Mining Sovereignties in Courts: Voicing Plural Sovereignties in Juridical Spaces

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1 Introduction

Resource extraction, and consequently extractivism, often have a fractured relationship with conceptions of sovereignty. Extractivism here relates to 'a complex ensemble of self-reinforcing practices, mentalities, and power differentials underwriting and rationalizing socio-ecologically destructive modes of organizing life through subjugation, violence, depletion, and non-reciprocity' (Chagnon et al. 2022: 761). However, as several scholars agree, the focus of the term has moved beyond mining or agroextractivism and also functions as an organising concept that synthesises knowledge forms (Nygren et al. 2022; Kröger et al. 2021). Since extractivism is best understood as a placeholder for knowing how people and things exist in a space and maintain relations with each other (Willow 2018), the term may mean different things socially and politically at different times. It may even refer to the relationship between First Nations and the juridical spaces based on extracting Indigenous peoples' knowledge and trust in legal processes and institutions. Hence, as Gudynas suggests, understanding extractivism assumes 'very different dynamics and impacts', thereby making it 'essential to differentiate' the concept when we use them (Gudynas 2021: 61).

Extractivism and ongoing accumulation processes also compel a critical examination of sovereignties, especially Indigenous sovereignties, to unpack what this concept means within the dynamics of capitalism. While state sovereignty and, to an extent, extractivism are deemed inevitable by the state itself (Kinnvall & Svensson 2018; Coulthard 2007), other sovereignties also co-exist, at times persisting alongside and at other times interrupting the former. Law and legal institutions play a key role in acknowledging, articulating and accommodating different conceptions of non-state sovereignties, in both intentional and unintentional ways. Within litigation, settler court needs to grapple with the co-existence of plural forms of sovereignties, which might be asserted by claimants who are seeking to resist new or established forms of economic organisation. While the process of adjudication may accommodate certain claims and marginalised voices, such as Indigenous knowledge forms deliberately erased in settler-colonial spaces, courts have continued to ignore the full impact and relevance of Indigenous voices. Consequently, litigation remains another form of extraction and erasure of Indigenous knowledge (Akena 2012).

This article examines how settler courts both facilitate and impede the acknowledgment of Indigenous sovereignty in socio-juridical spaces. To this end, the article relies on the concept of 'ancestral catastrophe' (Povinelli 2021) and its manifestation in the claims made by Indigenous communities in strategic litigation. Indigenous environmental litigation is characterised by a combination of factors, such as tensions between plural sovereignties and extractivism and an ambiguous relationship with the courts. This article examines two instances of Indigenous environmental litigation where courts in Australia and Canada have had an opportunity to encounter colonialism and, consequently, allude to plural sovereignties. First, I examine the two cases involving Santos – *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* and *Munkara v Santos NA Barossa Pty Ltd* – decided by the Federal Court, Australia. Second, I examine the *Teal Cedar Products Ltd v Rainforest Flying Squad*, decided by the Supreme Court of British Columbia. I

read these two case studies as opportunities that enable settler courts to adopt distinctive interpretative and self-critical lenses. The two case studies show that while juridical spaces indubitably embody late liberal power (Povinelli 2021) and settler-colonial violence and erasure, they are also sites of knowledge production. Thus, courts also offer the possibility of foregrounding many forms of knowledge and drawing on these plural knowledges to adjudicate the disputed issues in ways that do not further perpetuate ongoing colonial epistemic injustices. While settler courts are bodies of violence and contradiction, they can also emerge as spaces of self-awareness, epistemic solidarity, and strategic significance that can co-exist with colonial erasure. Even where juridical spaces appear as extensions of the colonial erasure, they can function as an epistemic refuge that provides a space for Indigenous knowledge forms and voices to be heard.

The case studies explored in this article illustrate the importance of Indigenous litigation, which contributes to the critique of settler-colonialism and assists in the progressive development of common law. Although juridical spaces offer a certain critical openness to a diversity of voices and knowledge forms, they also continue to perpetuate colonial violence, invariably pushing back against any formal recognition of Indigenous sovereignties. However, the indeterminacy and unpredictability of common law can always be harnessed to make incremental or substantial progress in creating spaces where plural sovereignties co-exist with state-centric Western sovereignties. Understanding these strategic advances requires careful consideration of the vocabulary used by claimants and courts and the avenues through which state power is confronted instead of a simple theorisation of sovereignty. The case studies used in the article unpack the multiplicity of factors to be noted in understanding sovereignties and the means through which they are articulated in juridical spaces.

2 Overview of the Concepts Used in the Case Analysis

This section introduces concepts that are used in the analysis of the two case studies. First, 'ancestral catastrophe' (Povinelli 2021) refers

to the instances of the past violence manifest in the present and the continual role of such violence influencing the ontological existence of the social space. Ancestral catastrophe broadly is a nod to the ongoing effects of colonialism and slavery, the brutal dispossession and violent extraction of human and more-than-human worlds that are both past and present. I use the term to refer to the impossibility of legal processes to understand the transcending nature of Indigenous claims in terms of time (for instance, dispossession from land at present or a specific instance of environmental harm), even though temporal specificity is necessary for the claim to be legible to the law. Moreover, as demonstrated through the case studies and broader Indigenous scholarship on Indigenous litigation, courts frequently fail to understand other temporalities that are not premised on linear, progressive notions of time.

