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Land Acknowledgment, Scripting and Julius Caesar

Jeffery G. Hewitt*

*The fault, dear Brutus, is not in our stars but in ourselves.*¹

– Cassius

I. INTRODUCTION

This essay follows my presentation at Osgoode’s 21st Constitutional Cases Conference on the growing practice of land acknowledgments, honour and the legacy of now retired Chief Justice McLachlin. During the presentation, I examined some of the Supreme Court of Canada’s constitutional cases arising out of section 35 of the *Constitution Act, 1982*, along with the practice of land acknowledgments in academic spaces. What follows is an essay critically examining scripted land acknowledgments mainly from post-secondary institutions in Canada. Are land acknowledgments contributing to Canada’s national reconciliation project as so often purported? I consider whether the practice is becoming too comfortable rather than challenging colonization and oppression, which should be uncomfortable. Throughout I offer some reflections on how to evolve the growing practice of land acknowledgments to “version 2.0”.

Though not in my original talk — because the experience had not happened yet — I also draw traces between the practice of land acknowledgments and some of the themes from William Shakespeare’s *The Tragedy of Julius Caesar*, which I saw performed by the acting

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¹ W. Shakespeare, *The Tragedy of Julius Caesar*, Act 1, Scene 2, Lines 231-232 [hereinafter “*Julius Caesar*”].

company at Ontario's Stratford Festival in the summer of 2018. One might wonder, why would I include discussions about a centuries-old tragedy?

Parallel play is when children who are playing on the same playground use or share the same toys, while seeking to accomplish their own goals, yet remain unaffected by each other.² In other words, upon closer inspection, when children might appear to be playing together, they are in fact playing separately — parallel to each other — while sharing the same space and accessing the same resources.³

It has been my experience that sometimes, for adults, art achieves a similar set of circumstances to parallel play. Art allows us opportunity to accomplish something together without being directly threatened. We might approach art as a means to have more difficult discussions, such as one's contribution to ongoing colonization, without quickly devolving into feeling personally maligned because the art is the object of our discussion — not the self.⁴ Additionally, Shakespeare was producing his artistic works in the 16th century as the colonization practices of several Crowns of Europe were thriving in what is now called North and South America. Shakespeare's work, such as *Julius Caesar*, offers potential insight into the thinking of the time, and the relevance of the play's themes today. The play presents the possibility of critiquing the practice of land acknowledgments without readers feeling personally threatened, as Brutus and Cassius were with Caesar's deep reservoir of power.

It also seems necessary to specifically state that in spite of the critique that follows, overall I view the practice of land acknowledgments as good, necessary and important. I hope it not only continues but expands into spaces beyond academic institutions — such as in the boardrooms and annual shareholders' meetings of natural resource companies, given their direct benefit from ongoing assertions of colonial authority.

² For a primer on parallel play among children, see Mildred B. Parten, "Social participation among pre-school children" (1932) 27:3 *The Journal of Abnormal and Social Psychology* 243. For a more in-depth discussion see Roger Bakeman & John R. Brownlee, "The strategic use of parallel play: A sequential analysis" (1980) 51:3 *Child Development* 873; Lisa Blomgren Bingham & Rosemary O'Leary, "Conclusion: Parallel play, not collaboration: Missing questions, missing connections" (2006) 66 *Public Administration Review* 161.

³ There is more to examine in relation to parallel play and colonization, such as the imagery from the two-row wampum belt of two rivers running in parallel while sharing the same lands and resources, but such considerations are the subject of a future essay.

⁴ For more, see Ruth Buchanan & Jeffery Hewitt, "Treaty Canoe" (forthcoming, 2018), in which sometimes difficult discussions relating to colonization and its ongoing impacts may be facilitated through the examination of an art exhibit. For a shorter online format, see <<https://lawarts.cult.osgoode.yorku.ca/category/ruth-buchanan/>>.

