.

Waddington possessed some progressive beliefs for his time. For example, he advocated for the rights of women in the House of Assembly and critiqued how women were forced to adopt the citizenship of their husbands.[128] While Waddington proved to be sympathetic to some of the injustices experienced by women and Indigenous people, his work was full of racist rhetoric. Nevertheless, Waddington found himself deeply angered and moved by the outcome of Allache's trial and wrote a highly critical pamphlet piece that demanded mercy for Allache and highlighted the ways that the courts failed him during his trial. Waddington's pamphlet is unique because it draws our attention to a publicly decried case of Indigenous mistreatment under colonial law.

Waddington, albeit sympathetic to Allache, was still profoundly racist in his writings and used derogatory terms and stereotypes against Thomas Brown, the victim, and Allache. It is crucial to keep this in mind when referring to 19th-century writings. While some white settlers expressed sympathetic sentiments, racism was still deeply rooted within their psyche.

Waddington's pamphlet, titled *Judicial Murder*, began with the following excerpt:

> the first judicial murder execution in Victoria has been consummated; and after the mockery of a trial accompanied by circumstances such as, it is to be hoped, will never recur in this Colony, a poor good looking young Indian under twenty, named Allache, has been executed for murder. […] It is appalling to think that any man on this Island, *even if he be an Indian*, should be condemned […] without a competent Interpreter to explain them, without a Counsellor to assist him in a matter of life and death.[129]

Immediately, Waddington called out the injustice experienced by Allache (he was judged without a lawyer or a translator), all the while weaving racist rhetoric into his response. Although he offered sympathetic sentiments, he reduced Allache (and all other Indigenous people) as less than whites by stating, "even if he be an Indian." Later confirmed by newspaper accounts, it

[128] Thomas Kervin, "A Look Back in History at Alfred Waddington," *North Island Gazette*, 8 February, 2019, https://www.northislandgazette.com/columns/kervins-corner-a-look-back-in-history-at-alfred-waddington.
[129] Alfred Waddington, "Judicial Murder," BCARS, NW p, 970.51, W118, 1.

became apparent that Allache did not have an interpreter sufficient enough to relay the proceedings of the trial, nor a lawyer to assist him.[130] Although Waddington does not suggest settlers received better treatment, we find that English-speaking settlers had an inherent privilege: they spoke the language in which courtroom proceeding occurred.

Allache, described as a "young Indian, not long married" had witnessed his wife experience "daily assaults" by the deceased, Brown, who "in spite of repeated warnings" returned to his home and conducted "impudent and abominable practices."[131] Waddington suggested that Allache's wife experienced physical or sexual assault. Allache, while intoxicated, took matters into his own hands and stabbed Brown, who died days later. For this reason, Allache was charged with premeditated murder.

Waddington continued to criticize the trial and described Allache's treatment in such a way that seemed as if he was, perhaps, cognizant of white settler privilege within the courtroom:

> [Allache] is now standing before a Court of law, to be tried for his life; before an English Court of Justice, the first proceeding of which he does not, cannot understand; with a Chinook Interpreter by his side, who neither knows good English or Tsimsean Indian. And questions are being put on every fact which is sure to condemn him […] a lonely, helpless victim, surrounded by judges the more inhuman because the more educated. Nor does a single lawyer present have the heart or the humanity to offer to defend him. […] An Attorney general complacently looks on and authorizes them by his presence! And the Chief justice too looks quietly on in that same Court.[132]

Waddington spoke directly to those in power and denounced how poorly the trial was conducted, and how reprehensible it was that in an English court of law, Allache was tried with no lawyer with no raised concerns from the chief justice. Further, Waddington made it a point to speak of

[130] Allache's situation evoked similar instances of inadequate interpreting that resulted in colonial injustice. For example, it is noted that Canada did not hire a competent interpreter for treaty negotiations in what is now known as Alberta. To learn more, see pages 23-27 in Walter Hildebrandt, Sarah Carter, and Dorothy First Riders, eds., The *True Spirit and Original Intent of Treaty 7* (Montreal-Kingston: McGill-Queen's University Press, 1996). This form of colonial mismanagement of negotiations or cross-cultural encounters was not unique to BC but existed across the Canadian state.

[131] Alfred Waddington, "Judicial Murder," 1.

[132] Ibid.

the "impartial jurymen" who came to the verdict and clergymen who tried to teach him their "Divine tenets" on the day of his execution, "which must have seemed passing strange when coming from one of that highly civilized race who violate [Indigenous people] every day."[133] Settlers from varying levels of power within the criminal justice system worked together, unified by their whiteness and whether deliberate or not, to create a legal system that worked against Indigenous people.

Waddington was very public with his critique of the trial, referring to it as a "judicial murder" as seen through the title of the pamphlet. Due to limited access to David Cameron's benchbooks, I will be relying heavily on the public record to convey the facts of the trials. Waddington's pamphlet working in tandem with the *British Colonist's* newspaper publications, retell the proceedings of Allache's trial.

3.1 Regina vs. Allache [134]

Newspaper records of the Allache trial were shorter than the usual articles written for murder trials, though, this may not speak to a bias on the part of the *British Colonist,* but rather to an oddly quick trial for a capital crime. Allache was apprehended for the murder of Thomas Brown on 16 July 1860. Allache awaited his jury trial for just under a month, and on 14 August 1860 was tried for the charge of premeditated murder with a plea of not guilty.[135] Chief Justice David Cameron presided over the trial, while Attorney General Cary opened the case for the prosecution and Donald McAuley acted as Allache's interpreter.[136]

[133] Ibid.
[134] The titles of the five murder trials included in my analysis originated from *British Colonist.* I have chosen to use these historical titles for chapter subheadings to help transport the readers into the cultural setting of my research.
[135] "Regina vs. Allache," *British Colonist* (Victoria, BC), 14 August 1860, 3.
[136] Ibid.

The first instance that spoke to the injustice in the courtroom was the lack of opportunity to find legal counsel. Allache, being an Indigenous man, was unable to obtain a lawyer trained in British law. Waddington suggested that no lawyer was willing to act as his defense solely based on his perceived race. Cameron and Attorney General Cary both acted in complacency as they had "forgotten the common feelings of justice, and forgetting [their] duty also, [did] not even assign a counsel for the defence" of Allache.[137] Allache was placed in an unprotected position even before the proceedings began and, with no acting counsel, lacked the opportunity to, at the least, reduce his charge or sentence. Even before their testimony was heard, Allache was placed at a disadvantage by Chief Justice Cameron and Attorney General Cary.

The proceedings began with the only witness, John of the Ts'mysen First Nation, who testified against Allache. John explained that he had "[saw] two negroes come into [Allache's] lodge; the negroes stood there and said nothing; a little child was standing at the door; the deceased stooped down to kiss the child, and just then Allache stabbed him in the back. The other negro ran away when his companion was stabbed."[138] The witness' testimony painted Allache in a way that seemed unrestrained and violent. John presented Brown as an innocent greeting a child. It is unknown whether John was bilingual or if he had used an interpreter. If an interpreter had represented him, it is possible his testimony could have also been botched as the interpreter had been identified as ineffective by Waddington.

Allache faced not only a barrier for finding counsel but also was forced to participate in a system of law and language that he was unable to understand – with an ineffective interpreter. Waddington spoke to this and stated that Allache's defence was so "mutilated by an

[137] Alfred Waddington, "Judicial Murder," 1.
[138] Ibid.

interpretation unworthy of confidence," even though there were other "competent interpreters in the room."[139]

Despite these limitations of counsel and interpretation, records show that Allache never confessed. He was reported as saying that he "never used to drink much rum; but that morning [his] brother bought a bottle of rum and gave him some. [He] was so drunk he did not know what he was about. One of the Songish Indians has said that it was not [him] that stabbed the man; it was another Indian."[140] This was the only statement made by Allache throughout the entire trial, and it seemed as though the jury disregarded his word entirely. While Allache admitted to intoxication, he did not admit to murder and cited alcohol-induced memory loss of the altercation. While Allache never admitted to the accusations, the admission of alcohol consumption may have led the jury to perceive him as felonious since the sale of alcohol to Indigenous people was prohibited in the same year by colonial law.[141] Although not the same severity of the crime, both had criminal associations.

Witness William Seely, his occupation unknown, explained that the Allache had been brought to see Brown in the hospital before he succumbed to his injuries where he said that "he would have rather given [Allache] 50$ than be cut in that way."[142] A doctor then testified that the wounds inflicted upon Brown were sufficient to cause death. It is important to note that Brown never directly accused Allache of murder. Some "further evidence was taken" and then the case was given to the jury for the verdict.[143] The jury returned within a "few moments with the verdict

[139] Ibid., 2.
[140] "Regina vs. Allache," *British Colonist* (Victoria, BC), 14 August 1860, 3.
[141] Mariana Valverde, "A Postcolonial Women's Law? Domestic Violence and the Ontario Liquor Board's 'Indian List,' 1950-1990," *Feminist Studies* 30 no. 3, (2004), 568.
[142] "Regina vs. Allache," *British Colonist* (Victoria, BC), 14 August 1860, 3.
[143] Ibid.

of guilty of murder in the first degree."[144] Allache was sent back to prison to await his execution date.

The trial lasted less than a day, quite short when compared to other the trials examined in this thesis that occurred over multiple weeks, and the jury's return within a "few moments" suggests little to no deliberation occurred.[145] Allache's trial demonstrated the limitations of British law and its application to Indigenous people for several reasons. Allache was tried under tenets of British law, not Indigenous law. This form of colonial dispossession of traditional law systems worked against Indigenous people, as Allache was unable to be tried under a system of justice that he understood. Further, he was unable to retain a lawyer as no white lawyers were willing to defend his case, disempowering him further. Systematically, Allache was refused a fair and proper trial due to the systematic racism that was already strongly rooted within BC's new legal system, and by agents of law with varying levels of power: lawyers, juries, and judges.

In an attempt to grant Allache mercy, a local citizen had procured a petition which was signed by seventy-eight people of Victoria.[146] It was evident that some white settlers of Victoria knew of the injustice, but their effort to save Allache's life proved futile. Allache's trial was conducted at the time when the Governor of the island, James Douglas, had the power to commute sentences. Governor Douglas denied the petition that "pray[ed] for a commutation of the sentence of death passed upon one Allache, a Tsimsean Indian, convicted of murder."[147] Douglas stated that there were no "extenuating circumstances which would warrant him in

[144] Ibid. Sullivan, Tomlinson, and Smith's trials were conducted over a period of weeks.
[145] The other trials compared to Allache's are the murder trials included in this thesis.
[146] "Petition Denied," *The British Colonist* (Victoria, BC), 24 August 1860, 3.
[147] Alfred Waddington, "Judicial Murder," 2.

incurring the grave responsibility in interfering with the ends of Justice in a matter so intimately affecting the entire community."[148] Allache was headed towards the gallows.

Both Waddington's pamphlet and the *British Colonist* described Allache's execution in much detail. Waddington poetically described the Saturday morning "bright as usual, gilding the hazy tops of the mountains, […] [with a] scaffold erected in front of the police court" in Bastion Square.[149] As this was the first execution on the island, it garnered over three hundred viewers, both white and Indigenous. Waddington suggested that half of the witnesses were crying – even the jail guards.[150] Allache was described by the newspaper accounts and Waddington as devastated, and sobbing – "which is said to be peculiar to his people and signifies that the person who utters it is reduced to the last extremity of despair."[151]

3.2 Another Man Stabbed to Death

That same month, a white man named George Snelling was charged with the murder of a white man named Edmund Simonds. The murder took place in July 1860 on Saanich Road in Victoria, BC, where the two men engaged in a drunken fight on the street. George Snelling, a white settler man, was employed on a ranch and was returning to his home when the fight occurred.[152] Snelling stabbed Simonds to death and then immediately turned himself in to the local police station stating that he had stabbed Simonds to death in self-defence. He claimed Simonds had tried to rob him.[153] Settlers like Waddington compared the treatment of Snelling and Allache as evidence of the limitations/failures of BC's courts. Given comparisons made by Allache's contemporaries, let us look at Snelling more closely.