Second, the idea of plural sovereignties is a recurring theme in this article. Whilst they are continually enacted through a seamless exchange between social, political, legal and epistemic realms, the conception of sovereignties is also essential for understanding how First Nations resist and live with extraction on their land. As Hawaiian scholar Goodyear-Kaʻōpua identifies, a 'constellation of factors', such as litigation, social movements, dispossession, the devastation of sacred sites, and radical pedagogies, is key to determining the material fate of sovereignty (2014). In this regard, plural sovereignty, or more fundamentally, Indigenous sovereignty, vastly differs from Western sovereignty. Australian Indigenous scholar Aileen Moreton-Robinson's comprehensive observation that sovereignty is 'embodied' and is derived from complex 'intersubstantiation of ancestral beings, humans and land', further suggests the diversity of cultural and spiritual existence that is necessary for shaping sovereignty (Moreton-Robinson 2020: 2)

While it is useful to understand the epistemological and ontological differences between Western and Indigenous sovereignties, examining how Indigenous sovereignties benefit from engaging with certain spaces of power, especially juridical power, has greater pedagogical use. There is neither certainty nor finality attached to plural sovereignties

articulated and negotiated within juridical spaces. Often, there is a looming question as to what becomes of the idea of plural sovereignties when laws and courts have a foremost obligation to uphold, or, at least not to antagonise, state sovereignty. Can plural sovereignties exist outside of juridical recognition? Are there specific legal interventions that uphold or propel plural/Indigenous sovereignties more effectively than others? Since Indigenous sovereignties most certainly exist even with active efforts to undermine and erase them, there are further questions one might ask as to how land, resources and Indigenous peoples who enter juridical spaces negotiate with and resist rigid forms of sovereignty (Vinyeta & Bacon 2024).

Third, bearing in mind the comparative nature of the arguments presented, there is a caveat concerning the analysis rendered here. Comparative work is a particularly difficult task, especially when there is little room to reasonably demonstrate a range of historic and contemporary experiences of socio-political and juridical overlap (Barakat 2017; Olwan 2015). However, what Olwan terms 'assumptive solidarities' (2015) is a useful analytical tool for understanding what late liberal, extractive economies such as Australia and Canada have in common, other than settler colonialism as a 'governing structure' (Wolfe 2006; Veracini 2015) and logic (Povinelli 2016). For functional reasons, this article relies on the definition of Indigenous sovereignty as advanced by Moreton Robinson, drawing from the idea that Indigenous sovereignties exist as a complex interface between ancestral beings, land and people (Moreton-Robinson 2007). The article also draws from the idea that Indigenous sovereignties are constantly redefined and renegotiated in order to move away from the reliance on state structures for their articulation (Barker & Battell-Lowman 2016; Lightfoot 2016). However, unlike Indigenous sovereignties defined in a plurinational context, such as Australian and Canada, the definition acknowledges the relations outside of resources governance, such as the 'ability to create and negotiate with the juridical orders' (Beckman et al. 2021: 5) and asserts the multiple land and spiritual relations sustained by the Indigenous ways of living (Davis 2006; Birch 2007).

Whilst many Indigenous scholars have always maintained that settler legal institutions are fundamentally inimical to Indigenous sovereignty (Watson 2012; McKenna 2019), others, especially Indigenous legal scholars, have also demonstrated the flexibility and changeability of common law structures and apparatus, thereby making law a strategic ally in the everyday fight towards Indigenous self-determination (Bradley & Yanyuwa Families. 2007; Borrows 2019; Morris 2021). This article engages with the tensions between two sovereignties. The comparison between the two case studies developed here provides critical insights into settler juridical spaces and the non-linearity of outcomes in Indigenous environmental litigation against extractive operations. Indigenous peoples' ongoing engagement with settler legal institutions is akin to Indigenous self-determination articulated in Indigenous-led resource governance — it mediates 'the metabolic relationships between nature and society and in doing serves to stabilize environmental and social regulation within a given regime of accumulation' (Perreault 2006: 151). Although courts continue to perpetuate forms of ongoing colonial violence, I argue that the cases discussed in this article are reflective of the growing number of judgments in both Australia and Canada, where there is a greater acknowledgement of the impact of colonialism on Indigenous peoples, which perhaps suggests a shift in judicial attitude towards Indigenous rights and environmental jurisprudence. Additionally, the contemporary challenges posed by a new class of environmental litigation – such as climate litigation and implicit sovereignty claims – before the courts in Australia and Canada are testing the remit of settler juridical spaces and creating opportunities for critical intervention.

Scholars have even refused to pin all the hopes on *sovereignty* as an accurate concept for alluding to Indigenous power and governance (Simpson 2020; Curley et al.. 2022). Forcing Indigenous sovereignty into certain theoretical moulds is not altogether different from certain forms of epistemic extraction. However, given that academic work happens in a fractured reality where one can fully grasp the implications and burdens borne by concepts but nonetheless must hang on to them for practical necessities, my analysis remains focused on plural

sovereignties. Tanganekald and Meintangk scholar/jurist Irene Watson questions the relentless exclusion of First Nations from every socio-political and legal space within settler colony when she asks, 'to what extent is our sovereign Aboriginal being accommodated by the nation state's sanctioned native-titled spaces?' (Watson 2012: 15). Watson poses an open-ended question when she asks if there is any 'settled or unsettled space' for Indigenous people to 'roam' (Watson 2012: 15). The metaphorical roaming suggests the possibilities (or lack thereof) of movement within the legal structures of the settler state. However, I argue that Indigenous people have been able to roam a little more within the judicial spaces than elsewhere in the body politic of settler states. This article argues that strategic engagement with juridical spaces can, over time, consolidate and propel existing Indigenous rights and make room for innovative articulation of Indigenous sovereignties.