II. SHAKESPEARE, WRITING AND PERFORMING

For me, writing takes time. Earlier this summer, while in the process of writing this essay, I attended the Stratford Festival's production of William Shakespeare's *Julius Caesar*.⁵ Immediately prior to the start of the performance, the Canadian national anthem was played. There was no usual preceding announcement, asking everyone to stand. The anthem simply began. Within seconds, almost the entire audience stood and sang along. After the crowd sat down from what felt to me like an impromptu display of nationalism — which I resisted — came a land acknowledgment. Over the sound system a voice read:

We acknowledge that the Stratford Festival is located on the traditional lands of the Huron-Wendat, the Haudenosaunee, and the Anishinaabe.

The territory was also the subject of the Dish With One Spoon Wampum Belt Covenant, an agreement between the Iroquois Confederacy and the Ojibwe and allied nations to peaceably share and care for the resources around the Great Lakes.⁶

What followed was a live performance about the dangers of mob (or herd) mentality — that is, how easily a crowd can be directed with or without the promise of reward. I wonder if part of the endurance of Shakespeare is that he understood how slowly societies evolve. Herd mentality feels like it defines both Julius Caesar's time and our current time with a deeply divided political spectrum and media discourse. For more on this discourse read the comments section of any Canadian online news article that features Indigenous Peoples.

In Act 1, Scene 3, minutes after the opening of the play, Cassius speaks plainly and tells us something insightful about Caesar, who is much loved by the people but loathed by the Senate: "I know he would not be a wolf, but that he [Caesar] sees the Romans are but sheep."⁷ In that moment, my earlier resistance to being compelled to stand in the theatre for the unannounced national anthem gave way to the realization of what may well have been a terrific gambit by Stratford's production, exemplifying how little it takes to manipulate a crowd. It seemed to goad

⁵ *Id.*, as performed at the Stratford Festival, July 31 – October 7, 2018, Stratford, Ontario.

⁶ The Stratford Festival's land acknowledgment is found in printed form in the play's programme for *Julius Caesar*, online: <[https://cdscloud.stratfordfestival.ca/uploadedFiles/Whats_On/Plays_and_Events/Plays/2018/The-Tempest\(1\)/About_The_Play/JUL_0146_-_2018_Accessibility_House_Program_FINAL-s_762219.pdf](https://cdscloud.stratfordfestival.ca/uploadedFiles/Whats_On/Plays_and_Events/Plays/2018/The-Tempest(1)/About_The_Play/JUL_0146_-_2018_Accessibility_House_Program_FINAL-s_762219.pdf)>, at 3.

⁷ *Julius Caesar*, Act 1, Scene 3, Lines 531-533.

us: “Do you even know that you are sheep? Look how we made you stand, sing and sit.” The national anthem and land acknowledgment were precursors to the funeral speeches of Brutus and Antony manipulating the crowd into wildly opposing views of whether Caesar’s death was justified and we (the audience) were the sheep — sing for Canada and sit mute for Indigenous Peoples.

Shakespeare uses references to the common herd and flock, throughout many of his works. His references to sheep as metaphor in *Julius Caesar* are an obvious substitute for human behaviour related to sheep’s predictability, proliferation and tendency to stay close together, and herd mentality.⁸ Perhaps sheep also serve as metaphor for colonial proliferation?

III. LAND ACKNOWLEDGMENTS AND INTENTIONS: WHY AND WHAT?

As Chelsea Vowel points out, there are those who propose land acknowledgments as a means of honouring Indigenous traditional protocols. Vowel disagrees that such a practice is possible with the reading of a script in comparison to the depth of Indigenous protocols. She notes “it is dangerous to even suggest that territorial acknowledgments alone satisfy protocol in any way unless concrete actions accompany the spoken words.”⁹ In other words, the practice of land acknowledgment does not necessarily equate to action. Vowel further states that for some groups, including the Canadian Association of University Teachers (“CAUT”) and KAIROS, land acknowledgments are developed and performed as a contribution to the national reconciliation project.¹⁰ Both organizations set out that land acknowledgments as well as action are necessary elements of reconciliation. CAUT produced a “Guide to Acknowledging First Peoples and Traditional Territory”, which among other things warns against using the Guide as a script, and states:

⁸ For more on the use of sheep and other herd animals in the context of asserting property rights, claiming space and colonization, see: Allan Greer, “Commons and Enclosure in the Colonization of North America” (2012) 117:2 *American Historical Review* 365.