[148] Ibid.
[149] Ibid., 2.
[150] "Execution of Allache," *British Colonist* (Victoria, BC), 28 August 1860, 2.
[151] Ibid.
[152] Another Man Stabbed to Death," *British Colonist* (Victoria, BC), 24 July 1860, 2.
[153] Ibid.

From the start, Snelling's whiteness gave him an inherent advantage within the courtroom. Snelling obtained a well-paid and eloquent lawyer for his trial to act in his defence.[154] He inherently held a privilege within the courtroom as he had no language or racial barriers as a man of British descent, being tried in a British court of law. He had a lawyer represent his case in English and would have been able to state his testimony rather than through an interpreter.

Snelling's case garnered two hearings: the first at the coroner's summoning and the second in the court of assize. The first, and smaller of the two, trial heard from two witnesses and the coroner. The first witness, William Robinson, witnessed Simonds and Snelling walking towards town, both men very intoxicated and yelling about a possible theft against the latter.[155] The two fell to the ground fighting one another, and after a few moments, Robinson stated that he saw Snelling raise a bloody knife from Simonds' body after hearing him beg for mercy.[156] Robinson further stated that the prisoner could have "got away from the deceased with great ease if he had seen fit to do so; when the deceased lay on his back with the prisoner on top of him, [Simonds] did not have a hold of [Snelling]."[157] The second witnesses relayed a similar testimony but had left the scene while they were fighting. The coroner then reported his findings, and found that it was "certain that at the time the fatal injury was inflicted, Simonds was unable to help himself, and was completely at the mercy of his antagonist."[158] In his first trial, Snelling's original claim of self-defence was challenged. Witnesses suggested Snelling's presentation of the events had been falsified.

[154] Alfred Waddington, "Judicial Murder," 2.
[155] Ibid.
[156] Ibid.
[157] Ibid
[158] Ibid.

The trial was then brought to the court of assize on 15 August 1860, as the charge of murder became more apparent. Snelling's jury trial was also heard by Chief Justice David Cameron, with Attorney General Cary and H.P.P Crease for the prosecution, and D. B. Ring and J.E. Dennese for the defence. The proceedings began with the prosecution's case against Snelling and explained the details of the murder to the jury:

> a blow was first struck with a stick that stunned the deceased. That no malice for the blow thus struck remained in the mind of the deceased will be clearly shown from the fact that the reconciliation takes place between them immediately after. The deceased was intoxicated; the prisoner mounted; he could have left if he had wished to do so. […] The deceased pleads for mercy. The pleas, alas! Seems to have acted more as a provocation, and the ready hand took the too ready life.[159]

The case then began to hear from the witnesses, nine in total, all of which stated that they saw Snelling and Simonds in a scuffle. However, not every witness saw the knife in hand, which helped destabilize the prosecution's case.

Each witness' story followed the same sequence of events: they witnessed the deceased and the prisoner walking together, drunk, and heard yelling about a theft, after which they saw a scuffle that concluded with Simonds on the ground and Snelling riding away.[160] In the cross-examination of witness Andrew McLean, the defense argued that there might have been "suspicious characters about," and the stick that was used was a "rotten one, it was one which had lain in the road for some time."[161] In the cross-examination of Henry Melvin and William Robinson, the counsel of the defence attempted to invalidate their testimony as they had not involved themselves in the scuffle or checked the body after Snelling had left.[162] Following the nine witnesses for the prosecution, the defence announced they had no witnesses to call.

[159] "Trial of Snelling," *British Colonist* (Victoria, BC), 16 August 1860, 3.
[160] Ibid.
[161] Ibid.
[162] Ibid.

After a brief recess, the court reassembled the counsel for prosecution, and the defence summed up their cases for the jury. Ring's address to the jury urged them to not

> place any faith in rumor – rumor was always a liar. […] The whole fatal affray arose from drink. The law holds a man responsible for acts he may perform under the influence of drink. But one of the ablest English jurists has said that the jury has a right to examine into the motives of a man who commits a crime while drunk.[163]

In Snelling's defence team's final address, D. B. Ring made an interesting remark about alcohol and violence. Snelling's counsel managed to use the involvement of alcohol in his favour to encourage the jury to re-examine what his 'true motives' were as he was intoxicated. Unlike Allache, Snelling's alcohol consumption was not classified as criminal; instead, it could be used to argue he required leniency. Snelling had the privilege of being seen as "white man" with impaired judgements, whereas Allache was a "red man" who had broken not one, but two, laws.

The jury deliberated for a total of two hours, "at which hour the jury came into the court and stated that they had not agreed upon a verdict, there being two or three points upon which some of the jury were not altogether satisfied."[164] It was here that Cameron offered an anecdotal situation to help the jurors conclude their deliberations. He stated that if "two men met to fight, and one killed the other in the heat of passion – that was manslaughter; if there had intervened between the fight and the killing a sufficient time for the parties to cool, it would have been murder."[165] The jury retired once more to deliberate. Ten minutes later, the jury returned with the verdict of not guilty of murder but guilty of manslaughter. Cameron responded to the verdict with approval, and Snelling was sentenced to four years of imprisonment with hard labour.[166]

[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Ibid.

Snelling's trial heard from a total of nine witnesses that observed the murder, although he was given the benefit of the doubt nine times throughout his trial. One of these witnesses was a coroner that stated that Snelling's actions were done with malicious intent as Simonds was too drunk to fight back or warrant an attack in the name of self-defence.[167] The jury acted per their racialized prejudices to give Snelling a reduced charge regardless of overwhelming witness testimony. The shared whiteness of the jury made it possible for them to see themselves in Snelling's place, which in turn made them more sympathetic in applying a lesser verdict. This was a key moment that demonstrated that whiteness was at work in the courtroom.

3.3 Chief Justice David Cameron's Legal Legacy

By understanding the difference in treatment of Allache and Snelling, it was apparent that Indigenous offenders experienced less sympathy, and white settlers were provided a privilege within Cameron's courtroom. One final excerpt, spoken by Chief Justice Cameron after Snelling's trial, offered insight into the ways that white bodies were privileged within the courtroom. Cameron's anecdote explained that if "two men met to fight, and one killed the other in the heat of passion – that was manslaughter; if there had intervened between the fight and the killing a sufficient time for the parties to cool, it would have been murder."[168] If this was to be true, then Allache's case, which also saw a trial of murder in an intoxicated state, should have been evaluated by the jury – especially considering the circumstances that he acted on. However, this double standard spoke to the prevailing societal beliefs of the time that labeled Indigenous people as the "drunken Indian." In 19th century courtrooms, jurors often applied their biases and assumptions against Indigenous assailants if alcohol was involved and often "exaggerated or

[167] "Trial of Snelling," *British Colonist* (Victoria, BC), 16 August 1860, 3.
[168] Ibid.

manipulated the evidence to fit prevailing stereotypes of the 'drunken' or 'criminal Indian.'[169] Allache had committed two wrongs under colonial law and was hanged, without the protection of counsel or a competent interpreter, as a symbol of colonial authority.[170]

Cameron would later imply Allache received hard justice. Reflecting on the events leading to the gallows, Chief Justice Cameron exclaimed that it was a misfortune that the prisoner had no counsel, however "an example (!) must be made, and the Indians taught to respect the laws!"[171] Although the highest holder of power recognized that it was a misfortune that Allache had no counsel, his perceived race justified the discriminatory practise on the grounds of 'Indians' needing to learn a lesson.

Throughout the 1860s and into the 1870s, white judges and white juries would continue to protect white assailants. Like Snelling, white assailants benefitted from language fluency, legal representation, and sympathy (perhaps as a fellow British colonist) in courts run by subsequent judges. Joseph Needham, who became Vancouver Island's second chief justice, inherited a courtroom culture from Cameron that protected white settlers and made examples of Indigenous. Needham would continue to protect white settlers in what would become Canada's justice system by keeping white assailants off the scaffold and executing Indigenous assailants.

[169] Lesley Erikson, "Constructed and Contested Truths," 609.
[170] The "drunken Indian stereotype" refers to the common belief that Indigenous people are prone to alcoholism based on racial identity constructions created and reinforced by Canadian bureaucrats and law enforcement. This stereotype worked to control and subjugate Indigenous people by the means of "narcotic dependency." For more information see pages 167-188 in Scott Thompson and Gary Genosko's *Punched Drunk: Alcohol, Surveillance, and the LCBO, 1927-75* (Black Point Nova Scotia: Fernwood Publishing, 2009).
[171] Alfred Waddington, "Judicial Murder," 2.

Chapter 4: Chief Justice Joseph Needham

A closer look at Joseph Needham's tenure as the island's chief justice allows us to deepen our understanding of how racism operated in British Columbia's budding legal system. Joseph Needham, a member of the colonial elite, became chief justice of Vancouver Island in 1865 and held the position until his departure for Trinidad in 1869. During his time as chief justice, Needham heard both civil and criminal cases in Victoria. His benchbooks held by the BC Archives, cover the period from 1867-1869. The archival records do not include his first two years of practice. Of the accessible benchbooks, there was not one murder trial of a white offender. This does not mean that there were no murders conducted by white assailants. As Hamar Foster noted, a lack of murder trials with white assailants points to a couple of possible outcomes: they went "undetected or unsolved," or the charges were reduced to manslaughter.[172] As a result, I selected a trial with similar weight in the courtroom to understand the difference in treatment between white and Indigenous assailants.

The trial of white settlers Charles Tomlinson and George Smith provided a comparable crime of 'assault with intent to murder' to Tshuanahusset's (Tom) murder charge. Although Tomlinson and Smith's trial was not for murder, the way that their charge was classified, and the trial's proceedings provide evidence that whiteness protected settler assailants. Tshuanahusset's trial for the murder of William Robinson is a well-known proceeding in the realm of Canadian legal history due to the way that the legal officials handled the case.

[172] Hamar Foster, "'The Queen's Law Is Better Than Yours,'" 111.

4.1 The Shooting Affray

On 8 October 1867 two American men, Charlie Tomlinson and Jacob Marks[173] were involved in a bloody affray at the corner of Government and Fort in Victoria. Jacob Marks, a white settler, "miraculously escaped death" after Tomlinson fired his gun and hit his "wristband button […] driving [the bullet] against his stomach a short distance above the naval."[174] The incident occurred after "words arose" between the two men, where Tomlinson "suddenly [drew] a four-barrelled pistol, presented it at Marks and fired."[175] After he had failed to issue a fatal shot at Marks, they fell to the ground and began to fight. Tomlinson attempted to conceal the evidence during the fight, throwing "the pistol over the fence […] and [striking] Marks upon the head with a knob stick which he held in his hands."[176] The scuffle continued until Sergeant Bowden of the Victoria Police, who was standing nearby, broke up the fight and attempted to "escort the two men to the Barracks when Tomlinson broke free from his grasp."[177] Tomlinson was later caught by the police and both him and (and his later named accomplice) George Smith were placed in the Victoria jail on the grounds of a street fight.