3 A Brief Juridical Context for Indigenous Litigation in Australia and Canada

This section briefly introduces the diversity of legal cases and outcomes in Australia and Canada, which makes it necessary to examine judicial responses to ideas of plural sovereignties closely. As argued previously, plural sovereignties tend to be articulated in many forms. These may take the form of strategic negotiation with state structures or organised resistance to state sovereignty and extractivism. The varied nature of negotiation and resistance makes it difficult to eliminate the role of courts in shaping the nature, or assertions, of plural sovereignties in settler colonies. Wet'suwet'en Hereditary Chiefs' ongoing fight against the expansion of the Coastal Gas link or the Yanomami fighting gold mining in Amazon do not represent the whole range of 'legitimate' strategies adopted by First Nations around the world. Those who celebrate the resistance of the Chiefs must also remember that the Houses within Wet'suwet'en First Nation are divided in their opposition to extractivism and often find themselves resorting to judicial remedies as a means of reasserting their claims for self-determination (Simmons 2022). Sometimes, the fight for sovereignty

is for a right to a robust voice at the table rather than an ideological fight against extractivism. While the threat of epistemic and material erasure is real, one must always remember Kanien'kehaka (Mohawk) scholar and activist Taiaiake Alfred's caution – 'How do we create a political philosophy to guide our people that is neither derived from the Western model nor a simple reaction against it?' (1999: vi).

Broadly, plural sovereignties claimed and articulated in juridical spaces emphasise the diverse possibilities through which state sovereignty may be fractured, disrupted, and negotiated to accommodate other forms of sovereignties. The power to negotiate, either through strategic litigation or demands for greater legal power, is an important factor in determining the nature of sovereignty (Borrows 2005; O'Faircheallaigh 2015; Scholtz: 2006). Often, juridical spaces provide room for Indigenous voices – amplifying epistemic claims of Indigenous sovereignties – as shown in some of the prominent Indigenous rights litigation (such as *Mabo v State of Queensland (No. 2)*(hereinafter *Mabo*)[1]). For instance, *Mabo* was a watershed moment in Australian legal history. Although the hallmark of the case was the (rhetorical) rejection of the doctrine of *terra nullius* (Ritter 1996), the judgment was sympathetic to Indigenous relationships with the land and to the need for the law to be more accommodating of cultural differences. The legendary status of the decision and the substantial political overhaul of land rights that followed the decision may be considered one of the key progressive contributions of the Australian High Court that have been taken up in more recent cases, such as *Love and Thoms v Commonwealth of Australia* (hereinafter *Love and Thoms*).[2] *Love and Thoms* was an unexpected yet muted judicial recognition of Indigenous sovereignty by conceding that Indigenous connection to land and waterways surpass any geographical limits imposed by the state or citizenship (*Love and Thoms* para 411; see Arcioni 2023 and Wood 2021). The *Mabo* judgment was itself a product of social momentum building up from the 1963 Yolngu people's Yirrkala bark petition up to the Wave Hill walk-off (Kwaymullina 2016). Adjudication is a continuing process where institutions and individuals learn from the past and demands of the present (McIntyre 2021).

Similarly, Canadian courts have evolved from a rigidly conservative approach of deference to *de jure* sovereignty held by the Crown, to a more accommodating *de facto* sovereignty that recognises Indigenous legal orders and constitutionalisms (McNeil 2018; Slattery 2008). Some courts have even moved away from conservative engagement with either treaties or Aboriginal Title and categorically interrogated the violent colonial history that underpins the state sovereignty. From merely contesting and conceding the existence or otherwise of Aboriginal title (*Calder v British Columbia (AG)*), and the modes through which it can be established and taken away by the Crown (*Delgamuukw v British Columbia*, *Tsilhqot'in Nation v British Columbia)*, the Canadian courts have progressed to a more self-reflective and self-aware space as juridical institutions. In *R v Desautel* (hereinafter *Desautel*) and *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc* (hereinafter *Thomas*), the Supreme Court of Canada and the British Columbia Supreme Court showed a profound engagement with settler colonialism and its ongoing effects on the cultural and economic lives of Indigenous peoples. For instance, in *Desautel*, the Court had to answer whether the Lakes Tribe not living in Canada are Canadian citizens. Further, it had to answer whether such non-resident members of the Lake Tribe could exercise Aboriginal rights under s 35 of the Canadian constitution. In the decision, Rowe J observes that 'an interpretation that excludes Aboriginal peoples who were forced to move out of Canada would risk perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonisers' (*Desautel* para 33). The *Desautel* decision makes a distinct impression as the judgment provides a rich critique of courts and laws that fundamentally alienate the Aboriginal people. Similarly, further in the decision:

> Canadian courts have tended to employ rather tepid language in describing the inhumane treatment of Indigenous peoples by both church and government. One early understatement, repeated in *R v Sparrow* [1990] 1 SCR 1075 at 1103, simply says, 'We cannot recount with much pride the treatment accorded to the native people of this country' … The legacy of 150 years of systemic discrimination and attempted assimilation is bleak and intractable. It has resulted in

> cultural erosion and alienation, relentless intergenerational trauma, and socio-economic marginalization. While representing only five per cent of Canada's population, Indigenous people endure massively disproportionate rates of poverty, interpersonal violence and family breakdown, addiction and substance abuse, youth suicide, lower levels of education, and higher unemployment. Many reserves lack basic human needs such as decent housing and clean water to drink. And mostly as a cumulative result of the foregoing, Indigenous people are hugely overrepresented in both the child welfare and the criminal justice systems of this country. Given these tragic realities, I have no hesitation whatever in making incremental extensions of the common law that might advance some small redress for Indigenous peoples, including, of course, the plaintiffs in this case (*Desautel* paras 173–178).

