From "Reconciliation" to Responsiveness: Applying the Relativity Condition to Crown-Indigenous Relations in Canada

In 1990, the Supreme Court of Canada issued a decision concerning the existing Aboriginal[1] right to fish according to traditional Musquem First Nation practices in the Fraser River Delta in the province of British Columbia. Musquem First Nation member Ronald Sparrow was arrested under the Canadian *Fisheries Act* for fishing with a net that exceeded the length permitted by the band's "Indian food fishing licence".[2] Rejecting the previous decisions of B.C trial, and county court judges who, on separate occasions, upheld these charges, the Supreme Court ruled that the Musquem First Nation's right to fish in the area it had occupied for millennia had not, in fact, been extinguished through any treaty or other legal negotiations between the Indigenous group and the Crown. As a result, the Court had no choice but to rule in favour of Mr. Sparrow and the Musquem First Nation thereby recognizing and affirming the Aboriginal right to fish undisturbed in the area in question.[3] Initially hailed by Indigenous groups, and legal scholars alike as a monumental step forward in the constitutional recognition of existing Aboriginal and treaty rights, subsequent commentators have, correctly, identified, and criticized the deeply troubling foundations upon which the *Sparrow* decision was given. The problematic position from which the decision was issued is captured within the following quotation from Chief Justice Dickson:

"It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, … there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown".[4]

[1] Throughout this paper, the term 'Aboriginal' will be used to refer to the constructed legal concept applied to Indigenous groups in bringing their legal claims to the judiciary, while the term 'Indigenous' will be used to refer to such groups outside of the context of a Canadian courtroom.
[2] *R v. Sparrow*, [1990] 1 S.C.R, at 1076.
[3] "Sparrow Case", First Nations and Indigenous Studies, University of British Columbia, https://indigenousfoundations.arts.ubc.ca/sparrow_case/
[4] Supra note 2, at 1103.

Implicit within this decision, then, is the presumption that supreme authority, jurisdiction, and legislative power within the political boundaries of the nation-state of Canada are held by a single, centralized entity; namely, the Crown. As such, any legal rights that are enshrined, protected, or advanced through an engagement with the *Constitution Act, 1982* in regard to Aboriginal and treaty rights, emanate from a single, universal source and, further, must be articulated in terms that are cognizable to the Canadian legal apparatus.[5] This understanding of law, and of Canadian legitimate authority has continued to inform Aboriginal rights jurisprudence in Canada from *Sparrow*, to the present day. By implication, then, any legal powers possessed, and employed by an Indigenous group within Canada's courtrooms must be understood as 'delegated' powers. That is, such powers do not have as their source the legal and political traditions that are unique to particular Indigenous groups and the physical, social, and economic world where these traditions were developed, and exercised in the management of both internal, and external affairs. Instead, those legal powers that are exercised by Indigenous groups in Canada are powers argued for, and won in Canadian courtrooms according to Canadian legal traditions.[6]

Moreover, many Indigenous nations today continue to assert that the unilateral imposition of Crown sovereignty, and the untrammeled exercise of legislative authority on the part of both the provincial and federal governments, ought to be understood as examples of illegitimate government overreach given that, in many cases, such powers were never officially consented to, nor were they transferred to the Crown from specific Indigenous nations through official treaties. Further, even where such powers have officially been transferred to the Crown via treaty or other formal

[5] The expression 'Canadian legal apparatus' will be used to denote the system of law, legal reasoning, and adjudicative and interpretive mechanisms understood, and accepted by Canada's legal system via an appropriate engagement with Canadian legal discourse.

[6] This is not to discredit the important, and effective uses of civil disobedience and direct physical resistance that have been successfully employed by many Indigenous groups in Canada throughout history, but merely to state that those powers that are recognized by Canada's legal system must be sought, and awarded according to the existing legal criteria.

arrangements, Indigenous activists, such as Kahnawake Mohawk educator Taiaiake Alfred, describe such transactions in a purely negative light. That is, commentators such as Alfred understand these transactions as creating incentives for the integration of Indigenous communities into the Crown's "sovereignty framework".[7] Such accusations declare that, in legislating on matters that concern Indigenous lives, and Indigenous physical environments, the federal government is effectively denying the existence of other legitimate legal orders within what it considers to be its proper sphere of jurisdiction; the Crown merely attempts to subsume Indigenous traditions within its own purview. Put differently, the Crown, through such legislative actions as, for example, the regulation of natural resources within the traditional territory of an Indigenous nation, has refused to acknowledge that its legal apparatus is, in fact, coming into contact with other *legal* systems. As such, there is an implicit assumption on the part of the Crown that those Indigenous traditions with which it comes into contact, do not have the requisite standing to place normative obligations upon Crown action unless those obligations are secured through channels which the Crown deems appropriate, i.e., Aboriginal rights claims within the confines of the Canadian legal system. Such requirements, legal scholar Alan Hannah has argued, mean that although a particular Indigenous group may be successful in securing the incorporation of certain aspects of traditional rules and principles within Canada's constitutional framework, the "substantial, and procedural outcome[s] will be either a translation of Indigenous legal traditions into western law, or the creation of new western law *per se*", not to mention the fact that such measures must be proven on a "case-by-case basis" according to terms that are cognizable, and enforceable within the Canadian legal apparatus.[8] Here, I contend, is where the heart of the structural issues in the contemporary Crown-Indigenous relationship lies; namely, in the denial of the existence

[7] Taiaiake Alfred, *Peace, Power, and Righteousness: An Indigenous Manifesto, Second Ed.,* (Toronto: Oxford University Press, 2009), 84.
[8] Brian Slattery, "Aboriginal Rights and the Honour of the Crown", *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference,* 29:20, (2005), 434.

of Indigenous nations as *authorities* in-and-of themselves, and the simultaneous refusal to engage with Indigenous authorities in ways that respect both the procedural[9], and substantive[10] legitimacy which has been bestowed by Indigenous subjects upon contemporary political leadership in such communities.