Tomlinson and Marks were first placed in the local police court, where petty crimes such as street fights were heard. The court was "crowded […] with spectators anxious to hear the proceedings in the shooting affray case."[178] The case garnered a lot of local attention as the shooting occurred in broad daylight and was witnessed by many. Mr. Bishop, appearing for the prosecution, opened the trial and immediately requested for a man named George Smith to be

[173] Although "Mark" is a common Jewish surname, the archival record did not indicate whether Jacob Marks was Jewish.
[174] "Remarkable," *British Colonist* (Victoria, BC), 10 October 1867, 3, "Bloody Affray," *British Colonist* (Victoria, BC), 9 October 1867, 3.
[175] "Bloody Affray," *British Colonist* (Victoria, BC), 9 October 1867, 3.
[176] Ibid.
[177] Ibid.
[178] "The Shooting Affray," *British Colonist* (Victoria, BC), 10 October 1867, 3.

arrested as an accessory to the attempted murder of Marks on the grounds of collected telegraphs found on Tomlinson.[179] The magistrate was given the telegrams and Marks was granted bail, while Tomlinson (and later Smith) were denied. Mr. Bishop closed the prosecution proclaiming that "he was prepared to prove the charge against Smith by the direct testimony of several witnesses."[180] The police court was adjourned, and the two prisoners awaited their appearances in the magistrate court.

As the case got more complex and the charge became more serious than a simple street fight, the case was moved to the magistrate court from the police court. The trial was moved to the magistrate court and was heard by a stipendiary magistrate, K. McKenzie, JP. The trial was opened by Mr. Bishop for the prosecution and started with Smith's charges. Bishop claimed that "he could show that Smith was the originator of the attempted assassination [as he had] telegraphed to Tomlinson to "come over – Marks is here – come fixed."[181] This term was identified as a means to make mischief to someone (although Mr. Ring, who would replace Mr. Courtney as Mark's lawyer would later argue it was a common term among gamblers meaning "bring money."[182] To show that Smith had "come fixed" for mischief, Mr. Bishop argued that Smith had bought a gun some hours before the attempted murder and that he had set up Marks to be shot – Mr. Bishop claimed that Smith was not guiltier than Tomlinson but that he would "prove beyond a doubt the complicity of Smith."[183] Mr. Bishop, commanding the courtroom, called upon a total of three witnesses for the prosecution. He began with Sergeant Bowden, who testified to arresting Tomlinson with attempting to murder Marks, and Smith with the accessory

[179] Ibid.
[180] Ibid.
[181] "The Shooting Affray," *British Colonist* (Victoria, BC), 11 October 1867, 3.
[182] "The Shooting Affray," *British Colonist* (Victoria, BC), 15 October 1867, 3.
[183] Ibid.

to the attempt.[184] This was followed by John O'Dywer, a local resident who witnessed the shooting, saw the gun in Tomlinson's hand and was able to identify both Marks and Tomlinson by name and sight.[185] This was then corroborated by John Williams, who was in a nearby butcher shop when he witnessed the incident. The trial was adjourned once again until the following day.

The next day's proceedings saw the testimony of Marks, a reading of the telegrams sent between Tomlinson and Smith, and accounts from two more witnesses. It was evident that the case was building against the two men. Marks stated that Smith had approached him and said that "there was a lie between him and the Tomlinson" and albeit Marks refusing his role in any gossiping, Smith attempted to convince Marks to go see Tomlinson.[186] When Marks refused to meet Tomlinson, as he had suspected they had it out for him, Smith claimed that "he was a reasonable man and nothing would be used against him."[187] Marks had eventually agreed to the meeting where he was told to meet Tomlinson at Fort and Government street. It was here that the affray took place. Mr. Bishop then proceeded with the telegraphs that read: "come down on Monday's steamer; Marks is here; answer, - Charley Tomlinson" and "bring Jack Quail with you; don't fail, - GF Smith."[188] The court was adjourned once again until 15 October when Marks was recalled by the Mr. Ring for the defence.[189] Following this, the case was handed over to the court of assize to be heard by Chief Justice Joseph Needham as a jury trial. Although the reason was not explicitly stated, it is likely that it was moved from the magistrate court as the

184 Ibid.
185 Ibid.
186 "The Shooting Affray," *British Colonist* (Victoria, BC), 12 October 1867, 3.
187 Ibid.
188 Ibid.
189 "The Shooting Affray," *British Colonist* (Victoria, BC), 15 October 1867, 3.

potential charges became serious.[190] I speculate this had to do with the phrase of "attempted murder" and the telegraphs that alluded to the fact that the act may have been premediated.

The trial at the court of assize were held on 7 November 1867 where Tomlinson was arraigned on indictment with the charge of assault with intent to maim and Smith was charged with conspiring thereto.[191] Although the case appeared to be passed onto the court of assize based on discussions of attempted murder, Needham classified the felony as assault with intent to maim – a lesser charge as it is classified as an assault rather than murder. This is an important shift to analyze. Although Tomlinson was originally arrested on the grounds of a street fight alongside Marks, it was soon established that this was not just a random brawl and that both Tomlinson and Marks acted with malice aforethought. This led to Tomlinson being formally charged with assault with intent to murder. Smith was also charged as an accessory to attempted murder. However, as the evidence became more damning, their formal charge was dropped to assault with intent to maim. Charges decreased despite physical evidence (i.e., telegrams) to show that Tomlinson and Smith planned to meet Marks the day of the shooting. Witnesses later testified that Smith stated their quarrel with Marks could only be finished when blood was spilled. These two men were shown clemency by state agents in labels assigned to the charge – neither men could be hanged for assault with intent to maim.

By the time the trial was heard by Needham, the prosecution had a new lawyer, Mr. Wood, and the defence was represented by Mr. Ring and Mr. Robertson.[192] It is interesting to note that their charges were reduced in gravity as Tomlinson and Smith entered their jury trial.

[190] During this time, BC's court system was based off of British law. Minor trials were heard by the magistrate's courts whereas the courts of assize dealt with more serious criminal trials. Royal BC Museum, "Guide to Court Records at the BC Archives," *Royal BC Museum*, 12 February 2020, https://royalbcmuseum.bc.ca/assets/Court-Records-guide.pdf.
[191] "The Shooting Affray," *British Colonist* (Victoria, BC), 7 November 1867, 2.
[192] Ibid.

The charge originally began as shooting with intent to kill which could have meant a more serious sentence. Mr. Wood opened the case for the crown in a "brief but eloquent address" where he began with testimony from the victim, Jacob Marks. Marks reiterated his address from the magistrate court, and another thirteen witnesses were called upon by the prosecution.[193] Many of the witnesses gave similar accounts of the affray: they had seen Tomlinson shooting Marks, followed by a scuffle where Sergeant Bowden collected them and brought them to court. All witnesses testified that Tomlinson shot Marks.

Other witness accounts supported the prosecution's case. One witness A. Buler, a shop owner, testified that Smith had entered his store looking for small pocket pistols.[194] Another witness, A. Peele, stated that he had spoken with Smith who had mentioned "a quarrel that could only be settled by blood being spilled," Smith then went on "to send Tomlinson and had arranged for a place of meeting between Marks, but that Marks was afraid of a private meeting."[195] Mr. Wood closed the prosecution's case which was followed by the defence's case. Mr. Ring, acting for the defence, was unable to call upon any witnesses, however, Mr. Ring still made his case by drawing upon evidence of the gun. Mr. Ring argued that "why would [Tomlinson] not use the other three bullets if he wanted to kill?" and argued that the shot was a misfire.[196]

With that, Needham addressed the jury and stated that "no doubt that whether the accused were brother Americans or brother Englishmen, an honest verdict would be returned by them."[197] The jury retired for a total of forty-five minutes and announced the verdicts to the courtroom.

193 Ibid.
194 Ibid.
195 Ibid.
196 Ibid.
197 Ibid.

Smith was found not guilty on all counts. Tomlinson was found not guilty on the first count but found "guilty with strong provocation and recommendation of mercy" on a reduced charge of shooting with intent to maim rather than kill.[198] Tomlinson received a sentence of two years imprisonment with hard labour.[199]

The trial heard from thirteen witnesses called upon by only the prosecution. These witnesses' testimonies had been consistent throughout and provided evidence that incriminated Smith as an accessory to Tomlinson's attempted murder. Meanwhile, the defence was unable to call a single witness for their case. This was reminiscent of the George Snelling trial analyzed previously and demonstrates a newly established trend – white assailants were given the benefit of the doubt regardless of damning witness testimony. Further, the use of evidence and witness testimony in the courtroom also demonstrated ways that white assailants were protected. The telegraph correspondence in Tomlinson and Smith's trial was, to say the least, incriminating as it demonstrated prior conversations about Marks. In two of the telegraphs, both Tomlinson and Smith alerted one another of Marks' whereabouts in Victoria, meanwhile, in the third telegraph Smith requested for Tomlinson to "come fixed." Although the meaning of this term was disputed by the defence, it was argued that it meant to make mischief – to fix the cards in some way. Although circumstantial, the two men were given the benefit of the doubt by the jury to which Needham "concurred fully" and "complimented the jury on their findings and promised that the recommendation should receive every attention."[200]

198 Ibid.
199 BCA, Joseph Needham's bench book notes, "Trial of Tomlinson and Smith," reel B09802(2) vol.1.
200 "Court of Assize," *British Colonist* (Victoria, BC), Nov 7, 1867, 2.

4.2 The Salt Spring Murder

Salt Spring Island, located off the coast of Vancouver Island, witnessed three murders – all of which were in the Black community between 1867 and 1868.[201] What makes this statistic even more shocking was at this time there were only 25 families on the island, and all the accused and convicted murderers were Indigenous.[202] This chapter will review the murder of William Robinson, a Black man who was shot and killed in his home. However, the trial of his accused murderer was not held until June of 1869. Although two white suspects were arrested immediately following the murder, they were released and acquitted of all charges. Sixteen months later Tshuanahusset, an Indigenous man known as Tom in the courtroom, was arrested and tried for the murder of Robinson.

William Robinson was described by the media as an inoffensive and harmless man who had lived in a "rather lonely log cabin by himself." He was found by a friend who noticed Robinson was missing sometime after his murder.[203] After an investigation by the local Constable, it was found that Robinson was shot in the back by a "good double-barrel shotgun" and many of his personal belongings were missing.[204] Although there was no Indigenous connection, the local newspaper identified the "suspicious presence of Natives in the area of the murder" and speculated "that it was an act of revenge for the recent arrest of a Native man."[205] This in turn created what Ruth Sandwell described as "the diatribe against the Indian Menace" to reach a new level in hostility.[206] The media had racialized the investigation from the get go and

[201] R.W. Sandwell, *Contesting Rural Space: Land Policy and Practise of Resettlement on Saltspring Island, 1859-1891,* (Montreal-Kingston: McGill-Queens University Press, 2005): 159.
[202] Ibid.
[203] "Salt Spring Murder," *British Colonist* (Victoria, BC) 24 March 1868, 3.
[204] Ibid.
[205] R.W. Sandwell, *Contesting Rural Space*, 174.
[206] Ibid.

fostered the stereotype of the 'violent Indian' which heightened the already hostile race relations on the coast.

The initial investigation turned up two suspects despite the limited resources invested by the police. Constable Henry Sampson had completed the investigation once he was notified of Robinson's death. Sampson did not thoroughly search Robinson's home, but rather "looked around," suggesting a limited investment of resources (i.e., time) into the murder.[207] Nevertheless, it was during Sampson's initial investigation that two white settlers named Manuel Duett and Clarke Whims were accused of the murder of Robinson after the coroner, Mr. Morley, was tipped off by William Whims, Clarke's brother.[208] Sampson questioned both men but only arrested Manuel Duett after finding incriminating objects in his home.[209] Duett was later acquitted. Sampson decided to search another house on the "Indian Ranch" even though he had only been given information about Manuel Duett and Clarke Whims and had no reason to suspect an Indigenous perpetrator.[210] With that, Robinson's murder remained unsolved until Tshuanahusset, an Indigenous man of the Stz'uminus nation was reprimanded on 5 May 1869 and placed on trial as the accused murderer following suspicion that he had Robinson's axe. Although evidence against Tshuanahusset was circumstantial, he received a serious charge.