In recent judgments, the denouncement of the colonial jurisprudence that diminished Indigenous claims and sovereignty is more likely within contemporary juridical spaces than formal recognition of plural sovereignties. Current forms of adjudication reveal heightened attention to the critique of state sovereignty and that alternative knowledge forms are admissible and relevant for judicial processes. Recent litigation concerning Indigenous land rights and cultural and environmental heritage, especially in Australia and Canada, has produced optimistic results in adjudication. All claims regarding the radical progressiveness of Australian courts must be mindful of the fact that their laudability is often relative, especially when seen in contrast to a body politic thriving on ongoing colonialism, white supremacy, and illusory national unities (Sengul 2022).

4 The Santos Litigation

Santos Limited is a notorious oil giant founded in 1954 for oil exploration in South Australia and Northern Territory. After several decades of unbridled profit accumulation and environmental catastrophe, Santos now has its operations in Indonesia, Malaysia and Papua New Guinea, amongst others (Santos 'Our Story'). While Santos is no different from BP, Woodside, Fortescue or any other energy corporations that constitute the infrastructures of extraction

and accumulation in Australia, some operations of Santos have attracted judicial attention. Two cases of heritage destruction and one case of misleading statements or deceptive conduct under consumer protection laws have recently been brought against Santos.[3] These cases scrutinise the largely obvious conduct of extractive industries — toxic destruction of biosphere and trespass on Indigenous relationalities (Povinelli 2021). My analysis focuses on the recent litigation brought by Tiwi islanders against Santos' proposed Barossa Project in the Northern Territory based on concerns about the destruction of cultural heritage. The outcome of this litigation provides an opportunity to understand what a successful litigation and a failed legal challenge against an extractive industry tell us about knowledge production in settler courts (Philippopoulos-Mihalopoulos 2018).

In September 2022, in *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* (hereinafter *Tipakalippa*), the Federal Court of Australia set aside the National Offshore Petroleum Safety and Environmental Management Authority's (NOPSEMA) decision to approve Santos' proposal concerning the Barossa project, a $5.2 billion offshore gas development project set to run between 2022 and 2025. The project is likely to emit 380 million tonnes of greenhouse gas pollution over its lifetime, which is approximately equivalent to 81 percent of Australia's total emissions in 2022 (Verstegen & Campbell 2023). The abatement options associated with the project are also exponentially high costing and risky (Verstegen & Campbell 2023: 4). The project also takes advantage of the inadequacies of NOPSEMA approval processes and the general lack of consultation with the Traditional Owners of the affected land and waterways, thereby making it incompatible with economic, social, environmental and climate goals (Ryan & Ogge 2024).

The Barossa Project had initially proposed to exploit an area of the Barossa Field, referred to as the 'Operational Area', located approximately 300 km north of Darwin and 138 km north of the Tiwi Islands. Under reg 10(1)(a) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations* 2009, NOPSEMA was required

to accept the Santos Drilling environmental plan ('Drilling EP') if it was 'reasonably satisfied that the environment plan meets the criteria set out in regulation 10A'. The Tiwi Islands are located in the Timor Sea, approximately 80 km north of Darwin, and comprise two main islands — Bathurst Island and Melville Island and several smaller islands. The traditional owners of the Tiwi Islands are comprised of eight clans, one of which is the Munupi clan. The applicant in this case, Dennis Murphy Tipakalippa, was the Elder, traditional owner and the senior law man of the Munupi clan. Mr Tipakalippa contended that the traditional owners and the Munupi clan were not consulted by Santos in relation to the Drilling EP (para 7). The primary argument in this claim relied upon reg 11A, which provided that in the course of preparing an environment plan, a *titleholder* must be consulted. Accordingly, the regulation meant each 'relevant person', would be a person 'whose functions, interests or activities may be affected by the activities to be carried out under the environment plan' (*Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations* 2009, reg 11). Mr Tipakalippa claimed that the Munupi clan, as well as other traditional owners of the Tiwi Islands, have *sea country* (traditional rights over the waterways) in the Timor Sea to the north of the Tiwi Islands, extending to and beyond the Operational Area. Their asserted rights to that sea country were based upon longstanding spiritual connections as well as traditional hunting and gathering activities in which they and their ancestors had engaged. In one of the public interviews concerning the case, senior Tiwi elder Pirrawayingi had observed 'Boundaries like in the sea – that's white fella rule. When they draw boundary in the sea, we're not interested in that because our dreaming, it goes everywhere. You can't measure that' (Cox 2023).[4] Some of the on-Country evidence included narration of the Dreamings important to Tiwi Islanders, such as the rainbow serpent Ampiji protecting sea country and showing itself as a warning if something is about to happen. Tiwi people claimed that Ampiji showed itself at Front Beach in Munupi country in 2018, thereby implying that Santos' action had a deep impact on the stories and messages arising from the land. They added: 'That's why we believe earthquakes start, because they're drilling the land. And when they're

drilling the land, they're drilling inside our body, because we are with the land. We are one'. (Cox 2023). The case was a typical example of ancestral catastrophe contested before courts, where the environmental harms and catastrophes from the past continue to manifest in and influence those in the present (Povinelli 2021).