The main structural issue that this paper will seek to address, then, will be the fact that one authority (the Crown), is understood as having the standing to issue directives that can change the normative obligations of individuals that can rightfully be understood as subjects of another authority, whose domain must come to be understood as 'overlapping' with that of the Crown, as opposed to one which is subsumed within the larger domain of the state. Importantly, the establishment of Indigenous authorities with a set of corresponding subjects that are shared with the Crown is predicated upon the history of colonialism in North America; an historical reality which necessitates a fundamentally different relationship between Indigenous peoples, and the Crown than between the Crown, and other minority groups in Canada. Central to the establishment of this claim will be a discussion of the theory of relative authority developed by legal scholar Nicole Roughan in her ground-breaking 2013 work.[11] While Roughan develops the model of relative authority with an eye toward the evaluation of the relationship between the Crown, and Maori Indigenous peoples in New Zealand, this paper will apply Roughan's project to the Crown-Indigenous relationship in Canada. Through a careful examination of the general character of the Crown-Maori relationship, and an evaluation of the structure of decision-making in matters of common concern between the two, Roughan ultimately

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[9] By 'procedural legitimacy', I follow the work of legal scholar Nicole Roughan who defines this as the process by which a particular community bestows authority upon its leadership. As will become clear later in the paper, procedural legitimacy is an important factor for establishing the existence of a legitimate authority deserving of respect from other authorities with which its subjects interact or overlap. See: Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory,* (Oxford: Oxford University Press, 2013), 87-101.

[10] By 'substantive legitimacy', I again follow the work of Roughan who defines this as the ability of a relevant authority to improve conformity with the reasons for action that apply to the subjects of its authoritative directives. See: *Ibid.*

[11] See: Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory,* (Oxford: Oxford University Press, 2013).

declares that, as it stands, that relationship ought to be understood as illegitimate; a charge that will be shown to be apt in the Canadian context as well.

That is, this paper will demonstrate that the refusal on the part of the Crown in Canada to recognize the fact of plurality of law is, at least implicitly, to deny the authority of those Indigenous entities in Canada that have been bestowed with procedural, and substantive legitimacy by their respective constituents. Such a denial, according to Roughan and the parameters of the 'conjunctive test' for relative authority, warrants the charge of illegitimacy in regard to such inter-authority relationships. Throughout the paper, one specific relationship between an Indigenous community and the Crown that has come to be defined by prolonged conflict and confrontation[12] will be examined in detail in order to draw-out the general character of the Crown-Indigenous relationship in Canada. That is, by highlighting particular features of a specific manifestation of the Crown-Indigenous relationship in Canada, a more accurate representation of the *general* character of that relationship will be possible. It will be argued here that the general character of the overlap between Crown, and Indigenous authorities is such that it requires what Roughan terms a 'justified relationship' in order to be understood as legitimate. In isolating pervasive features of the Crown-Indigenous relationship, then, this paper will argue that the general character of the Crown-Indigenous relationship in Canada, in all of its manifestations, is structurally illegitimate according to the demands of both the conjunctive test for relative authority, and the requirements of Roughan's overall theory of legitimacy.

The first section of this paper will engage in a detailed treatment of the salient features of Roughan's model of legitimate authority for the purpose of applying those features to a particular

[12] The protracted struggle of the Algonquin First Nation of Barriere Lake, Quebec will be discussed in some detail here. The work of geographer Shiri Pasternak will be especially relevant to drawing out those manifestations of the Crown-Indigenous relationship which most forcefully demonstrate the monistic imposition of Crown sovereignty. See: Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake Against the State,* (Minneapolis: University of Minnesota Press, 2017).

instance of the Crown-Indigenous relationship in later sections. Important to this opening section will be a discussion of the model of relative authority which, as a guideline for assessing the legitimacy of inter-authority relationships, makes the establishment of a justified relationship a key component of the legitimacy of authoritative entities. Integral to the overall theme of this section will be the assertion that, in regard to the interaction of subjects of separate, yet interacting authorities, an inter-authority relationship is justified when, according to Roughan, "it improves or does not diminish the prospect of either subject's conformity to reason".[13] It will be my argument, then, that in understanding itself as a supreme, unilaterally-acting, monistic legitimate authority, the Crown in Canada is, in fact, diminishing and, in some cases, precluding Indigenous subjects from conducting themselves in accordance with reason as required by the specific 'reasons for action'[14] that apply to them in various circumstances. Further, this section will develop an argument for understanding Indigenous authorities as *authorities* (as opposed to interest groups, or as subjects of Crown authority only) that are endowed with both the procedural, and substantive legitimacy required for the status of legitimate authority as prescribed by the 'relativity condition' offered by Roughan. As well, this section will demonstrate that Indigenous authorities possess a set of subjects that are, in fact, distinct from those of the wider population who, in relation to Indigenous authorities, must be understood as "non-subjects". The point here will be to illuminate the fact that Canada is a multijuridical nation whether the current sociological contingencies of Canada's constitutional tradition reflect this fact or not. Moreover, demonstrating both that Indigenous nations are, in fact, authorities, and that they have their own proper subjects that are distinct from those subjects of the wider, state authority, will be a crucial element in the argument that, when these two authorities interact, either through their direct

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[13] Roughan, *Authorities,* 139.