⁹ Chelsea Vowel, “Beyond Territorial acknowledgments”, posted September 23, 2016, online: <http://apihtawikosisan.com/2016/09/beyond-territorial-acknowledgments/>.

¹⁰ *Id.*

Acknowledging territory shows recognition of and respect for Aboriginal Peoples. It is recognition of their presence both in the past and the present. Recognition and respect are essential elements of establishing healthy, reciprocal relations. These relationships are key to reconciliation.¹¹

KAIROS, which is an ecumenical program administered by the United Church of Canada, generated a document entitled “Territorial Acknowledgment as an act of reconciliation”, part of which states:

a territorial acknowledgment can be a meaningful and important practice ... is important as part of our churches living into right relations with Indigenous peoples ... [i]t is a way to counteract the ideologies operating in the Doctrine of Discovery by naming that the land was not empty when Europeans first arrived on Turtle Island.¹²

While most universities have developed land acknowledgments and placed them on their websites, there are no links to supporting documents about a university-wide plan to decolonize education, for example. There are no links to universities’ action plans on developing and sustaining those “healthy, reciprocal relations” CAUT notes as a vital element of reconciliation. Though KAIROS expressly sets out the importance of it, there is no direction toward how the universities are counteracting the doctrine of discovery.¹³ In other words, it seems the development, posting and reading of a land acknowledgment is sufficient as a contribution to reconciliation. Is it?

The overwhelming majority of land acknowledgments are scripted. Typically, an organizer or host of a meeting will read from an institutional script approved by way of committee. Almost always the scripts read like a history in land occupation. When I listen to acknowledgments being read, there is often an ease that comes from using a script. Yet, Frantz Fanon wrote, “the settler knows perfectly well

¹¹ CAUT, “Guide to Acknowledging First Peoples & Territory”, online: <<https://www.caut.ca/content/guide-acknowledging-first-peoples-traditional-territory>>.

¹² KAIROS’ Territorial Acknowledgment as an act of reconciliation document is located here: <<https://www.kairoscanada.org/territorial-acknowledgment>> [hereinafter “KAIROS”].

¹³ In Canada’s legal system the doctrine of discovery is more often referred to as the doctrine of *terra nullius* and essentially holds that the lands of what is now called North America were unoccupied and therefore could be claimed by whomever “discovered” them first. This doctrine ignores the prior and continued occupancy and existence of Indigenous Peoples in North America. For more on the continued acceptance of *terra nullius* in Canadian courts, see John Borrows, “The Durability of Terra Nullius: Tsilhqot’in Nation v British Columbia” (2015) 48 U.B.C.L. Rev. 701.

that no phraseology can be a substitute for reality.”¹⁴ In using both the national anthem and land acknowledgment, Stratford’s production demonstrated herd mentality from the outset. The audience knew to stand and sing the anthem, as well as to sit and listen to the land acknowledgment. Aside from possible improvement to our collective standing and sitting skills, has anything changed? After listening to land acknowledgments in various spaces, I am often left wondering what is trying to be accomplished. Are acknowledgments serving as a “substitute for reality” or is there something more at play?

1. Scripting Out of (Dis)comfort

It appears to me that one of the purposes of scripting a land acknowledgment is avoidance. Rather than worry about risking offence to a listener with one’s own expression, it is safer to read carefully manicured words. That Indigenous faculty and students are often engaged in the script development process is a positive sign and essential, except when they are later used as a defence to criticism — particularly by an Indigenous critic. This has the effect of avoiding responsibility by using Indigenous Peoples as a shield against other Indigenous Peoples. This is a tactic of colonial power. Using Indigenous Peoples as a vehicle to avoid responsibility does not contribute to decolonizing or righting the relationship. Maybe this reflex is located in avoiding action because if anything is to be done about the ongoing impacts of colonization, the answer, as Fanon points out, is not found in words. It is located in action.