Tshuanahusset's trial began on 2 June 1869. Attorney General Cary acted for the Crown (prosecution), while Mr. Ring represented the defence, and Robert McMillan, a police officer, acted as Tshuanahusset's interpreter.[211] The first day of proceedings began with Constable Sampson testifying about his original investigation, and heard from witness John Norton. Norton

[207] "Salt Spring Murder," *British Colonist* (Victoria, BC) 24 March 1868, 3.
[208] BCA, Joseph Needham's benchbooks, "Trial of Tom," reel B09802, vol. 2.
[209] Ibid., The names of the objects were illegible to me and therefore could not be transcribed during the research process.
[210] Ibid.
[211] Ibid.

corroborated that Sampson found Robinson's body and testified that Tshuanahusset had Robinson's axe as Norton had used that exact axe before.[212] He noted the axe's oak handle as the key identifier. The court was then adjourned until the next day.

The following day's proceedings heard from five witnesses. Armstead Buckner, a local farmer, began the proceedings by stating that he had known Robinson who, to his knowledge, owned the axe that was produced in court by the prosecution.[213] Hambro Rinner, a local constable, followed by stating that he had "recognized the axe shown to [him] as the one [he] got from the Indian the prisoner Tom's (Tshuanahusset) house. [He] found it there on May the 5th 1869" after he was instructed by Mr. Morley to search there for the axe.[214] Rinner was also instructed to bring back other items that were presumably stolen from Robinson's home, including a box of goods (which Rinner stated he could not find). During his cross-examination, he stated that he had "seen the Indians make oak handles" similar to one produced in the courtroom.[215] This was incredibly important to Tshuanahusset's case as it discredited the prosecution's theory that he had Robinson's axe. It was then that Sui Tas, an Indigenous woman of the Stz'uminus nation, provided a highly incriminating account of Tshuanahusset.

Sui Tas explained that she joined Tshuanahusset in his journey to Salt Spring Island from traditional Stz'uminus land [Chemainus] in the Cowichan Valley when he stated that he had "like to kill the colored man" after which he approached Robinson's home with a musket and shot him.[216] It was at that point that Tshuanahusset had "shouted to [her] to come back and take things," to which Sui Tas peeped inside the door, saw Robinson bleeding on the ground, and

[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] Ibid.

witnessed Tshuanahusset take “a box and a coat and an axe.”[217] The two then fled the area and made their way back home. When Sui Tas was cross-examined by Mr. Ring, she stated that she had not told the police since she “had not heard of any reward,” but when Tom was arrested she “thought [she] would go and tell all [she] knew about it.”[218] Although quite damning in nature, Sui Tas’ account was challenged by the witness Thomas George Askew, a local mill owner, and Charlie, Tshuanahusset’s brother. Further, the box and coat that she had claimed Tshuanahusset stole from Robinson’s home were never found.

Askew stated that he knew of Tshuanahusset and that he had sold him the axe head that had been produced in court, but he couldn’t be sure who had made this specific handle though he knew that the “Indians [made] the axe handles.”[219] He continued to speak well of Tshuanahusset’s character by stating that he had “always been a good Indian, as good as any I know.”[220] Charlie, “an Indian Chemainus [Stz’uminus]” was the last witness to speak of his account whereby he stated that he knew of the handle as he had “made it at Tom’s (Tshuanahusset) house” on Stz’uminus traditional land and that he had only known of him using that axe.”[221] Following Charlie’s statements, the defence closed their case and the jury retired to decide on a verdict. After roughly 30 minutes, the jury returned with a verdict of guilty of willful murder and Tshuanahusset was sentenced to death by hanging.[222] The trial had concluded, and although the circumstantial evidence was refuted by witnesses – the jury, considering the length of their deliberations, found it easy to convict Tshuanahusset of murder.

[217] Ibid.
[218] Ibid.
[219] Ibid.
[220] Ibid.
[221] Ibid.
[222] Ibid.

In Tshuanahusset's trial, a total of five witnesses' testimonies were heard by the jury and Needham. Of these testimonies, only Sui Tas made direct accusations that he had murdered Robinson. None of the objects she claimed were stolen by Tshuanahusset from Robinson's house were found. Two others testified that they had seen Robinson use an axe similar to that of the one produced in court. The final two witnesses suggested that Robinson and Tshuanahusset may have simply owned similar axes. Despite these inconsistencies, the jury quickly came to the decision that Tshuanahusset was guilty of murder.

Moreover, Tshuanahusset had been arrested on circumstantial evidence that accused him of having the same axe as Robinson. Regardless of witness testimony that stated the local Indigenous population created oak handles for axes, and the axe head was sold to him by a local mill owner, Robinson was charged with willful murder. This charge implied that Tshuanahusset acted with malice aforethought, based on Sui Tas' untimely and unsubstantiated oral testimony. Sui Tas only claimed to witness the murder in 1869 after the case went public. The axe was a turning point in the case. Although two of the witnesses believed that it was Tshuanahusset's and not Robinson's, it was able to sway the jury along with Sui Tas' testimony that he was guilty.[223] Tshuanahusset was not afforded the benefit of the doubt with circumstantial evidence in his trial, but rather the jury used it to convict him.

Just under a month later two parties questioned the validity of the verdict. Settler William Smithe witnessed the trial and wrote to the *British Colonist* to identify the court's lack of understanding of the island's race relations.[224] Smithe stated that the "jury members were not thoroughly conversant with Indian."[225] Smithe then "drew on specific evidence from the trial to

[223] R.W. Sandwell, *Contesting Rural Space*, 177.
[224] Ibid.
[225] Ibid

argue that Tshuanahusset could have not wielded the murder weapon to create the wound that killed Robinson."[226]

The second party, "a large delegation of Songish [Songhees] Indians waited on the administrator of the Government […] to petition for a commutation of the sentence of death."[227] Tshuanahusset's counsel with the help of his family submitted the petition of commutation that had produced an alibi for him to the Chief Justice, Joseph Needham. Needham "listened attentively to the statements, and said that [he] regretted that the statements were not made at the time of the trial," even though Mr. Ring explained "the difficulty of procuring Indian testimony at the proper time."[228] No further reasoning was listened to by Needham, the family's petition was denied, and Tshuanahusset execution was set for 24 July 1869.

Two days following Tshuanahusset's hanging, the *British Colonist* published its final article to conclude the murder trial. The article described him as being overcome with emotion as he attempted to address his people […] but his voice was choked and his sentences [were] unintelligible."[229] The article then closed with the following statement; "the lesson will prove a salutary one to the Indians."[230] Eerily similar to the sentiments expressed by Governor Douglas following Allache's execution, Tshuanahusset's execution served as a warning to the local Indigenous people.

[226] Ibid., 178. Sandwell argued that William Smithe who had spoken against the verdict "hinted [that] the most convincing evidence offered against Tshuanahusset was a set of incursive assumptions about Native-settler relations on the island during that decade." Sandwell explains that the very small Black and white populations were "confronted with a rich but dangerous country" and had to work together rather than discriminate against one another in order to thrive on the island. Instead, the *British Colonist* and legal officials had projected their own racist beliefs, which were common among the "Victoria bourgeoisie," on the investigation and trial which in turn simplified Salt Spring Island's less racially hostile climate.
[227] "The Salt Spring Island Murder," *British Colonist* (Victoria, BC), 30 June 1869, 3.
[228] Ibid.
[229] "Execution," *British Colonist* (Victoria, BC), 26 July 1869, 3.
[230] Ibid.

4.3 Chief Justice Joseph Needham's Legal Legacy

The racialized courtroom culture that was inherited from David Cameron was sustained by Joseph Needham during his tenure as chief justice. This was demonstrated during the trials of Tomlinson and Smith and Tshuanahusset. The whiteness shared by the chief justice, jury members, and lawyers worked to protect Tomlinson and Smith while disadvantaging Tshuanahusset within the courtroom. This was done through the classification of both cases' charges which demonstrated manipulation of the legal system. The two white men, Tomlinson and Smith, were decriminalized to a degree, affording them a less serious trial, while the Indigenous man was placed in front of the jury for a "wilful murder" that lacked any concrete evidence. We find here that case classification could be used to protect white settlers by minimizing possible charges and, by so doing, racializing leniency.

Further, the protection of the white assailants through the manipulation of circumstantial evidence had worked in favour of Tomlinson and Smith as the jury used it in their deliberations to deliver their verdicts. The doubts that were present in the deliberations for the two white assailants were not present in Tshuanahusset's jury deliberations. This was evident in the verdicts and subsequent sentencing of the two trials. Smith was afforded a full acquittal of charges, and although Tomlinson was acquitted of the first count, he was found guilty on the second but with a strong recommendation of mercy from the jury. Notwithstanding repeated testimony that Tomlinson shot Marks premeditatively, the jury took 45 minutes to recommend a verdict. Needham who had agreed with the verdict applied this to his sentencing which gave Tomlinson only two years of imprisonment with hard labour. Meanwhile, Tshuanahusset was not afforded any mercy by the jury. Despite conflicting evidence, the jury determined he was guilty

within 30 minutes and Needham refused to grant a commutation of sentence following his defence's petition that had provided him with an alibi.

These cases demonstrate that judges – like Needham – worked in conjunction with white lawyers and white juries to protect white assailants in the courtroom until the end of the 1860s on Vancouver Island. Indigenous offenders were fully upheld to tenets of the imposed colonial legal system while white assailants enjoyed privileges of mercy and sentence commutation from white agents of power in the courtroom. Colonial agents openly linked the deaths of Indigenous "criminals" to colonial power, noting the capital punishment could be used to suppress dissent. Allache and Tshuanahusset's executions were thought of by the *British Colonist* as "good lessons to scare the Indian from committing any further crimes."[231] All the while white assailants like Snelling, Tomlinson, and Smith were applauded by the local media on their ability to avoid punishment.[232] This prevailing whiteness continued to dominate the courtroom into the 1870s throughout trials heard by various judges.

[231] This was shown earlier in this thesis by Chief Justice Cameron (see pages 40). Similar sentiments were also expressed by the *British Colonist.*

[232] As indicated on page 60, the media reported that Chief Justice Joseph Needham "complimented the jury on their findings and promised that [Smith and Tomlinson's] recommendation should receive every attention." Refer to page 80 to revisit media discussions of the Snelling Trial, particularly his "[delight] with what he considers his narrow escape from death and . . . gratitude and praise of his counsel and the Chief Justice."

Chapter 5: Judge Augustus Frederik Pemberton

Cameron, Needham, and the other agents of legal power established a strong courtroom culture of racist and discriminatory practises in the 1860s. By the 1870s, it was so entrenched within the courtroom that a white police officer could admit to shooting two Indigenous people and receive no penalty. Indeed, the preferential treatment of white settlers survived legal changes associated with BC's entry into the Dominion of Canada. County courts were reorganized. The court of assize was regulated. Reforms through the English Judicature Acts were enforced, and Ottawa assumed power over execution processes.[233] These changes helped to regulate the courts and reflected an emergent vision of Canadian justice. Within the adapted judicial system, however, members of the court continued to protect white assailants and to discriminate against Indigenous assailants.