[14] For the purposes of this paper, 'reasons for action' will denote those dependent reasons which, in the absence of an over-arching authority, a subject would contemplate on their own in an effort to discern the appropriate course of action. Here, I employ concepts such as 'reasons for action', and 'dependent reasons' in the way that is typical of analytical jurisprudential literature. See: Joseph Raz, "Authority, Law, and Morality," *The Monist,* 68:3, (July, 1985), 297-300.

interaction, or in the interaction of their respective subjects, the Crown-Indigenous relationship must be predicated upon the principles laid out by the theory of relative authority or risk illegitimacy.

The final section of the paper will concern itself with the role that Canada's highest court can play in implementing, and monitoring a legitimate inter-authority relationship between the Crown, and Indigenous nations in Canada. For, given that the legislative agenda in Canada is perpetually influenced by the political will of the majority and, further, is often deeply connected to the requirements of a national, capitalist economy, the standard political process, I contend, cannot be relied upon for meaningful 'reconciliation'. The Supreme Court of Canada, then, in its (relative) freedom from political pressure, is better-placed to issue decisions that, in both their language, and character, correspond to a model of authority that sees Crown authority as relative, as opposed to an independently held power that applies to an undifferentiated mass of subjects. Encouraging in this respect is the recent decision of the Federal Court of Appeal in regard to the federal government's purchase of the Trans-Mountain pipeline expansion project. In that decision, the court declared that the level of consultation between the National Energy Board (NEB) (a Crown corporation with the authority to evaluate, and approve economic development proposals in Canada), was inadequate, thus requiring a renewed consultative process. While the decision is still informed by notions of supreme Crown authority in that, had meaningful consultation taken place, the Crown still possessed the power to approve, and begin construction on the expansion even if Indigenous dissent was made clear during the consultation process, the decision is nonetheless important for its potential in requiring 'dialogue' as opposed to merely transcribing Indigenous concerns and, further, has positive implications for the prospect of a model of relative authority coming to inform the Crown-Indigenous relationship.

The Model of Relative Authority: The Conjunctive Test

Integral to the argument of this paper is, first of all, to establish the existence of Indigenous communities as *authorities*, as opposed to interest groups or other segments of the Canadian population which deserve to have their interests represented in the political process; and in order to successfully articulate *that* claim, it is necessary to demonstrate that a situation where multiple authorities come into contact with one another through either the overlap of their proper domains, or through the interaction of their respective subjects, is possible *in general*. To do so, I will employ the conjunctive test for the existence of plurality of authority developed by Roughan supplemented by a discussion of an empirical example of a particular manifestation of the Crown-Indigenous relationship in Canada. Roughan's conjunctive test, it will be shown, involves a combination of the procedural, and substantive requirements of conferring the standing of authority on a particular body or individual; requirements that are typically treated in isolation in the literature. Further, in addition to the kinds of organizational efforts that are typical of justificatory accounts of authority, there are less obvious coordinative efforts, I contend, that warrant being understood as examples of authoritative decision-making that have typically been excluded from the literature. Indigenous communities such as the Algonquin First Nation of Barriere Lake, Quebec, for example, have, according to Geographer Shiri Pasternak, engaged in intimately regulated systems of social and political organization for millennia that warrant being understood as authoritative exercises aimed at leading the relevant subjects to a greater conformity with the requirements of reason *as defined by the First Nation.*[15] As a result, Indigenous communities such as Barriere Lake, must be understood as satisfying what Roughan terms the 'procedural' requirements for legitimate authority due to the fact that leadership is bestowed through community legitimated processes with a level of participation which satisfies Roughan's conditions.

[15] See: Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake Against the State,* (Minneapolis: University of Minnesota Press, 2017).

What is more, through a discussion of Pasternak's work with the Barriere Lake community, it becomes clear that not only are Indigenous authorities bestowed with procedural legitimacy, but, in addition, that they can be said to satisfy the substantive requirements for legitimate authority articulated as part of Roughan's conjunctive test. This section, then, will utilize Pasternak's work in an effort to bring the abstract, theoretical claims made by Roughan into conversation with questions concerning legitimacy in the Crown-Indigenous relationship in Canada. In doing so, it will be argued that the Algonquin First Nation at Barriere Lake, in satisfying the procedural, and substantive requirements of Roughan's conjunctive test for legitimate authority, serve as undeniable evidence for the existence of plurality of authority in Canada; a reality that necessitates understanding Crown-Indigenous interactions as an 'inter-authority' relationship as opposed to one predicated upon a presumption of unilateral Crown authority. Having established the procedural, and substantive legitimacy of Barriere Lake, this section will then move to a discussion of Roughan's 'relativity condition' which serves to structure the resulting inter-authority relationship according to modified procedural, and substantive requirements. Further, the question may arise as to how one particular instance of the Crown-Indigenous relationship can be utilized in an indictment of that relationship *in general*. Pertinent to this section, then, will be a demonstration of how the particular features of the relationship between the Crown, and the Barriere Lake First Nation are such that the range of possible actions available to the Crown under the current relationship are such that they enable that body to deny procedural, and substantive legitimacy to Indigenous authorities thereby "legitimizing" a monist conception of Crown authority and perpetuating the denial of understanding the engagement as predicated upon the principles of relative authority.