I am not aware of any Indigenous culture where reading a pre-packaged script written in English or French¹⁵ to acknowledge land is an Indigenous practice or protocol.¹⁶ This matters because there is a colonial economy in disrupting Indigenous languages compelling many of us — me included — to have to (re)learn our language(s).¹⁷ Howard Adams stated that “[t]he impact of the colonial domination on the Indigenous

¹⁴ Frantz Fanon, Jean-Paul Sartre & Constance Farrington, *The Wretched of the Earth*, Vol. 36 (New York: Grove Press, 1963), at 45.

¹⁵ Of note, on their website, Lakehead University has translated their written land acknowledgments (for both Thunder Bay and Orillia campuses) into Anishinaabemowin.

¹⁶ On this point I may well be corrected because I am not an expert in all Indigenous cultures nor do I believe in a pan-Indigenous culture. Should I be corrected, I will listen to understand and not point to another Indigenous person as responsible for my education or as a means of defending my statement and deflecting my responsibilities to learn.

¹⁷ For more on the colonial impacts on Indigenous languages, see Teresa L. McCarty, “Revitalising Indigenous Languages in Homogenising Times” (2003) 39:2 *Comparative Education* 147.

society is total. It exploits the oppressed people, destroying their national society and replacing Indigenous cultures.”¹⁸ By way of example, the *Gradual Civilization Act*,¹⁹ sought to enfranchise “Indians” into the Canadian mainstream and sever connections to treaties, families, lands and communities in exchange for money and 50 acres of land.

Eliminating Indigenous Peoples through “integration” or bringing Indigenous Peoples into the mainstream was among the main purposes of the *Gradual Civilization Act*. The Act is rooted in racism. The legislation held an underpinning view that the cultures and worldviews of Indigenous Peoples were inferior to the English and French, which is why the Act, required all “Indian” males, to learn to read and write in either English or French.²⁰ The strangling of Indigenous languages was part of “the colonial domination on the Indigenous society”.²¹ Why do institutional representatives then, read land acknowledgments in English or French without having or trying to learn the language(s) of the Indigenous Peoples on whose land the schools are located? That is an action one might take.

In addition to dodging critique, scripting also appears to be a means of avoiding potential conflict in classrooms or at conferences and events of post-secondary institutions. Meanwhile, colonization itself is the ultimate conflict. Across the world, colonialism “locked the original inhabitants and the newcomers into the most complex and traumatic relationships in human history.”²² This traumatic relationship is not only something we all share, Indigenous and non-Indigenous (and those of us who are both), but it is complicated. It will not be resolved by a programmed script. We need to talk with each other on a deeper level — not be read to, as though listening to an actor recite lines. We need to start from the reality that non-Indigenous people have been doing all of the talking but little of the listening and learning in the stride toward “reconciliation”. Land acknowledgments devoid of clear, strongly worded statements challenging colonization and *terra nullius* are about talk, not action.

¹⁸ H. Adams, *Tortured People: The Politics of Colonization* (Penticton: Theytus Books Inc., 1999), at 6 [hereinafter “Adams”].

¹⁹ *An Act to Encourage the Gradual Civilization of Indian Tribes in this Province, and to Amend the Laws Relating to Indians*, 3rd Sess., 5th Parl., 1857. In the title of the Act, “this Province” referred to Upper Canada (now Ontario). Canada would not become a confederation for another decade. After Confederation, however, the *Gradual Civilization Act* became the precursor to the *Indian Act*, R.S.C. 1985, c. I-5, which continues to be federal law in 2018.

²⁰ *Id.* Also of note, the Act did not offer Indigenous women money and 50 acres of land if they learned to read and write in either English or French — only “Indian” men.