Up until the early 1870s, no white settlers were convicted of murder and executed for their actions by colonial enforcers of British law on Vancouver Island. If white settlers were tried for murder, their sentences were commuted. Matthew Baillie Begbie (Chief Justice of BC, 1870-1894) stated that "the Indians' were incredulous apparently, that a white man would be convicted or executed for a capital offence" following the first documented execution of a white man named George Bell in 1872.[234] This quotation showed that the Indigenous population of Vancouver Island found it shocking that a white settler would be executed for murder, suggesting that white assailants were totally protected before 1872. Legal historian Hamar Foster substantiated Begbie's claim in "The 'Queen's Law Is Better than Yours'": Foster was unable to

[233] Hamar Foster, "Law Enforcement in Nineteenth-Century British Columbia," 21.
[234] Ibid., 84.

find a single white settler charged with murder on the island until 1872 in the court records consulted during his research.[235]

The first white settler, George Bell, was convicted of murder and sentenced to death by hanging for the murder of another white settler, Thomas Datson. Bell had sought out vengeance after Datson had seduced his much younger Indigenous wife with alcohol.[236] After an unsuccessful attempt to shoot him, Bell attacked Datson and stabbed him to death after which he immediately turned himself into the local authorities.[237] Bell was later tried before Chief Justice Matthew Baillie Begbie just a few days following the incident. Bell's jury trial resulted in a guilty verdict and a recommendation of mercy but Begbie refused to commute his sentence of death.[238] Begbie, who spoke sympathetically, recognized that there had "not been a case of murder by a white man for many years though among the native population [they] have had several executions" and "acknowledged the harmful effect upon the administration of justice […] if the course of the law were interfered with."[239] For Begbie, George Bell's execution represented more than punishment for a crime, but rather reflected his desire to administer justice more equally.

Following Bell's sentence, there was a steady increase in white men that were convicted for crimes of murder and sent to the scaffold. Even so, whiteness continued to protect some white assailants. This was made the most apparent in the trial of Constable Sullivan in May of 1873. Sullivan was tried for the murder of two Indigenous men, but a jury acquitted him of all

[235] Hamar Foster, "'The Queen's Law Is Better Than Yours,'" 84-85.
[236] Swainger, "Distant Edge of Authority," 214.
[237] Ibid.
[238] Ibid., 215.
[239] Ibid.

charges. The retelling of the events comes from Sullivan's letter to the attorney general explicating his side of the events, and the trial proceedings that followed.

5.1 The East Coast Tragedy

On 6 May 1873, Constable Sullivan sent a letter to attorney general Cary to describe a series of events that took place in Nanaimo only days prior. Sullivan had been sent to Nanaimo to collect a white settler, James F. McGrath who had murdered a local Indigenous man. After the arrest of McGrath, Sullivan claimed to have seen a canoe that was "laden with Indians and liquor" and he became "determined to intercept them."[240] Sullivan claimed that while he attempted to get them to stop drinking the liquor by calling out to them, they continued which led to his pursuit after them. When he caught up to their canoe, the "Indians" claimed they had no liquor. Sullivan escalated the situation and "ordered [them] to let it down or [he] would shoot [them]," to which he claimed that they took out a pistol.[241] Sullivan then stated that he shot the two men, known as Portlet and Wallapoo, in the head after they had supposedly taken out a musket and pointed it at him.[242] Following the murder of the two men likely from the Snuneymuxw First Nation, Sullivan went to William Baldwin, stipendiary magistrate, in Nanaimo to have an investigation conducted.[243] Sullivan was not arrested and remained acting as constable until his trial on 12 June 1873.

The story was published almost immediately in the *British Colonist*. The title read "The Shocking Occurrence on the East Coast," although it seems "shocking murder" would have better reflected the events. The article traced the details of the double murder as per Sullivan's

[240] BCA, Attorney General Correspondence, "Constable Sullivan Shoots Two Indians," reel B09318.
[241] Ibid.
[242] Ibid.
[243] Ibid. Portlet and Wallapoo's nation was not explicitly stated, though inferring from the records they were murdered after Sullivan visited Nanaimo – the traditional lands of the Snuneymuxw First Nation.

word and explained that the initial investigation conducted by Spalding resulted in a full exoneration of Sullivan.[244] The article concluded with the following statement:

> we do not blame Sullivan for shooting the Indians, but we do strongly, utterly and wholly condemn him for the reckless and fool-hardly manner in which he provoked a conflict with a superior force. […] Now we have two Indians killed, and perhaps an Indian war inaugurated.[245]

Eleven days later, the *British Colonist* published a follow-up article speaking to a second investigation that was to be held. After succumbing to the "pressure of public opinion, the local government [had] at last consented to hold an investigation into the circumstances."[246] It was announced that the Superintendent of Indian affairs, Alexander Campbell and Judge Pemberton, would investigate the events that unfolded at the inlets by taking "additional evidence and by bringing down the wives of the dead men to Victoria."[247] It was hoped that "Sullivan [would] now have the opportunity of clearing himself of the terrible charge that [laid] at his door."[248] The article provided the sense that the locals of Victoria, the author, and the government cared less about providing justice for the two Indigenous men or about their murder, but rather cared more about using British law to clear Sullivan's name.

Sullivan was brought to trial on 12 June 1873 for an examination into the murders that had taken place in Nanaimo. The trial opened before Judge Pemberton with Mr. Johnson for the crown, and Mr. McCreight represented Sullivan. The trial began with testimony from Portlet's wife, Ubalello, who had been in the canoe at the time of the shooting. Ubalello spoke through an interpreter and her testimony claimed that her husband had been killed by Sullivan. Ubalello

[244] "The Shocking Occurrence on the East Coast! – Return of the Superintendent," *British Colonist* (Victoria, BC), 6 May 1873, 3.
[245] Ibid., The "superior force" that the article refers to is the Indigenous population in Victoria. During the 1860s, the Indigenous population outweighed the white settler population which contributed to settler fears of Indigenous attack or resistance.
[246] "The East Coast Tragedy – An Investigation to be Held," *British Colonist* (Victoria, BC), 17 May 1873, 2.
[247] Ibid.
[248] Ibid.

stated that she had been "sitting in the stern of the canoe steering; [her] husband was in the center pulling the oars; Sullivan's canoe came up and Portlet pulled the oars," to which Sullivan attempted to connect the canoes and after a brief scuffle, shot the first man, Wallapoo, twice.[249] She struggled through her statement, being overcome with emotion but stated that "Portlet got up to see Wallapoo, he had nothing in his hand but his blankets, which he held around him; when Sullivan shot Portlet twice his gun was under the seat, he did not pick it up."[250] In this account, Ubalello opposed the original claim made by Sullivan. During her cross-examination by Mr. McCreight, she stated that there was no pistol in the canoe, though there was a broken musket that was wrapped in a blanket under the seat, and that the four cans in the canoe were full of molasses, not whiskey.[251] Ubalello concluded her witness account and Annie, Portlet's daughter followed.

Annie offered a similar testimony to that of Ubalello. She had witnessed Sullivan shoot both men, claiming no guns were pulled on Sullivan and that the musket onboard had been wrapped in a blanket and located under a seat as it was "no good." Annie also testified that there were only cans of molasses in the canoe.[252] Following her testimony, the trial was then adjourned until 22 June. The following day after the proceedings it was announced that Sullivan had been partially suspended from his duties, however, continued to "act in the capacity of gaol warden."[253]

In the second round of proceedings, another three witnesses were called. The first witness, Charley Coma, an Indigenous man, corroborated aspects of Sullivan's account. Coma

[249] "The East Coast Tragedy – Resumed Examination of the Superintendent of Police," *British Colonist* (Victoria, BC), 12 June 1873, 3.
[250] Ibid.
[251] Ibid.
[252] Ibid
[253] "Committed," *British Colonist* (Victoria, BC), 13 June 1873, 2.

had been in another canoe which fled the scene following Sullivan's arrival, however, he stated Wallapoo opened a box from under the seat and tried to take something out of it. Coma also stated that Wallapoo had grabbed a musket and pointed it at Sullivan to which he had shot them both.[254] When reviewing this trial, Coma's testimony raises some questions on its validity. How was Coma able to secure such a vivid memory of the events if he was fleeing the scene? Although it was unknown if Coma fled completely or watched from afar, the lack of cross-examination to identify his situation was neglectful of the Crown. Coma was then followed by Thomas McCulloch, a local shop keeper. McCulloch identified both Ubalello and Annie in the courtroom and stated that he had sold them cans of molasses, though he was unable to provide an exact date as he had not written one down.[255] Although the date could not be provided, McCulloch had corroborated that it was molasses, not whiskey in the cans, speaking to the recklessness of Sullivan's actions.

McGrath, the formally accused murderer whom Sullivan was collecting when he shot Wallapoo and Portlet, then testified for the defence. He provided a similar account to that of Sullivan's. He added that he had heard Portlet's widow, Ubalello, tell Annie to "not talk whiskey, do not talk musket" outside of the courthouse before the trial.[256] Although it was stated that McGrath understood the Indigenous language, his account was not verified by any other witnesses.[257] McGrath's claim should have been taken with a grain of salt considering the strong possibility of bias in his account. As Sullivan remained the warden during his partial suspension,

[254] "The East Coast Tragedy – Resumed Examination of the Superintendent of Police," *British Colonist* (Victoria, BC), 12 June 1873, 3.
[255] Ibid.
[256] Ibid.
[257] If the two men were indeed from the Snuneymuxw First Nation, their traditional language would have been Hul'q'umi'num. Snuneymuxw First Nation, "Language, 2020 accessed February 2020, https://www.snuneymuxw.ca/nation/language.

McGrath could have worked to testify for Sullivan in order to secure better treatment in the jail. The trial continued, and the attorney general Cary began his address for the dominion.

Cary stated that Sullivan was acting per the written instruction to stop the "traffic of Indian Whiskey, and when [Sullivan] asked if he should be entitled to take whiskey […] if he sees any, [I] told him yes, and to adopt plan of the Victoria constables and to empty the cans wherever he found them."[258] Although there was little to alter the structure of British law on the island, colonial law created a new offence in 1860 to criminalize the selling of liquor to Indigenous people.[259] Colonial law demanded that Sullivan empty the cans, not murder Indigenous peoples found carrying liquor. Cary continued his address by explaining that Sullivan was "at first anxious to suppress the traffic as it not only added a course of great expense to the Government buts [led] often to the murder of white settlers."[260] It has been argued that this belief reflected "the common consensus that Indian people became violent under [alcohol's] influence, neglecting the more rational association between their violence in the face of dwindling autonomy, scarce resources, encroachment to their lands, and increased dependence on increasingly ruthless traders."[261] Moreover, this narrative justified the use of force against Indigenous people and "allowed the state to secure jurisdictional control."[262] Following his conclusion, Mr. McCreight rose to address the Jury for the defence's final statements.