The Conjunctive Test for Plurality

The procedural characteristics of the conjunctive test for the existence of plurality of authority are centred upon what Roughan refers to as 'reasons for decision'. That is, in any assessment of authority, Roughan argues, there must first be an "undefeated reason to have authority rather than private decision making"; a requirement that would satisfy legal scholar Joseph Raz's independence condition which "precludes authority when reasons for having authority are outweighed by reasons for having autonomous decision-making".[16] Circumstances which call for the imposition of an authority, then, must be such that concerns of coordination, hierarchical decision-making, or administrative consistency are more important than those associated with individual autonomy; this includes, but is not limited to, mass coordinative efforts such as the organization of a national system of defence as well as the administration, and patrol of a system of traffic regulations and by-laws. These kinds of coordinative efforts involve a level of complexity which necessitates centralized administration that is consistently applied, and monitored in all of the relevant areas. Conversely, there are also situations where hierarchical decision-making schemes are not appropriate, such as the choice an individual makes in pursuing a particular career. Reasons for decision, then, are those reasons for, or against having an authoritative entity in the first place as determined by the particular circumstances as well as those reasons recommending a particular kind of authority; hierarchical or heterarchical.

Once it has been established that the reasons for decision in a certain community, in regard to a particular domain, require the imposition of an authoritative entity of a certain kind, the next step, for Roughan, is for the relevant body/individual to be conferred with the standing of authority through a morally justified procedure. This stipulation runs counter to what Roughan essentially calls an oversight within the model of legitimate authority developed by Raz. In that monist model of legitimate authority, Roughan explains, the only requirement for an entity to be conferred with the

[16] Roughan, *Authorities,* 126, 134.

standing of authority is its general success in leading its subjects toward conformity with reason; how that entity comes to occupy the position of authority, then, is either irrelevant or is not considered to be a factor which can be said to effect an authority's legitimacy.[17]

In contrast, Roughan's conception of authority requires that any prospective authority be conferred with legitimacy through a justified process regardless of its ability to secure compliance with reason on the part of its subjects. For, Roughan argues: "A really good dictatorship, even one which generally produces substantively better results than private decision-making would produce, cannot be authoritative if it carries no procedural values".[18] This is because, in order to be legitimately authoritative, Roughan's model requires that subjects themselves confer the standing of authority through justified procedures which are sufficiently open to the participation of those who stand to be impacted by the subsequent imposition of the authority's directives and, importantly for both Roughan, and this work, this can happen through a variety of conferral procedures; a point that will be returned to later in this section. In order to discern whether the appropriate procedural values have been satisfied by a prospective authority, there must be an investigation "into individual consent or participation by group members in the conferral of the standing of authority".[19] The obvious example of such a procedure is the democratic electoral system which, despite operating according to the principles of 'majority rules', provides for the meaningful representation of its constituents. Though individuals may disagree with the result of a particular election, the point is that their political opinion can be expressed through a justified procedure.

For Roughan, such justified procedures have two important effects upon the relationship between a prospective authority, and its subjects. First, these procedures have what Roughan terms

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[17] Roughan, *Authorities,* 22-25.
[18] Ibid, 134.
[19] Roughan, *Authorities,* 225.

an 'epistemic significance' in that they "identify particular bodies or institutions as prima facie authorities around whom subjects can coordinate".[20] That is, having identified an authority, subjects can proceed to plan their actions according to the directives of such an authority without confusion in regard to their source. If subjects are unable to identify who the relevant authority is with respect to a particular domain, then the subject must, necessarily, engage in a reasoning process about the very reasons that an authority is supposed to pre-empt.[21] That is, the subject must investigate those primary reasons for decision (reasons for having an authority at all) that would establish a particular entity as an authority for that subject. However, in reasoning about those primary reasons for decision, the subject, by implication, denies that the authority is an authority for them merely by investigating into the question of whether or not they are under an authority *at all*.

In addition to clearly identifying authoritative entities through consistent, reliable procedures, and thereby alleviating this concern of identification, Roughan's procedural constraint upon legitimacy also has the effect of performing "the normative work of conferring standing upon particular authorities".[22] Regardless of outcomes, authorities can be understood as legitimate only if they first satisfy these procedural constraints.[23] Justified procedures, in addition to clearly identifying who *has* authority, then, also carry much moral weight in the conferral of standing thereby influencing the character of the relationship between the subject, and the authority in a qualitative manner.

In the same way that a prospective authority cannot secure such standing in the absence of a justified procedure, neither can it be legitimately authoritative if it is generally unsuccessful in leading its subjects toward conformity with reason. That is, Roughan argues, "a procedural justification is incomplete unless the substantive result is sufficiently valuable to confirm the normative value of the

[20] Ibid, 126.
[21] Ibid, 156.
[22] Roughan, *Authorities,* 126.
[23] Ibid, 127.