The dispute in the case thus concerned the process of approval and consultation (or rather the failure to consult) and not the environmental risk associated with the project per se. Therefore, any normative opposition to the deep rooted extractivism that underlies Santos' projects and how the materiality of the project itself violates Indigenous sovereignty was not a legally relevant consideration at this point. The presiding judge is also a relevant factor in our understanding of the case. Justice Bromberg, known for his recognition of a common law duty of care to young people regarding climate impacts in *Sharma v Minister for the Environment (No.2)*, was the presiding judge. He, thus, was capable of perceptively listening to the claimants' novel legal arguments. My reading of the judgment shows that while several aspects of procedural justice are fulfilled or even amplified in parts, there remains a limitation in how the judgment attends to the claimants' arguments, tracing the roots of their current problems to the incomprehensibility of law and the inability of legal language to articulate Indigenous claims (Povinelli 2016).

The judgment in *Tipakalippa* rests on two simple propositions, namely that there was a methodological flaw in who was considered to be a 'relevant persons' and that there was also a 'failure to consider' the diverse sea country evidence and other cultural material put forward by the Tiwi islanders in their role as relevant persons (paras 125 and 173). First, Santos tried to extricate itself from the 'relevant persons' criteria by arguing that the individuals identified in the Drilling EP were an insignificant category that had no economic connection to the usage of seas, fisheries, etc. The judgment identifies that the category of 'relevant persons' is not superficial but is a deeper one, which recognises values and interests held in lands and waters that go beyond commercial interests. The judicial deliberation of who is a 'relevant person' provided

an avenue for articulating the expanse of the sea country (the traditional waterways over which the Munupi clan and the Tiwi Islanders have rights and interests). However, the limited nature of claim which was focused on consultation rights also highlighted the patent inability of legal framework to understand or give effect to those rights that have a fundamental ability to challenge extraction. The body of the judgment grappling with who is a 'relevant person' (paras 119–145) provides a glimpse of a settler court wrestling with the limitations of liberal forms of recognition (Coulthard 2014; Povinelli 2002) but also with the constitution of 'relevance', especially since the contradiction and absurdity of relevance that seeks to erase Indigenous knowledge, relations and memory of a place is so palpable.

The Court also dealt with the argument that the regulator 'failed to consider' Indigenous voices through their claims of historical and cultural presence, which concerned the application of 'sea country material' (*Tipakalippa* para 189). The 'sea country material' was a body of evidence that demonstrated the functions, interests or activities of the traditional owners of the Tiwi Islands that may be affected by the extractive activity (*Tipakalippa* paras 190–91). At various points, the Santos' strategy was to dismiss the evidence of traditional owners as a 'pass time' (Chaseling 2023), suggesting that traditional owners frequently interrupt economically significant activities on grounds that it disrupts their cultural and spiritual rights. In *Tipakalippa*, once more, Santos objected to the claim that the regulator must consider the sea country materials while deciding whether the projects must be granted permission, on the ground that it was irrelevant. Unwittingly, in opposing the sea country material because of the difficulty in reflecting Tiwi Islanders' dreamtime stories on modern maps, Santos reveals the territory-defying expanse of the sea country between the north of the Northern Territory and the north of the Western Australian coast (*Tipakalippa* paras 199–210). Nevertheless, the Court found NOPSEMA's omission and Santos' reluctance to engage with the sea country material was sufficient reason to conclude that there has been inadequate consultation.

The *Tipakalippa* judgment is powerful because it demonstrates the radical possibility inherent in foregrounding Indigenous voices and perspectives within the reasoning of administrative law. The anticipation built around the case and arguably the David and Goliath tale of taking on an extractive industry adds to the perception and import of the case. Justice Bromberg's reassuring and methodical reasoning slowly sets back some of the hostility of settler bureaucracy that exists to exclude the First Nations. In understanding traditional knowledge expansively and agreeing with the claimants that traditional knowledge may be manifest in diverse forms, such as fishing, hunting, maintenance of maritime cultures and heritage through rituals and stories, Bromberg J opinion implies that relevance and probative value of Indigenous values must be provided broader judicial treatment (*Tipakalippa* paras 205–218, para 222). He disregards Santos' claim that something is not a legally relevant interest or activity (such as those carried out by the traditional owners) because it is carried out by a group of people by pointing out that extractive activities are carried out by groups or ventures (Tipakalippa para 222). However, a key question remains: can the figure of a competent judge who understands the interactions between the coloniality (both material and epistemic) and plural sovereignties alone alter the settler juridical spaces? Even if a judge takes on a comprehensive knowledge creation role within a limited juridical space, the limitations of the procedure and the remit of the case often hinder the flourishing of sovereignties. The second Santos litigation that followed *Tipakalippa* leaves one less hopeful.