His address began; "when a prisoner is brought into court, his offense is not known and cannot be known until the evidence is heard. In the present case, much rancor had been shown in discussing the case out of court" to which he begged the jury to "divest themselves of any such

[258] Ibid.
[259] Hamar Foster, "Law Enforcement in Nineteenth-Century British Columbia," 20.
[260] "The East Coast Tragedy – Resumed Examination of the Superintendent of Police," *British Colonist* (Victoria, BC), 12 June 1873, 3.
[261] Nicholas Simons, "Liquor Control and the Native Peoples of Western Canada," (Master's Thesis, University of Ottawa, 1986), 40-41.
[262] Ibid., 96.

impressions as might have been thus produced."[263] He proceeded to state that according to the liquor laws, Sullivan was "required to search the craft for liquor," seize it when found, and conduct "his duty as far as possible."[264] McCreight continued his address by claiming that the killing was justifiable, according to the liquor laws and asked the jury for a full acquittal.[265] The jury retired for a total of twenty-five minutes and then returned with their verdict:

> We find that the prisoner committed a justifiable homicide in shooting Portlet in the faithful performance of his duty as a public officer; and they take this opportunity of congratulating the Government on having an officer who so efficiently and energetically discharged his duty.[266]

With the verdict provided, the trial concluded, and Sullivan was acquitted of all charges. The article concluded by saying that "the prisoner, who was congratulated by his friends, was discharged by the Judge, who remarked that the verdict was in accord with his feeling and that Mr. Sullivan left the court without a stain on his character."[267]

5.2 The Protection of White Assailants in the Courtroom

Sullivan's investigation and trial into the murder of Portlet and Wallapoo was the most blatant confirmation of racist and discriminatory practise working alongside white privilege in the courtroom to protect a white assailant. The jury, attorney general, and judge made their decisions based on their racial sympathy for Sullivan. This denied Portlet and Wallapoo's family justice by claiming that he had committed justifiable killings. Sullivan, who's policing practises were clearly grounded in racist practises, had murdered two Indigenous men on the grounds of seizing alcohol, which was never proved during the trial. Instead, witness testimonies that had corroborated Ubalello and Annie's testimonies that the cans were full of molasses, not liquor,

[263] Ibid.
[264] Ibid.
[265] Ibid.
[266] Ibid.
[267] Ibid.

were disregarded. The lawyers acting for the Crown played on the ambiguity of the law and stated that confiscating alcohol was to be completed to the full extent of the officer's judgments.

Sullivan had shot to kill the two men, not in a manner that would potentially disarm them if they had been in the possession of a gun. Although Sullivan had accused the two Indigenous men of pointing firearms against him there were no attempts at reducing the conflict. Further, Portlet's wife and daughter had challenged Sullivan's testimony and stated that there were no guns drawn. Though instead of their testimonies being applied to the jury's deliberations, the racial discrimination upheld within the courtroom valued Sullivan's testimony over theirs.

Sullivan also had the privilege of recounting his version of the murder in English. Both Ubalello and Annie's accounts were translated by an interpreter. This in turn could have affected how well their testimonies were relayed in the courtroom due to misunderstanding of the language, or manipulation. This also could have been the case with Coma's case who was also represented by an interpreter. It was clear that the trial's proceedings were full of possible bias, and it was evident that the jurors, the judge and the attorney general were able to protect Sullivan by employing their shared beliefs of white superiority to justify the two murders.

A newspaper article published after the trial stated that Sullivan "had lots of friends in Court. Even the Crown Prosecutor was his friend."[268] As Sullivan was the Superintendent of the Police, he was able to utilize his connections and white privilege within the courtroom to achieve a full acquittal. This also raised questions on the crown's real intentions behind conducting investigations into malpractice by their officers. Rather than actually employing an impartial and just investigation in order to give Portlet and Wallapoo's families, the Crown seemingly held the trial to suppress public and Indigenous dissent – as the public had pushed for the investigation,

[268] "Fish and Flesh," *British Colonist* (Victoria, BC), 26 June 1873, 2.

the crown responded in order to remain popular with the public in a developing colony, and mitigate potential risk with the Indigenous population.[269] It seems that Portlet and Wallapoo's families were never going to receive justice. Instead, the government had worked to protect Sullivan and clear his name by utilizing colonial control to employ racial discrimination within the courtroom. The double murder was a clear reflection of the ways that power was afforded to white settlers during the 19th century. Sullivan was especially privileged in the courtroom as his whiteness was paired with the power of acting as a law enforcer.

[269] "The East Coast Tragedy – An Investigation to be Held," *British Colonist* (Victoria, BC), 17 May 1873, 2.

Chapter 6: White Assailants and Court (In)Justice

The juror's and judge's treatment of Snelling, Tomlinson, Smith, and Sullivan reinforced racialized ideals of a superior/inferior binary and, by so doing, established a culture of white privilege in colonial courtrooms. Verdicts issued by white jurors and charges laid by white judges then entrenched the negative stereotypes of the violent, drunken, and primitive 'Indian' into broader society and in the courtroom. This may have created a vicious circle whereby court precedent made it more likely an Indigenous assailant would be deemed capable of violence by white judges and juries. Regardless of whether the Indigenous assailant pleaded guilty, not guilty, or had overwhelming evidence in their favour, the jury and acting judges easily applied capital punishment to sentences. Once this precedent was established, whiteness acted in tandem with racism as an instrument to deny Indigenous assailants justice in the courtroom. Meanwhile, white assailants who had been convicted of murder or attempted murder were shown mercy by the jury and the judge and had their sentences commuted.

Sullivan's trial was stacked against him – witness testimony confirmed the murder as did Sullivan's own confession. However, Sullivan's lawyer had been able to convince the jury that Sullivan deserved a lesser sentence for carrying out settler laws (e.g. preventing alcohol consumption by Indigenous peoples). Snelling was also commended for upholding Canadian laws. For Tomlinson and Smith, although concrete evidence was provided that incriminated them to planning the attempted murder of Marks, the collective whiteness shared between them and the jury offered them an inherent advantage. Since it was attempted murder, we will not know if the jury would have convicted them as guilty if Marks had been murdered. Though, by applying features of controlled speculation and the outcome of their trial for attempted murder, we can assume that they would have been shown mercy and their sentences commuted as not one white

assailant was hung during the 1860s. As their trials progressed, the language that was used in their trials was reduced in severity. As shown in this thesis, Needham reduced incriminating language from their charges from attempted murder, to shooting with intent to kill, to shooting with intent to maim. This had only given the jury more reason to apply mercy to their verdicts. Further research is required to determine whether Needham was unique in his approach to settler offenders, or whether his language reflected general practice.

Media reporting also shaped people's understandings of white assailants and downplayed violence against Indigenous peoples. Sullivan's murder case, although he had admitted to shooting two Indigenous men in the head, was referred to as an "occurrence" and "tragedy" in the local newspapers, but never directly as murders. Rather than applying the correct term that would incriminate him, the whiteness that was shared between the newspaper editors and Sullivan protected him in a way that would save his reputation and grant him a lesser the charge from the jury.

Indigenous assailants charged with murder did not receive media coverage with such neutral terminology. Allache and Tshuanahusset's murder charge was vilified in the newspapers. Tshuanahusset's case was referred to as the "Salt Spring Murder Case." In one article of Allache's case, the murder was to be an example to settlers to avoid 'Indian lodges' as they were a place of inherent violence. The media reinforced the 'violent Indian' stereotype, making Indigenous bodies criminal bodies, while protecting white assailants for their 'actions' (not 'murders').

Media coverage following Tshuanahusset's persecution suggested that Indigenous assailants who appeared before the court may have been treated more harshly to reinforce colonial might. Two days following Tshuanahusset's execution, the *British Colonist* published

that they had hoped this to be a "lesson [will have] prove[d] to be a salutary one to the Indians."[270] Similar to Allache's sentence to death, the public suspected that this would act as a beneficial lesson to the 'Indians' to not cross the settlers or British Law. The *British Colonist* published that they believed Douglas' decision was actually "on the ground[s] that it was necessary to make an example to prevent future occurrences of the kind among the Indians."[271] As the Indigenous population was experiencing acts of colonialism (violence and oppression) the legal system worked as a colonizing tool of violence to instil fear into Indigenous people to mitigate Indigenous dissent.

Meanwhile, the language used for white assailants was much different. White assailants such as Snelling and Sullivan were commended on their privilege and ability to leave the courtroom unscathed. On Snelling's final verdict, the *British Colonist* stated that Snelling was "delighted with what he considers his narrow escape from death and speaks in terms of gratitude and praise of his counsel and the Chief Justice. Snelling is a very lucky man."[272] Similarly, Sullivan was protected by the media by white settlers in order to save his reputation. The articles written on his trial recognized the recklessness of Sullivan's actions, but his whiteness protected him from total vilification in the media. His actions were murderous, though the language used to describe the events remained neutral, a privilege that Allache did not have in the articles written about his crimes as he was characterized as dangerous and savage. However, one article written post-trial spoke against the trend of protection and attacked Sullivan.[273]

The article described the shooting of the two men in their canoe as immoral since the murder occurred in "their castle, in the presence of their wives," to which the author asked, "had

[270] "Execution," *British Colonist* (Victoria, BC), 26 July 1869, 3.
[271] "Petition Denied," *British Colonist* (Victoria, BC), 24 August 1860, 3.
[272] "Snelling," *British Colonist* (Victoria, BC), 18 August 1860, 3.
[273] "Fish and Flesh," *British Colonist* (Victoria, BC), 26 June 1873, 2.

our sympathetic contemporary any word of pity for the poor Indian in this instance? Oh dear no. The Indian is 'only an Indian,' mere 'fish,' when he comes to be shot down like fun by 'our plucky Superintendent of Police."[274] Here, the author compares Indigenous people to fish as reflective of the way they are treated by legal agents. It was then stated that Sullivan

> had lots of friends in Court. Even the Crown Prosecutor was his friend! And yet our contemporary had no word of sympathy for Portlet's widow, who was friendless in Court in search of British Justice. But then, 'she was only Indian.' She was 'fish' and what have 'fish' to do with sympathy, much less justice? [275]

The author shares the fact that there was inherent bias within the courtroom that protected Sullivan and blatantly identifies that Indigenous people were viewed as less than white settlers, bluntly equating their position in society with animals. White settlers, especially those that held power in the courtroom, and some colonial agents saw the law as a tool for teaching "Indians" their place (as secondary to white settler colonists). Colonial critiques and records of their speech suggest they used it as such.

As the media reported on the murders that occurred in Victoria, the odd sympathetic article was published, but the majority helped to sustain the courtroom culture of racist practise that was established by the juries, judges, chief justices, and attorney generals. This whiteness employed by colonial agents worked to British-ize the colony's legal practises and in turn dispossess Indigenous people of their traditional political and legal institutions. As this occurred, the media worked as a subset of colonialism to protect white assailants and further villainize Indigenous assailants. This contributed to the entrenchment of violent, savage, uncivilized, and uneducated stereotypes of Indigenous people. Courtroom accounts and editorial articles published in the *British Colonist* provided insight into the ways that the white colonial settlers

[274] Ibid.
[275] Ibid.

were making sense of the evolving justice system on the island and demonstrated how injustice towards Indigenous assailants and victims were being rationalized as necessary assertions of power.

This whiteness that was interlaced in the legal system by agents of power was grounded in the pursuit of colonial control. If Indigenous people could be systematically mistreated within the justice system, those in power could claim relative immunity in acts of land dispossession. This was the case in the early legal system established in BC. Colonial violence had established a new outlet to dispose of Indigenous bodies. Colonial violence worked to engrain white privilege into the BC legal system to ensure that white bodies were protected by special privileges within the courtroom. This inherent privilege was grounded in the fact that they were accustomed to British law, whereas Indigenous people had it enforced upon them. This privilege was then leveraged by white settlers – the only holders of power in the legal system – to control the outcome of the trials.

Chapter 7: Conclusion

7.1 Research Questions Answered

When I set out for my research in Victoria, British Columbia I had brought along a series of questions to answer in order to understand early expressions of white privilege in BC's legal system Following my research process, I was able to provide an answer to these initial questions that proved the presence of white privilege and discriminatory practises in the courtroom.