procedure".[24] It is no good to have a procedurally justified authority which diminishes its subjects' ability to conduct themselves in accordance with reason or who would, Roughan explains, "act inconsistently with their subjects' autonomy"[25]; there are substantive requirements that a prospective authority must meet in order to be in a position to legitimately change the normative reasons that apply to an individual. Presumably, then, the authority would have to be in a position to understand what would be beneficial for the lives of its subjects since it is at least claiming to be in such a position by virtue of issuing directives governing people's conduct. It would not make sense, that is, to confer legitimacy upon an authority that issued directives which it knew not to be in the best interest of its subjects or on matters in which the authority was not well-placed to determine the correct course of action for the relevant subjects. Moreover, Roughan makes it an explicit requirement of the conjunctive test for legitimacy that, having been conferred with the standing of authority through a justified selection procedure, the subsequent exercise of authority will actually help the prospective subjects "conform to the reasons that apply to them"[26]; those reasons being ones which are relevant to the particular social, cultural, legal, and epistemic conditions of the subject community. The Canadian federal government, for example, in coordinating an internationally competitive domestic economy, must be in a position to discern which directives will help its subjects conform with this common concern. This involves a range of detailed knowledge concerning capitalist economics, domestic resource development planning, and international commercial transactions. Centralized control of such an economic endeavour will, in general, be more successful in securing its goal than if individual economic actors in Canada were left to their own devices in their engagement with the international system. In fact, this example is apt in that it draws out Roughan's insistence that it is not

[24] Ibid, 235.
[25] Ibid, 129.
[26] Roughan, *Authorities,* 156-7

a necessary feature of authority to claim supremacy over other systems.[27] That is, in engaging with the international economy in various manifestations, the Canadian government does not assume or claim supremacy of its laws governing economic behaviour over those of other nations or international economic organizations; rather, Canada understands its authority in such situations as relative to the authority of other individually legitimated entities. By implication, then, a claim to supremacy is not an integral feature of Canadian authority. Understanding the authoritative claims of particular entities in this way, Roughan contends, better reflects the actual practice of authority on-the-ground. In regard to the economic domain, then, the Canadian government can be said to be legitimate in that it is a procedurally, and substantively justified authority.

In combining the procedural, and substantive justifications for legitimate authority, Roughan's conjunctive test allows for the possibility of plurality of authority through its ability to accommodate diverse selection procedures as well as being sensitive to the various reasons that can apply to subjects under distinct authorities. That is, on this model, subjects are viewed as "cosmopolitan…interactive individuals, whose interactions have moral relevance not just within the communities of people with whom they share a single authority, but also across those boundaries".[28] This allows for the 'overlap' of legitimate authorities and for individuals to be properly understood as subjects of multiple authorities *at the same time*.

According to Roughan, it is not difficult to imagine scenarios where the primary reasons for action applying to a particular set of individuals subject to one authority, are fundamentally different from those primary reasons applying to a different set of individuals who can rightfully be understood as non-subjects of the first; primary reasons being those reasons for action that a subject would consider in deliberating about the correct course of action in the absence of a legitimate authority. To

[27] Ibid.
[28] Roughan, *Authorities,* 140.

illustrate this point, Roughan uses the example of conflicting directives within a common domain being issued from a legitimate state authority (S), and from a tribal authority (T), respectively.[29] Suppose, Roughan explains, that S issues a directive which states that all marine resources are public domain and, further, that all citizens of S have the right to access such resources while T, on the other hand, issues a directive to its subjects declaring that marine resources within the territory of the tribe belong to the tribe alone and, as such, ought to be protected from encroachment. In such a scenario, Roughan argues, each authority is essentially interfering with the ability of the other to fulfill its duties as an authority for its subjects; the respective authorities are hindered in their ability to guide their subjects toward conformity with reason by having their effectiveness excluded by the directive of the other authority.[30]

A particularly powerful empirical example of what can happen in the overlap of multiple authorities when that interaction is predicated upon a presumption of supremacy by one of the actors thereby hindering the effectiveness of the other authority, are the events that transpired between the Algonquin First Nation of Barriere Lake, and both the provincial, and federal Crown in the early 1990s. After spending several years amongst the Algonquins of Barriere Lake learning from elders, and observing their way of life, Geographer Shiri Pasternak has published what can be considered as an empirical investigation of the way the concept of authority is played-out through bodies in interaction with one another in particular physical spaces.[31] While Pasternak officially characterizes the work as an investigation of the gap between the assertion of Crown sovereignty over Indigenous peoples and "its legal authority to exercise jurisdiction", I think the salient features of Pasternak's study can be understood as corroborating the abstract claims made by Roughan in regard to relative

[29] Roughan, *Authorities,* 131-2.
[30] Ibid*,* 132.
[31] Pasternak, *Grounded Authority.*

authority. In fact, the detailed empirical accounts of the tactics of physical resistance employed by the Algonquins of Barriere Lake against the Suréte du Quebec (SQ), the Royal Canadian Mounted Police Force (RCMP), and the Crown generally, provide illuminating correlates for Roughan's abstract investigation of situations of plurality of authority. That is, Pasternak investigates "how legal orders meet across epistemological difference and overlap on-the-ground".[32]

Pasternak, under the direction, and leadership of influential community members, describes the system of political organization on Barriere Lake lands as "a kinship-based tenure system, where families responsible for particular ranges [of land] hold the legal decision-making power" and which understands the authority to govern as dependent upon "the legal relationship between the political community and the place it inhabits".[33] Moreover, that legal relationship is based upon *Mitchikanibikok Anishnabe Onakinakewin* (MAO); Barriere Lake's sacred constitution which is predicated upon an ethics of *care* as opposed to one of *supply*.[34] In conferring the standing of authority upon a particular individual, the Algonquin community at Barriere Lake, up until 2010, had, Pasternak explains, "governed themselves by a custom of leadership selection that goes back hundreds, if not thousands of years".[35] Moreover, under that system of selection, individuals are chosen at an early age in an effort to begin the process of internalizing the incredibly detailed knowledge of both the human, and nonhuman world that is a prerequisite for effective Algonquin leadership. Further, heredity plays an important role in leadership selection in the Barriere Lake community as people in the hereditary line are, Pasternak notes, generally "preferred as leaders" although this requirement is not absolute by any means.[36] That is, through conducting interviews with community members and traditional knowledge holders, Pasternak learned that "leadership qualifications are valued over heredity" given that the