In December 2023, NOPSEMA accepted the revised drilling plan prepared by Santos, following the *Tipakalippa* ruling. Santos asserted that this plan was based on 'further extensive consultation with Tiwi Island people and other relevant persons consistent with the applicable regulations' (Australian Associated Press 2023). Simon Munkara, a Tiwi Islander, challenged this revised plan and NOPSEMA's decision to accept the same, resulting in *Munkara v Santos NA Barossa Pty Ltd (No.3)* (hereinafter *Munkara*). Whilst the issues here were similar to the claims in *Tipakalippa*, the claims in *Munkara* focused on cultural heritage protection. Here, the applicants (Simon Munkara along with

members of Munupi and Malawu clan as second and third applicants) alleged that the proposed plan for construction of the pipelines for the Barossa Project resulted in 'the occurrence of a significant new environmental impact of risk' under regulation 17(6) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations* 2009 (Cth).

The applicants alleged that there were several significant cultural sites around the pipeline route. They contended that the spiritual connection that the Jikilaruwu, Munupi and Malawu people have to the area of sea country through which the pipeline will pass was significant and that activities of Santos may result in many forms of damage to those relationships, thereby alluding to the ancestral catastrophes that do not necessarily have legal recourse. Again, in the claims, we are taken back to the stories of the travel of an ancestral being, a rainbow serpent known as Ampiji. It may be noted that the dreamtime stories are from a period when the geomorphology of the planet was vastly different from how we know it today, especially regarding the sea levels and the extent of land that was inhabited. The applicants alleged that Ampiji is the caretaker of the sea and that the pipeline will not only disturb her in her travels but cause her to create calamities that may harm Tiwi people. In addition, the applicants also stated that the song line of significance to the Jikilaruwu people about a shape-shifting ancestral being known as Jirakupai, or the Crocodile Man would be in the vicinity of the pipeline, thereby the proposed activities could be said to have disrupted and even angered the Crocodile Man (*Munkara* paras 15–22). It must be noted that the claims here are drawn from a different time, knowledge and spiritual world that coexists with colonial Australia.

The judge, Justice Natalie Charlesworth, had initially granted an injunction against all Santos' activities until the conclusion of the trial. However, in the trial, the Indigenous evidence received a hostile judicial treatment and the analysis of all of the complexities and controversies arising from the case are beyond the remit of this article.[5] Justice Charlesworth found the evidence contradictory and

inconsistent, especially because there was a significant divergence amongst the Tiwi Islander witnesses and a lack of integrity in how the cultural mapping exercise was carried out (*Munkara* paras 1133, 1212). Primarily, Charlesworth J writes that the Court is not obliged to consider beliefs held by a single person merely because there was no contradicting evidence (*Munkara* paras 957–8). Charlesworth J also brushes aside some of the statements regarding the sea country, Ampiji and Crocodile Man as 'potentially adapted beliefs', where claimants may have developed them because of the interactions with the non-Indigenous experts and, more prominently, the cultural mapping exercise (*Munkara* paras 1016–27). The decision also reads that the existence of the belief in itself does not make it a belief held by a group. Further, the Court endorses the claim that a large number of people hold certain belief does not make it the cultural feature of an area or that it can be considered as a 'new risk' (*Munkara* para 1312).[6] While Santos had strategically discredited the Tiwi Islander witnesses throughout the trial for narrating their evidence in different ways (Chaseling 2023), the Court privileges the absence of oral evidence and misplaced interpretative interference by the applicants' legal team and its non-Indigenous experts over the gravity of Indigenous voice (*Munkara* para 1025). While the lawyers for the applicants tried to point out that the rift in the community was partly because some community members were working for Santos on the current project, that contention received less attention than the so-called disagreement between Indigenous witnesses regarding the existence of the cultural heritage (Chaseling 2023).

The *Munkara* case unpacks a number of key issues. First, it reveals settler juridical spaces as fundamentally adverse to non-Western knowledge forms. It also discloses legal knowledge production as a closed space that refuses to adapt, evolve or listen. For instance, there is a clear contrast existing between the treatment of *Tippakalippa* and *Munkara*, where the former decision entails openness to Indigenous forms of knowledge even where judges may not fully comprehend its significance. Whereas in *Munkara*, the unknowability itself becomes a ground for disregarding Indigenous voices and claims. Second, the

Munkara decision also reflects what Povinelli terms 'epistemological failure manifesting as environmental catastrophe' (2022: 107). First Nations have also adapted means and modes of presenting their stories and relationalities as *evidence* before settler courts. The 'adapting' was necessary to gain the minimum rights and recognition settler juridical spaces allowed them to possess. To be punished again for this adaptation while continually witnessing their cultural, material and epistemic loss is one of the many harms the law fails to comprehend. These precise failures of legal imagination to recognise other forms of knowledge and cultural lives continue to add to the ancestral catastrophes, otherwise manifest in dispossession and environmental destruction.