The first question asked, "what trends existed in the sentencing/court verdicts of crimes committed by Indigenous and settler offenders in the cases heard by Cameron, Needham and Pemberton?" For this thesis, the term 'trend' was identified as a recurring practice or position that could influence courtroom culture. With this in mind, my research clearly identified that Indigenous people were tried more frequently, and more harshly, for crimes of murder within the courtroom as a result of a racialized culture sustained by white agents of legal power. This is corroborated in David William's biography of Matthew Bailie Begbie where he stated that between 1859 to 1872, 52 men were charged with murder.[276] Of the 52, 5 were acquitted and 9 had their sentences commuted which left 27 executions of which 22 were of Indigenous men.[277] Of the three selected cases I selected, involving white assailants, not one was charged with murder or sentenced to death. The two Indigenous assailants were declared guilty by juries and sentenced to be hanged. This trend is substantiated by other legal historians, such as Hamar Foster and Jonathan Swainger, that not one white settler (according to the historical record) was executed before 1872 on Vancouver Island although some were tried.[278]

[276] David Williams, *The Man for a New Country: Sir Matthew Baillie Begbie,* (Sidney: Gray's Publishing, 1977), 141.
[277] Ibid.
[278] Foster, "The Queen's Law is Better Than Yours," 84.

The second question asked, “how did the court’s treatment of Indigenous individuals and settlers compare?” Building upon the first question, it was evident that the courtroom acted as a barrier in Indigenous assailant’s cases and how justice was administered. The archival research demonstrated that the courtroom treated Indigenous assailants as second-class individuals. The tenets of English law were more adequately applied to white assailants without bias but were most definitely applied to Indigenous assailants with a racialized bias. To begin, both Allache and Tshuanahusset were represented by an interpreter. We had already heard from Alfred Waddington that Allache not only was given a poorly trained interpreter, but that others were available but refused to assist Allache. The courtroom, acting as a racialized colonial space, denied him justice during his trial. Allache was unable to provide his testimony adequately enough to represent himself and substantiate his story. Similarly, Tshuanahusset had an interpreter during his case. Although we do not know how proficient the interpreter was in Tshuanahusset’s native tongue, it is possible that the translations were ineffective or incorrect.

Indigenous assailants were not the only participants that experienced bias in the courtroom. Indigenous witness testimony was often given through an interpreter, such as Ubalello and Annie’s during the trial of Constable Sullivan. Regardless of where the interpreter fell on the spectrum of skill, Indigenous testimony was never directly communicated to the judge and jurors. Indigenous peoples did not have the privilege of self-representation.

Indigenous people were not always afforded the privilege of adequate legal representation – or any representation for that matter. Allache was unable to retain a lawyer as no one was willing to represent him within the courtroom. Further Chief Justice Cameron, who had the power to appoint his legal representation, did not. Cameron treated Allache as second-class subject within the courtroom and denied him right to legal representation, one that Snelling

possessed. Other barriers to acquiring legal representation could have also social and economic factors. Although more unclear with Tshuanahusset's trial, we do not know if his legal counsel was adequate or applied his possible racial bias against him during the trial. On the other hand, Snelling, Tomlinson and Smith, and Sullivan all had legal counsel – and seemingly powerful ones as they helped to keep all four white assailants off the scaffold.

This thesis provided evidence that proved that Indigenous assailants were systemically discriminated against by white jurors and judges in murder trials in colonial courtrooms. Although all the cases dealt with accused criminals, white settlers received leniency within the British legal system. Meanwhile, Indigenous assailants who were already forced to take part in a foreign colonial system of law, were tried to the fullest and harshest extent of the law.

The third and final question inquired if "the comparison revealed evidence of preferential treatment?" Simply put, yes. The whiteness that was present within the courtroom and legal system was overwhelming as it acted to protect white assailants and negatively impact the trial outcomes of Indigenous assailants through discriminatory practises. This whiteness was shared by the jury, white assailants, the judges, and other agents of legal power such as attorney generals and governors. By working together, all of the listed agents of power afforded courtroom and sentencing privileges on a racial basis. Acting as a culminating question, my research clearly identified the whiteness that worked within the courtroom and legal system to give preferential treatment to white assailants from 1860-1873 on Vancouver Island.

Previous scholars have demonstrated that there was racism in British Columbia's legal system. Indigenous people were deprived of their utilizing their own nations' legal systems during colonization. It was evident that Indigenous people were usurped once their own nation's legal system were dispossessed, and the British system was imposed. But another force worked

in tandem with colonial dispossession to ensure that white settlers could protect one another and maintain their supposed superiority in a colonial state. This trend of whiteness built upon the already established racial prejudices set by the white settlers and worked as an agent of colonial violence, a tool to vilify Indigenous assailants. The effects are long lasting.

7.2 The Past is Present: Gerald Stanley's Murder Trial

The trial of Gerald Stanley for the murder of Colten Boushie confirms that the white privilege established in 19th century courtrooms continues to influence the delivery of justice today. On 9 August 2016, Colten and his friends left the Red Pheasant Reserve (near Saskatoon, Saskatchewan) for a day of swimming. The car they were driving had one tire on the rim so they pulled onto Gerald Stanley's property to receive help with their car, as he was known to help people with car troubles.[279] After arriving, one man got out of the car and jumped on a quad, which was met with yelling by Stanley and his son.[280] As they attempted to drive away, Sheldon, Stanley's son smashed their windshield with a hammer and Gerald smashed their taillight and unable to see, their car crashed and stopped.[281] As Colten was sleeping in the backseat, he woke up and as he tried to get into the driver's seat, he was shot by a close range shot to the head.

Following Colten's murder, RCMP officers treated his family as second-class subjects of the Canadian state when they arrived at his mother, Debbie Baptiste's home. The RCMP officers entered their home without permission, guns drawn, and grabbed Debbie Baptiste roughly to inform her that her "son was deceased."[282] They asked Debbie Baptiste if she had been drinking

[279] *nipawistamasowin: We Will Stand Up*, directed by Tasha Hubbard (Montreal: National Film Board of Canada, 2019), online video.
[280] Ibid.
[281] Ibid.
[282] Joe Friesen, "The Night Colten Boushie Died: What Family and Police Files Say About His Last Day, and What Came After," *Globe and Mail*, 14 February 2018, https://www.theglobeandmail.com/news/national/colten-boushie/article32451940/.

and told her to "get [herself] together" while her other children were treated like the criminals as the RCMP, with their guns still drawn, searched their home for Colten's friend.[283] The day following the murder, the RCMP had their first press release that exhibited whiteness working to protect the white assailant. It was stated that "three occupants from the vehicle, including two females (one being a youth) and one adult male were taken into custody as part of a related theft investigation," – there was no mention of Colten's death nor Stanley's murderous actions.[284] Though, during Stanley's interview with the RCMP, he stated that he "went up to the driver's side window and shot [Colten] once in the head and killed him."[285] Although the reasoning for this was later used by the defence to argue Stanley's "innocence," it is unclear why the murder was not mentioned during the press release.

Some media outlets and people on social media argued in support of Stanley and stated that he had acted in accordance to how he should of if met by "drunk and mischievous thieves."[286] Though the Boushie family, allies, and those in the media speaking in support of Colten knew that his death was the result of a racially motivated murder. This murder was grounded in centuries of old beliefs of white superiority and negative stereotypes of Indigenous people as the 'drunken Indian'. This led back to the white privilege that had once protected Snelling, Tomlinson, Smith, and Sullivan and was employed by Canada's legal system grounded in the same racist practices to protect Stanley in his jury trial.

In August of 2018, Stanley was charged with second degree murder. This means that Stanley acted with an intent to harm, however, the actions were not premeditated. Shortly after

[283] Ibid.
[284] *nipawistamasowin: We Will Stand Up,* dir. by Tasha Hubbard, 2019.
[285] Joe Friesen, "The Night Colten Boushie Died: What Family and Police Files Say About His Last Day, and What Came After," Globe and Mail, February 14th, 2018.
[286] Ibid.

this charge was announced, his two-week jury trial began.[287] The defence's argument claimed that there was no evidence that Stanley pulled the trigger of the gun – regardless of oral testimony that he did. Instead, "Stanley claimed in the courtroom that the gun went off and that he [did] not know how, suggesting "hang-fire" or a malfunctioning weapon."[288] But during the trial, gun experts testified that "the weapon used could not have gone off accidentally and could only have been fired by pulling the trigger."[289] This did not provide enough proof to satisfy the jury, which was composed entirely of white settlers.

Jade Tootoosis, Colten's cousin, had witnessed the defence challenge all the possible jury members that were Indigenous, thus ensuring an all-white jury in attempts to protect Stanley during his trial.[290] She stated that "it was really difficult to sit there […] and watch every single Indigenous person be challenged by the defence."[291] Deliberately excluding Indigenous jury members is a longstanding problem. The *1991 Manitoba Aboriginal Justice Inquiry* demonstrated that during the trial for the murder of Helen Betty Osborne, the white men's lawyers were able to bar Indigenous people from the jury as the defence held the ability to exercise peremptory challenges to any of the prospective jurors without reason.[292] Lawyers for white perpetrators have argued that Indigenous people will not be impartial, which establishes a dominate whiteness within the courts.

[287] Idle No More, "Discussion Guide: Justice for Colten Boushie," accessed 1 May 2020, http://www.idlenomore.ca/discussion_guide_justice_for_colten_boushie.
[288] Ibid. A "hang-fire" refers to an unexpected delay to the ejection of the bullet following the triggering of the firearm.
[289] Idle No More, "Discussion Guide: Justice for Colten Boushie," http://www.idlenomore.ca/discussion_guide_justice_for_colten_boushie.
[290] *nipawistamasowin: We Will Stand Up,* dir. by Tasha Hubbard, 2019.
[291] Kent Roach, "Colten Boushie's Family Should be Upset: Our Jury Selection Procedure is Not Fair," *Globe and Mail*, 31 January 2018, https://www.theglobeandmail.com/opinion/colten-boushies-family-should-be-upset-our-jury-selection-procedure-is-not-fair/article37787115/.
[292] Ibid.

The all-white jury heard the case, were given the option of finding Stanley guilty of second-degree murder, manslaughter, or not guilty at all, and later returned with their verdict of not guilty.[293] Gerald Stanley had been acquitted of all criminal charges. As the family grappled with a devastating verdict, Jade Tootoosis stated that they would fight for an appeal. This appeal was later rejected.

The proceedings were met with heavy criticisms by Debbie Baptiste who provided a list of concerns. Her first concern was with the way that her family was informed of Colten's death – though the RCMP claimed that it was not the "officer's intention to cause any additional pain" as they "had to ensure there was no risk to officer and public safety."[294] The second was with one of the officer's testimony during Stanley's trial. While the officers were still investigating the crime scene on Stanley's property, it rained heavily, erasing evidence.[295] Debbie Baptiste also made note of the indignity it was to leave Colten's body laid face down in the gravel for over twenty-four hours while the RCMP waited for a warrant. That piece expressed additional concerns including the RCMP's failure to hire a blood splatter expert to examine the crime scene, the victim blaming conducted by the RCMP during their initial press conference, and excessive RCMP security during the trial.[296] Moreover, an internal RCMP investigation was conducted but cleared officers of misconduct, regardless of the complaints made by the Boushie family.[297]

[293] Andrea Hill, "Gerald Stanley Trial: Jury Delivers Not Guilty Verdict in Death of Colten Boushie," 8 February 2019, *Saskatoon Star Phoenix*, https://thestarphoenix.com/news/local-news/gerald-stanley-trial-jury-delivers-not-guilty-verdict-in-murder-of-colten-boushie.
[294] Jason Warick, "The Long List of Problems Colten Boushie's Family Says Marred the Case," 13 February 2018, *CBC News*, https://www.cbc.ca/news/canada/saskatoon/colten-boushie-family-list-problems-gerald-stanley-case-1.4532214.
[295] Ibid.
[296] Ibid.
[297] Ibid.