[32] Pasternak, *Grounded Authority,* 7.
[33] Ibid*,* 3.
[34] Ibid, 77-78, 84-5.
[35] Ibid, 89.
[36] Pasternak, *Grounded Authority,* 92.

position of chief is, in most cases, held for life.[37] This flexibility is, according to Barriere Lake member Doug Elias, necessitated by the Algonquin reliance upon an intimate connection to, and understanding of, their physical surroundings; the selection of leaders according to traditional methods, then, ensures that the MAO will be protected. By implication, only those individuals with the requisite, Algonquin specific knowledge of the interconnection between plants, animals (including humans), and the natural world, can effectively discharge the responsibilities of chief within the community. Integral to the selection of such an individual is the "quality of a flexibly minded person" or, put differently, "someone who could look at a problem from multiple sides and arrive at a judicious decision".[38] This process, passed down from generation to generation over millennia can take years to complete and, importantly for our purposes here involves the participation of the community through what is termed a "Leadership Assembly of the People".[39]

There is not space to continue to expand upon the specific procedure, however, the salient point to be drawn from Pasternak's work with the Barriere Lake community is that the selection of political, and cultural leadership satisfies justified procedures that allow for the participation of community members and, even more importantly, combine procedural requirements of identifying, and conferring the standing of authority upon an individual with the substantive requirements necessitating an intimate knowledge of the Algonquin land-tenure system, and of the place of the community within the interconnectivity of the natural world. This allows for the creation of a "consensus-based community that empowers everyone to participate and influence decision making. In combining the procedural and substantive requirements for legitimacy, then, the Barriere Lake community can thus be said to satisfy Roughan's conjunctive test and, as a result, can properly be

[37] Ibid, 92, 94.
[38] Ibid, 93-4.
[39] Ibid, 94.

understood as triggering the requirements of relative authority in its engagement with other authoritative entities. As the following section will show, however, the refusal on the part of the Canadian Crown to engage with the community as an *authority* so understood, and its attempt to assimilate Algonquin governance structures into the confines of the archaic requirements of the *Indian Act, 1876*, demonstrate a violation of Roughan's relativity condition and, as such, warrant the charge of an illegitimate inter-authority relationship in need of serious revision.

The Relativity Condition

The previous section, in drawing out the salient features of Rougan's conjunctive test for legitimate authority and applying those conditions to the Algonquin community of Barriere Lake, established the existence of a distinct, procedurally, and substantively justified authority in Canada with a set of subjects that it shares with the Canadian state. While the procedural, and substantive elements of Roughan's conjunctive test serve to establish when understanding a relationship as one involving the 'overlap' of multiple authorities is required, the relativity condition takes the further step of prescribing appropriate courses of action in the conduct of the ensuing relationship and, further, makes the legitimacy of each dependent upon the character of the interaction. That is, on Roughan's model, the relativity condition tests "the *interdependent* legitimacy of authorities and requires *justified relationships* between overlapping or interacting authorities" as a condition of legitimacy.[40] The first requirement of the relativity condition is that there exists an undefeated reason for securing coordination or cooperation in an effort to avoid situations of serious practical conflict, while the second stipulation requires that authorities cooperate *only* if doing so would allow their shared subjects to do "better in conforming to reason".[41] The implication of this view of authority is that the interaction or overlap between multiple authorities can no longer be seen as something "parallel" to

[40] Roughan, *Authorities,* 136.
[41] Ibid, 139.

their legitimacy but, rather, comes to be an integral part of the legitimizing process itself.[42] Moreover, one of the most interesting features of this model is that, in contrast to monist conceptions of authority, the relativity condition is sensitive to both the quantity, and quality of authority, suggesting that there can be "degrees of authority, rather than treating authority as necessarily ultimate".[43]

What the relativity condition offers, then, as a supplement to the conjunctive test for plurality of authority, is, Roughan contends, "a tool to explain how [multiple authorities] can have legitimate authority despite their plurality"[44] by making legitimacy "mutually constitutive and mutually constraining between persons or bodies who prima facie have the standing of authority, but cannot alone have independent legitimacy because of the existence of the other and the need for interaction".[45] In such situations, legitimacy is evaluated, Roughan explains, according to the "procedural, and substantive reasons applicable to each participant, in light of their relationship".[46] If the resulting relationship fails to secure cooperation or coordination between the multiple authorities, then, by implication, it cannot meet the substantive requirements of legitimacy. That is, a lack of cooperation or coordination in a situation in which multiple authorities come into contact with one another necessarily implies that at least one set of subjects is not having the substantive requirements of reason applicable to its circumstances met in the conduct of the interaction.

In making legitimacy dependent upon justified relationships in the overlap of authorities, the relativity condition, in contrast to monist conceptions of authority, understands the reasons that apply to subjects as considerably more complex and, as a result, requires that inter-authority relationships accommodate, and be responsive to this complexity. For example, the Algonquin First Nation of

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[42] Ibid.
[43] Ibid, 137.
[44] Roughan, *Authorities,* 138.
[45] Ibid.
[46] Ibid, 10.