5 Teal Cedar Litigation

The Fairy Creek watershed in Vancouver has been in the news for its continuing logging operations that target old-growth forests (Cox 2021a). Fairy Creek watershed stands on the Pacheedaht First Nation territory and in the neighbouring territory of the Ditidaht First Nation. First Nations in British Columbia have opposed various extractive activities, from hydroelectric development to logging and unconventional oil and gas production (such as shale formations, tar sands and coal seams). Logging is one of the prominent avenues for the removal and destruction of resources and relations embedded in those resources (Clayoquot Sound Scientific Panel 1994). While Indigenous resistance to clearcutting logging and clearing of old-growth forests in British Columbia dates back to the early 1990s (Tindall et al. 2013), Pacheedaht First Nation had had a better experience making a case for resource stewardship in Fairy Creek and acquiring deferral from the provincial government and evidence of it may be found in the fact that in 2017, the government of British Columbia signed a forest consultation and revenue sharing agreement that gives the Pacheedaht a percentage of stumpage revenues from all timber on its territory cut by tenure holders (Cox 2021b). However, the logging corporations still had plans to log in areas outside of the deferral region and continued building infrastructure, such as logging roads, through the Fairy Creek

old-growth forest. These activities attracted resistance from First Nations and non-Indigenous environmental activists, who joined hands in July 2021 to launch the Fairy Creek blockade preventing the logging activities.

In October 2021, a petition for injunction filed by Teal Cedar Corporation against the protestors in Fairy Creek was heard by the British Columbia Supreme Court. In *Teal Cedar Products Ltd v Rainforest Flying Squad* (hereinafter *Teal Cedar*), the petitioner had asked for an extension of the existing injunction by another twelve months on the grounds that the logging company was likely to suffer significant economic loss from the continuing blockade and obstruction. Fairy Creek in southern Vancouver was not only an ecologically sensitive area but a place of cultural significance to Pacheedaht, Ditidaht and Huu-ay-aht First Nations. While some degree of self-determination over traditional territories was handed over to the community after the signing of the Hišuk ma c̓awak Declaration in June 2021, the larger opposition to logging or the persistent Royal Canadian Mounted Police (RCMP) violence that followed logging operations around had not stopped. Fairy Creek was not a quintessential case that could have been litigated in courts, especially since there were no treaty rights violations, and logging usually fell in the province of legislative decisions prioritising public and economic interests.

Nonetheless, the Supreme Court's treatment of this application for extension of injunction provides an ideal opportunity to suggest how courts may overcome some of the structural constraints that prevent juridical spaces from fully recognising Indigenous sovereignty. Canadian courts have conventionally responded adversely to First Nations claimants seeking injunctions against extractive activities because it impaired economic opportunities (Pasternak & Ceric 2023). The judgment contained some startlingly original reflections on courts' responsibility in countenancing settler violence. Without breaching the limits of the judicial powers in an injunction application, Justice Douglas Thompson carefully considered the matter of public interest alongside the conventional balancing exercise. While excessive RCMP

brutality against protestors was well recorded, the claimants argued that the Court would suffer reputational damage should it take into account the social context around the issue. Thompson J observed that there would be 'dangers of depreciation of the legitimacy and effectiveness of the Court when a dispute between citizens on one side and the government and a logging company on the other is converted into a dispute between citizens and the Court' (*Teal Cedar* paras 43–44). Since the defendants urged the Court to consider public interest while renewing the injunction, despite its reservation, the Court proceeded to contextualise the Fairy Creek blockade and the Indigenous resistance that is at the heart of the matter.

In an important reflection, Thompson J suggested that the range of relevant circumstances is wide. The public interest may vest in maintaining the reputation of the Court as a neutral arbiter as much as it is in 'standing against interference with private rights by unilateral and unlawful actions' (*Teal Cedar* para 44). None of these reservations necessarily implied that the analysis in the adjudication must end with an exhaustive list of public interests. Following this, the judgment proceeded to consider the high-handedness of the police, which was more glaring than the violent acts of the protestors. One of the allegations from the defendants included the fact that the police in attendance never wore any identification or regiment number that was likely to hold them accountable. Instead, only a 'thin blue line' was present on the uniforms, reminding the protestors, especially Indigenous protestors, of settler colonial violence and the genocidal history of the RCMP—as manifestations of another of form of ancestral catastrophe, where contemporary carceral state continues and upholds the historic violence against Indigenous peoples and land. This element became a pivotal point for deciding whether a fresh injunction must be issued. To quote Thompson J:

> I addressed the 'thin blue line' issue informally at a judicial management conference. I suggested that the RCMP might consider asking their members to remove the patch in these circumstances where they are enforcing a court order. The response to my suggestion came in the RCMP's written argument: matters relating to RCMP attire are for the

> Commissioner of the RCMP, and the 'thin blue line' patch is a labour relations matter in which this Court should not become involved. Of course, I have no jurisdiction or inclination to make orders about RCMP attire or otherwise become involved in its labour relations. But the RCMP has made a choice not to enforce their direction against the wearing of a symbol that it knows is divisive. It must realise that in circumstances where RCMP members are enforcing the Court's order, the wearing of this symbol reflects on the Court. I intend to do no more than to consider the effect of this regrettable RCMP decision on the Court's reputation, which is a relevant public interest consideration on this application (*Teal Cedar* para 86).

In understanding the 'reputation of the court' broadly, the Court opened newer ways of comprehending a legal issue where Indigenous sovereignty is always unstated but utterly conspicuous. In this instance, Thompson J conceded the presence of multiple contesting sovereignties as more than a legal dispute. The 'reputation of the court' appears as a nod to the limits of a court but also the fact that the reputation of the court is always in jeopardy as long as juridical spaces are unreceptive to Indigenous claims, knowledge forms and temporalities that blend ancestral catastrophes with present dissonance.