Lastly, Saskatchewan's government declined the Boushie family's request for an out-of-province lead investigator and Crown prosecutor.[298]

The public response to the verdict was overwhelming and garnered responses nation-wide including a response from Justin Trudeau. He spoke sympathetically of the family and stated

> I won't comment on the process that led us to this point, but I will say that we have come to this point as a country far too many times. Indigenous people across this country are angry, they're heartbroken, and I know that Indigenous and non-Indigenous Canadians alike know that we have to do better.[299]

Trudeau later met with Boushie's family in Ottawa, though his words did not go further than sympathetic sentiments. There was no meaningful response or action. And while Trudeau alluded to the history of colonialism and discriminatory practise in the courts, he refused to speak on it. The Boushie family experienced support from both Indigenous and non-Indigenous communities but were also confronted with appalling racist hate speech and attacks by white settlers. One rural municipality counsellor said that "in my mind his only mistake was leaving witnesses," meanwhile an anonymous Facebook user posted, "shoot, Shovel, Shhhhhhh."[300] Countless more hateful and racist comments were made that evoked the 'drunken thieving Indian' stereotype and expressed sympathy for Stanley. An online fundraiser created by a fellow white settler farmer was even started in support of Stanley to which more than 1,200 people donated over $107,000.[301] This public response vindicated Stanley's murderous incident and sent a message to other white settlers that the court would be lenient towards their racialized

[298] Ibid.
[299] Aaron Wherry, "In the Angry Wake of Colten Boushie's Death, Justin Trudeau Tries to Find the Words," 13 February 2018, *CBC News*, https://www.cbc.ca/news/politics/colten-boushie-trudeau-analysis-wherry-1.4530721
[300] *nipawistamasowin: We Will Stand Up,* dir. by Tasha Hubbard, 2019.
[301] Alex MacPherson, "'This is Bigger Than Them; This is Bigger Than Their Hate': FSIN Vice Chief Says Online Vitriol Following Stanley Verdict a 'Distraction' From Achieving Change," 13 February 2018, *Saskatoon Star Phoenix*, https://thestarphoenix.com/news/local-news/false-names-messages-of-support-for-gerald-stanley-abound-on-100000-online-fundraiser.

actions.[302] The centuries old racism that had been weaved into Saskatchewan's social sphere ignited deep rooted beliefs of white superiority from coast to coast.

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After I had completed my archival research and began to transcribe the trials I had found, I couldn't help but identify similarities between them and Stanley's trial, especially Sullivan's. It disappointing and appalling. The racialized practises that had been established by jurors, judges, chief justices, and attorney generals in the 1860s and 1870s was still very much alive in 2018. Like in that of Sullivan's trial, the jury associated with and worked to protect Stanley. Both Sullivan and Stanley were acquitted of all charges even though they both admitted to shooting an Indigenous person. In conjunction to the protection by agents of legal power within the courtroom, the media also worked to protect the name of the white assailants while enforcing negative stereotypes of Indigenous people. Although the two trials were conducted 145 years apart, the racist practises were established during the early 19th century proved to be alive and well today.

The murder of Colten Boushie is not the only instance of where Indigenous victims and their families have been denied justice. Tina Fontaine, a 15-year-old girl from the Sagkeeng First Nation in Manitoba was found murdered in 2014 in Winnipeg's Red River. Her accused murderer Raymond Cormier was brought to trial after being charged with second degree murder but was later acquitted of all charges in a jury trial.[303] Tina Fontaine acts as just one example of

[302] Stanley's acquittal gave him the opportunity to pitch a book to tell "his side of the story." Although rejected, his "supporters" attacked Between the Lines Publishing House (BTL). His murder not only demonstrated leniency but empowered other white racists to speak out. In this case, BTL received "obscene, racially charged, and hate-filled" messages by self-proclaimed Stanley supporters. For more see: Between the Lines, "Press Release: Hate Speech Follows Stanley Story Rejection," 26 March 2018, https://btlbooks.com/files/2018.03.26-Press_Release-Hate_Speech_Follows_Stanley_Story_Rejection.pdf.

[303] "Tina Michelle Fontaine," CBC News -- Missing & Murdered, https://www.cbc.ca/missingandmurdered/mmiw/profiles/tina-michelle-fontaine.

the thousands of missing and murdered Indigenous women and girls (MMIWG) whose murders received no justice.[304] The criminal justice system that was built upon racialized practises and grounded in colonial dispossession still continues today to be plagued by the whiteness and discriminatory practise that works to protect white assailants all the while denying justice to Indigenous victims and their families.

In 2019, Tasha Hubbard's documentary titled *nipawistamasowin: We Will Stand Up* was released at the Hot Docs Film Festival in Toronto, ON. The documentary detailed the story of Colten Boushie and looked back to the centuries of injustice and colonial violence conducted by the Canadian state. Hubbard followed the Boushie family during Stanley's Trials and their mission in finding justice. The courage, tenacity, and strength demonstrated by the Boushie family was extraordinary as they navigated the courtroom, hateful media and social media attacks, talks with political leaders, and the United Nations Permanent Forum on Indigenous Issues. At the forum, Jade Tootoosis recommended:

> that the special rapporteur and expert mechanism undertake a study on the systemic racism and discrimination against Indigenous people within the judicial and legal systems in Canada. This study must produce recommendations to ensure the protection of Indigenous families who utilize the judicial and legal systems. This will advance our calls on the Canadian government to establish a royal commission on the elimination of racism in the justice system. Only a royal commission has the authority to compel all involved in this miscarriage of justice.[305]

This thesis is a response to this call to action. Although not a royal commission, I hope that this thesis works as a dialogue starter, is mobilized by justice seekers and activists, and used in further research. Although just a starting point, this thesis works to call out the systemic

[304] For more information on the MMIWG crisis, consult Kim Anderson, Maria Campbell, and Christi Belcourt, *Keetsahnak/Our Missing and Murdered Indigenous Sisters* (Edmonton: University of Alberta Press, 2018) and the National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls," 2019, https://www.mmiwg-ffada.ca/final-report/.
[305] *nipawistamasowin: We Will Stand Up*, dir. by Tasha Hubbard, 2019.

racism and discrimination against Indigenous people within the judicial and legal systems, identified by Jade Tootoosis, and work as evidence to prove that white settlers worked to engrain racialized practises in the courtroom by employing their whiteness to protect one another as they established colonial control and developed the Canadian legal system. Canada's legal system, grounded in racism and whiteness, has historically, and continues today to devalue Indigenous lives in the courtroom and within the judicial and legal system.

Afterword

A Call to Action: Mobilizing Knowledge of Colonial Violence

Research on the centuries of colonial violence is abundant. Scholars, community activists, and justice seekers have proved time and time again that the state has acted with malice in attempting to disenfranchise, assimilate, and at its worst, exterminate Indigenous peoples since the colonization of what is now known as North America. This research, however, must be mobilized by academics and scholars in order to enact meaningful and tangible change within the institutions of the Canadian state. If the important findings from scholar's research remain stored away in paid or members-only libraries, true change cannot be enacted. Further, as a white settler it is my (and others) responsibility to maintain positionality as a researcher, thus practising reflexivity. This requires a constant and lifelong questioning of my own personal beliefs and many uncomfortable conversations to unsettle the settler within.

Paulette Regan proclaims that we must "unsettle the settler within", beginning with the myth of Canada acting as a peacemaker with Indigenous peoples.[306] By confronting denied guilt, day to day forms of settler violence, and the ways in which colonialism continues to benefit settlers, the decolonization process may begin to occur. Although unsettling and uncomfortable in nature, Regan explains this process can occur in both informal and formal settings; "at negotiation tables, in policymaking forums, at conferences and in community halls and classrooms."[307] However, these conversations must develop into action. The Indigenous blog, *Unsettling America* explains in an essay that the term ally itself is a verb, thus action must be

[306] Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010), 10.
[307] Ibid, 16.

taken in order to contribute the decolonization movement.[308] While an unlearning of colonial Canadian history is necessary in the decolonization movement, those conversations must develop in how we, as settlers, can effect change. In doing so, settlers who want to practise active allyship must be able to provide resources to challenge the metanarrative. The *Unsettling America* essay offers a number of examples to help settlers provide meaningful support to communities and groups. Some of these examples include providing means of transportation, asserting autonomy rather than privilege, access to office administration equipment, promotion of events, and assisting in organization.[309]

Though, allyship and the term ally has been met by many critics due to the often-apathetic response met by settlers that claim that identity. In the "Indigenous Ally Toolkit" published by the Montreal Urban Aboriginal Community Strategy Network (MUACSN), they explained that the term "ally" has been taken up by some settlers to "symbolize a token identity – a kind of 'badge' that people wear to show they are one of the 'good guys'."[310] Though we must take it further than just being one of the "good guys" – good intentions can only take us so far in the fight for Indigenous nations. Although allies are an important role as help to decolonize our society by helping to education others of the history, two other roles were offered: the accomplice and the co-resistor. The accomplice

> works within a system and directly challenges institutionalized/systemic racism, colonization, and white supremacy by blocking impeding racist people, policies, and structures, [meanwhile the co-resistor] is about standing together as an ensemble, in resistance against oppressive forces and requires a constant learning. It is combining theory and practise by establishing relationships and being deeply involved within a

[308] Xhopakelxhit, "Everyone Calls Themselves an Ally Until it is Time to do Some Real Ally Shit," last modified 30 January 2014, https://unsettlingamerica.wordpress.com/2014/01/30/everyone-calls-themselves-an-ally-until-it-is-time-to-do-some-real-ally-shit/.
[309] Ibid.
[310] Montreal Urban Aboriginal Community Strategy, "Indigenous Ally Toolkit," *Segal Centre*, accessed 12 January 2020, https://segalcentre.org/common/sitemedia/201819_Shows/ENG_AllyTookit.pdf.

> community that informs how one listens critically, understands an issue and influences the way they go about disrupting oppressive instructions and systemic systems.[311]

All three members have an important role in supporting and working alongside Indigenous people, but applying the accomplice and co-resistor approach better fosters a total transformation of state policies and practises. Though regardless of which role you choose, MUACSN's guide urges you to be critical of your own motivations in practising anti-oppressive work. It is important to ask yourself if your interest is only existing because this is a "buzz issue," due to a possible increase in changes for funding, if your involvement "hijacks the message" and takes away from Indigenous voices, and if you are doing this to feed your ego.[312] This is where being in a constant state of reflexivity is important. It is important to check up on yourself and your own motivations in order to guarantee that you are being the best ally, accomplice, or co-resister to Indigenous people.

As a white settler, all of these roles expect you to "transfer the benefits of your privilege to those who have less."[313] Use your voice and access to resources to better position your Indigenous counterpart and support them in anti-oppressive work – especially your voice. Ensure that you are "amplifying marginalized voices that are too often silenced" when it is necessary.[314] Further, it is important to continually practise this self-reflection to ensure that if and when the space you are in is taking a space away from an Indigenous person, that it be given to them. Ask yourself "how can I use my position and privileges to listen, shift power dynamics and take steps towards reconcili-action."[315] It is imperative that we, as white settlers, take the privilege that was established by our ancestors, and redistribute it so that Indigenous people and other marginalized

311 Ibid. 1.
312 Ibid., 2.
313 Ibid.
314 Ibid., 3.
315 Ibid.

groups are granted the same opportunities we are. Moreover, white settlers must work to decolonize our criminal justice system. Decolonization and justice reform are the responsibility of the descendants of the white settlers that established racialized discriminatory practises and whiteness in the courtroom.

To do so, we must employ the white privilege we have been granted and use it against the colonizing and discriminatory groups, institutions, and laws that continue to systematically disempower and harm Indigenous people

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