Barriere Lake, as subjects of a procedurally, and substantively justified Algonquin authority, have particular reasons for action, and reasons for decision that apply to them as members of that specific community. Further, the requirements of reason that obtain within that community are fundamentally different from the requirements of reason for, say, a Crown corporation engaging in resource extraction projects. Such reasons accord with the intimate knowledge of the physical environment, and with particular social, cultural, and legal practices unique to the Barriere Lake community. However, individual members of the Algonquin community, in residing within the political boundaries of the Canadian state, are also the subjects of another procedurally, and substantively justified authority whether they tie their identity to that authority or not; namely, the Crown. The key addition that the relativity condition makes to the literature on authority, and the integral point for the work being presented here, is its requirement that authorities, in their dealings with one another either directly, or through the interaction of their respective subjects, must either cooperate, or coordinate their activities so that they correspond to the reasons for action applying to subjects of 'overlapping', as opposed to independent authorities. That is, according to the model of relative authority, in issuing directives concerning, for example, logging on the traditional territory of Barriere Lake, the Canadian government ought to be understood as engaging in an inter-authority relationship and, as a result, must do more than simply consult federal and provincial laws governing the extraction of resources; rather, the actions of the federal government, through entities such as the National Energy Board (NEB) must be responsive to the substantive requirements of reason that apply to Algonquin members of the Barriere Lake community as subjects of *both* an Algonquin, and a wider state authority.

While, in theory, it is possible to imagine that the Crown could end up issuing directives that are beneficial to the First Nation on this monist conception of its authority, the point is that, by refusing to consider those reasons for action that apply to Barriere Lake community members as subjects of overlapping authorities, the character of the overall relationship is such that it is denying

the procedural, and substantive legitimacy that has been bestowed upon the community's leadership and, as such, cannot be said to be responsive to the unique requirements of reason applying to the Algonquin peoples. In order to more clearly demonstrate the real-world implications that accompany the refusal to engage with Indigenous authorities as *authorities,* I will now briefly discuss the events surrounding the Trilateral Resource Co-Management Agreement (TLCMA) of 1991 between the Barriere Lake First Nation, the Quebec provincial government, and the federal government in Ottawa.

The official purpose of the TLCMA was to "integrate local and state management systems, allocate control of resources among competing interests, and facilitate the merging of knowledge".[47] That is, in the face of persistent resource extraction activities such as logging, recreational hunting, and hydro electric development in their traditional territory, the Algonquins of Barriere Lake sought to exert some form of control over the use of such lands. Therefore, this manifestation of the Crown-Indigenous relationship warrants an investigation under the principles of relative authority for two reasons. First, given that the Algonquin First Nation clearly has an interest in conducting itself in accordance with the knowledge required to fulfill its responsibility in managing its traditional territory according to the principle of 'care' or stewardship and, further, that the provincial government of Quebec has an obvious interest in engaging in resource exploitation projects within what it considers to be its sphere of jurisdiction, the two sides have an undefeated reason to enter into a cooperative or coordinative relationship and to avoid pursuing their interests in isolation. Second, given the existence of an undefeated reason to secure cooperation or coordination, the relativity condition makes the further stipulation that the resulting inter-authority relationship must only be pursued if it will improve the respective subjects' ability to conform to reason.

[47] Claudia Notzke, "The Barriere Lake Trilateral Agreement", *University of Lethbridge,* (1993), 5.

However, as Claudia Notzke argues in a critical, albeit dated, case study of the Tri-lateral Agreement, the situation was, from the outset, "embedded in a political framework of non-recognition of treaty and aboriginal rights, centralized decision-making with regard to land and resource use planning, and a strong emphasis on extractive resource utilization".[48] Important for this paper is the fact that, according to Notzke, the impetus for the agreement, which was initiated almost entirely by the Algonquins, was inspired by a desire for the "realization of integrated resource management which would take the needs of their subsistence economy into account".[49] That is, in terms cognizable to the model of relative authority, the Algonquin First Nation sought a co-management resource arrangement that would respect both those reasons for action applicable to actors who, in acting through the authorization of another procedurally, and substantively legitimate authority (the state) had specific reasons for action which differed from those applying to the First Nation. Rather than understanding its own authority as absolute, the Barriere Lake First Nation, whether they were conscious of the fact or not, engaged Crown authority according to the principles laid out by the model of relative authority.

That is, in refraining from an out-right ban on any state-sanctioned resource development projects, I contend, the First Nation was demonstrating a certain amount of respect for the requirements of reason for a profit-driven, capitalist organization interested in the exploitation of resources on Barriere Lake's traditional territory and, further, was willing to work with those interests. There is not space to delve into the specifics of the agreement, however, the salient feature of the entire process is the refusal on the part of the provincial, and federal Crowns to implement the Agreement according to principles, and laws existing outside of the confines of state authority. For, Notzke declares, "Quebec viewed its resource management regime as sacrosanct, with no room for

[48] Notzke, "Barriere Lake", 5.
[49] Ibid.