The *Teal Cedar* decision is immensely useful in how a settler court recognises the limits of adjudication but also reimagines the juridical space to respond to past and present injustices that are not confined to the issues raised within adjudication. In his final decision rejecting the injunction application, after acknowledging that there is significant harm to Teal Cedar Corporation, Thompson J wrote:

> On the other hand, methods of enforcement of the Court's order have led to serious and substantial infringement of civil liberties, including impairment of the freedom of the press to a marked degree. And, enforcement has been carried out by police officers rendered anonymous to the protesters, many of those police officers wearing 'thin blue line' badges. All of this has been done in the name of enforcing this Court's order, adding to the already substantial risk to the Court's reputation whenever an injunction pulls the Court into this type of dispute between citizens and the government (*Teal Cedar* para 80).

The outcome here is an extraordinary contrast to previous injunction decisions from Canadian courts that fervently adhered to the balance of convenience rule. Invariably, the balance of convenience has been a principle that weighs economic benefits over Indigenous sovereignty (Pasternak & Ceric 2023; Kruse & Robinson 2019). The Fairy Creek blockade will continue to morph itself into one of the most intense and complex environmental struggles of our times. In its long journey, the decision of the Supreme Court will be an invaluable intervention against the overreach of settler states as it dismantles the previous understandings of what adjudication can achieve. When judges reflect on what is suitable, what is possible, and what implications 'relevant factors' and 'factors that cannot be reasonably considered' have for adjudication, it reflects the positionality of the court. Sometimes, even the colonial apparatuses can listen and be allies. Hence, the deliberation and careful reasoning of Thompson J evokes greater hopefulness in how a court can still accommodate Indigenous voices and direct or indirect claims of plural sovereignties, resistance to past and present colonial violence, amongst others, despite the juridical spaces in Canada continuing to remain a hostile, unknowable territory. The openness of courts makes them what I call epistemic refuges, as they provide space for claims, knowledge forms and voices erased elsewhere but may continue to grow here and offer stronger resistance in the future.

6 Conclusion

In what form will plural sovereignties be cognisable if most socio-economic and political spaces are unreceptive to non-state sovereignties? This is a question academic scholarship should always confront. In traditional juridical spaces, through some of the very distinct cases pursued by Indigenous peoples, there is informal juridical recognition and formal epistemic openness to Indigenous voices and sovereignties. What a court can and cannot do might be a better blessing and less of a limitation when one notes that Indigenous sovereignty must fight only epistemic battles in courts as opposed to many more outside juridical spaces. While reconciliation has failed noticeably in

Australia and Canada, some of the settler colonial courts distinguish themselves by treating Indigenous voices as forms of knowledge that tell us something more about the social and environmental contexts we live in and not merely forces that exist to challenge sanctioned state sovereignty. From the recent string of cases, including those discussed here, there is a willingness to understand and accommodate claims about past and continuing injustices. Failures, such as *Munkara*, tell us that the judicial path to justice is slow and contingent on the judge as a critical legal actor to remedy the inadequacies of epistemic justice. Nevertheless, courts continue to be spaces of epistemic refuge and epistemic allies where legal processes and outcomes may create opportunities to accommodate plural sovereignties in the future. Any new understanding of sovereignty will now have to pay attention to why Indigenous peoples continue to engage with legal spaces and institutions despite the widespread reluctance to confront settler coloniality. Those courts that do confront coloniality in some forms are of strategic importance and must be engaged further in academic scholarship.

Endnotes

1. *Mabo v Queensland (No 2)* [1992] HCA 23 is a key decision in Australian Indigenous rights jurisprudence, where the High Court, amongst other things, overturned the doctrine of Terra Nullius.
2. *Love and Thoms v Commonwealth of Australia* [2020] HCA 3. In *Love and Thoms*, the High Court was considering whether aliens under s 51(xix) of the Australian Constitution (1901) (Cth) was applicable to Indigenous Australians. A majority of the bench held that Aboriginal and Torres Strait Islanders could not be considered aliens, irrespective of whether they were born in Australia or held its citizenship, and that the Commonwealth lacked constitutional powers to deport them.
3. *Australasian Centre for Corporate Responsibility v Santos* (pending). File number: NSD858/2021
4. One of the highlights of Charlesworth J's adverse findings against the Tiwi Islanders was the comments in the decision pertaining to the conduct of Environmental Defenders Office (EDO) lawyers and experts who presented on behalf of EDO. Charlesworth J criticised the EDO for having engaged in 'a form of subtle witness coaching' and that there was an inference that 'Indigenous instructions have been distorted and manipulated'. Subsequently, EDO has nominated eminent senior counsel and barrister, Dr Tony McAvoy SC as external reviewer for conduct of EDO. In the meanwhile, Santos has pursued an application for third party cost orders against the EDO and has also made another application for subpoenas against EDO and other environmental groups involved in the case. Recently, the Federal Court sided with the Santos again and decided that EDO was to hand over internal documents, including its correspondence with the Tiwi Islander plaintiffs and four other environmental groups. Invariably, the Munkara case and its aftermath will continue to have severe detrimental effects not only to Indigenous sovereignty but also to public interest and environmental litigation in Australia.
5. For comparison, Justice Mortimer in the Federal Court decision in *Dempsey v State of Queensland* [2014] FCA 528 navigated the difficult task of an inconsistent Indigenous witness claiming membership of a native title group without diminishing her evidence or dismissing the significance of her claim.

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