compromise" and, further, "insisted that the Agreement be implemented within the rigid confines of existing laws, and regulations".[50] Such a hard-line stance toward the terms of the Agreement, resulted in, Notzke explains, "overt non-compliance on the part of Quebec" before the province opted for the unilateral suspension of the Agreement in February, 1993 despite mediation efforts by Quebec Superior Court Judge Rejean Paul.[51] Composed in 1993, Notzke's study, by no fault of its own, uses language which is optimistic that the Agreement could be salvaged, however, the benefit of hindsight allows us to declare the Agreement a failure in that the federal government terminated all funding to the project on September 30, 2001.[52] Moreover, the attitude of the federal government toward the Agreement is succinctly summarized in the following quotation from a Government of Canada run website: "The Department [of Indigenous Affairs and Northern Development] has always been prepared to consider any Band Council project proposal eligible for funding *according to the criteria and funding authorities of existing programs.*[53] In sum, then, both the provincial government of Quebec, and the federal government in Ottawa, were willing to engage in the co-management of resources on traditional Barriere Lake territory *unless* this meant conducting itself in accordance with those reasons for action that applied to Barriere Lake community members as subjects of *both* an Algonquin, and a wider state authority thereby satisfying the requirements of both the conjunctive test for plurality, and the relativity condition upon legitimacy. Such an understanding of authority is, according to Indigenous legal scholar Gordon Christie, antithetical to the way that the Canadian Crown understands its own authority, and this fact was certainly on display in the negotiations surround the Tri-lateral Agreement.[54] That is, Christie argues, the Canadian legal apparatus is "powerfully

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[50] Notzke, "Barriere Lake", 7.
[51] Ibid.
[52] See the Government of Canada Report on the history of official relations between the Crown and the Barriere Lake First Nation: < https://www.aadnc-aandc.gc.ca/eng/1100100016352/1100100016353#a3>.
[53] Ibid, emphasis added.
[54] See: Gordon Christie, "Indigenous Authority, Canadian Law, and Pipeline Proposals", *Journal of Environmental Law and Practice,* Vol. 25.

antagonistic" to assertions of authority that can create normative obligations for the Crown or, put differently, which demand that Canadian law be *responsive* to Indigenous legal orders, rather than merely *open* to them.[55]

That is, Indigenous authority conferral procedures such as those of the Algonquins at Barriere Lake would, on Roughan's model, satisfy the procedural requirements for legitimacy thereby satisfying the first criterion for generating a sufficient claim to 'relative authority' in situations of both interaction, and overlap with other authorities. Any commitments secured from the provincial, and federal governments on the part of the Algonquin First Nation would, then, would need to be articulated in terms cognizable to the existing structure of Canadian resource extraction laws as well as those regulations surrounding land-use planning and development in an effort to integrate the community into the Crown's existing 'sovereignty framework'. By seeking to impose its economic, and legal will, the Crown, in remaining steadfast in its insistence that the terms of the Agreement accord with existing provincial, and federal laws, effectively precluded the effectiveness of the authority at Barriere Lake in performing the duty owed to its own subjects resulting in physical displays of resistance such as multiple blockades of Highway 117. In order to avoid situations of practical conflict caused by the unrelenting imposition of Crown authority, blockades, and physical acts of civil (dis)obedience became necessary in order for subjects of Barriere Lake authority to continue to comply with the requirements of reason as stipulated by their sacred constitution (MAO), and embodied in their procedurally justified political leadership. Therefore, such unilateral assertions of Crown interests, I contend, preclude Indigenous subjects such as those at Barriere Lake from conforming to the reasons that apply to them as subjects of overlapping authorities and, as such, warrant the charge of illegitimacy.

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[55] Ibid, 191.

Conclusion

The preceding sections of this paper have demonstrated first, that the requirements of the conjunctive test for the existence of plurality of authority, together with the relativity condition, necessitate understanding the Crown-Indigenous relationship as an 'inter-authority' relationship. As such, the relativity condition prescribes that the conduct of the relationship must be such that it secures the compliance with reason on the part of the subjects of both the Algonquin, and state authorities respectively. Had the principles of relative authority animated the negotiations surrounding the Tri-Lateral Agreement between the Algonquin First Nation, and both the provincial and federal governments of Quebec and Canada respectively, the Agreement may have been salvaged in that each actor would have been required to engage in cooperation or coordination in order to satisfy the newly complex requirements of reason. In continuing to understand subjects as belonging to individually justified authorities, state actors such as Canada will continue to conduct themselves according to the presumption that their authority is supreme, untrammelled, and absolute resulting in a perpetuation of an oppressive system which requires marginalized communities, such as Indigenous peoples in Canada, to effectively translate their genuine aspirations into the legal and moral lexicon of the host legal system. It has been my argument here that such requirements serve to deny the procedural, and substantive legitimacy that subjects of Indigenous authorities, such as that at Barriere Lake, and, as such, fail to satisfy the relativity condition as developed by Roughan. Canadian courts, then, in moving to understand the authority of the Crown as relative in situations where that bodies' authority comes into contact with another procedurally, and substantively justified authority, will have a theoretical model or 'tool' at their disposal to evaluate the character, and quality of the resulting inter-authority relationship according to serious, clearly-defined criteria thereby alleviating concerns that a move to a pluralist understanding of authority will result in perpetual consultation and inefficiency. The point here is not to declare that Indigenous communities in Canada deserve a veto on proposed Canadian

economic projects (although there are convincing arguments in favour of such a power) but, rather, to stress the fact that it is high-time that Indigenous legal, and political leadership be understood, and engaged as *authorities* in their own right, with the power to create normative obligations not only for their respective subjects, but for their interlocutors as well. Further, understanding the legal existence of Indigenous communities as authorities in their own right will allow such communities to better conduct themselves in accordance with the requirements of reason that are unique to their lived experiences.

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