²¹ Adams, *supra*, note 18.

²² A. Loomba, *Colonialism/Postcolonialism* (New York: Routledge 1998), at 106.

Drafting a script by committee and reading it at the commencement of a meeting might be a place to start, but it is the follow-up that counts: the redistribution of lands and resources; the dismantling of systems that uphold colonial power; the end of oppression and exploitation; learning to be uncomfortable, as well as practising acceptance not avoidance, are some of the necessary actions to reconcile. Failing which, the longer term effects of scripting acknowledgments may lead to the opposite of what is intended — making mistakes, upholding a colonial narrative, inviting critique, sustaining conflict, further damaging the relationship — and utterly miss the point of reconciliation.

2. Elements of Post-Secondary Institutions' Land Acknowledgments

At Osgoode's 21st Constitutional Cases Conference, held at Toronto's Reference Library, there was a land acknowledgment delivered by then Dean Lorne Sossin. While going off script with his own words, yet capturing the essence of it, Dean Sossin tracked York University's land acknowledgment (where Osgoode Hall Law School is located), which reads:

We recognize that many Indigenous nations have longstanding relationships with the territories upon which York University campuses are located that precede the establishment of York University. York University acknowledges its presence on the traditional territory of many Indigenous Nations. The area known as Tkaronto has been care taken by the Anishinabek Nation, the Haudenosaunee Confederacy, the Huron-Wendat, and the Métis. It is now home to many Indigenous Peoples. We acknowledge the current treaty holders, the Mississaugas of the New Credit First Nation. This territory is subject of the Dish with One Spoon Wampum Belt Covenant, an agreement to peaceably share and care for the Great Lakes region.

As land acknowledgments go, this one is good. It includes the seemingly obligatory history lesson of Indigenous Peoples who have been and are in the area. Both the Stratford Festival and York University cite the Dish with One Spoon²³ wampum belt — though Stratford uses

²³ For more on the Dish with One Spoon, see S.M. Hill, "Traveling Down the River of Life Together in Peace and Friendship, Forever: Haudenosaunee Land Ethics and Treaty Agreements as the Basis for Restructuring the Relationship with the British Crown" in L. Simpson, ed., *Lighting the Eighth Fire: The Liberation, Resurgence and Protection of Indigenous Nations* (Winnipeg, MB: Arbeiter Ring, 2008); Victor P. Lytwyn, "A Dish with One Spoon: The Shared Hunting Grounds

the past tense and York the present.²⁴ This point should be underscored. One Dish existed long before Confederation and continues to exist today.²⁵ The Haudenosaunne and Anishinaabe Nations continue to practise the principles of this wampum belt.²⁶ But what are institutions doing to understand the obligations and meanings about the One Dish Belt, as law? What institutional commitments have been made to “peaceably share” the land?

Though I am using York’s land acknowledgment script because it is directly relevant to Osgoode’s 21st Constitutional Cases Conference, I have also read the land acknowledgments of each university in Canada that have been posted online.²⁷ There are some common elements to them all: (1) a recitation of at least one Indigenous Nation who is or was in the territory where the university now sits; (2) no mention of how colonization violated Indigenous Peoples and their lands, which are being acknowledged; and (3) with very limited exception, no action-based words²⁸ or stated commitments to change. Why not include words that obligate the institution to fulfil its part in ending the violence of colonization? Merely because colonial violence is prolonged and has been sustained over centuries does not make it any less violent. It makes it multi-generational, sustained, slow violence.²⁹ Academic institutions

Agreement in the Great Lakes and St. Lawrence Valley Region” in *Papers of the Algonquin Conference* (Winnipeg, MB: University of Manitoba, 1997) 210 [hereinafter “Lytwyn”].

²⁴ The University of Toronto’s St. Michael’s College also references the Dish with One Spoon wampum belt in the past tense, while also acknowledging gratitude for having “the opportunity to work in the community, on this territory”. The “opportunity” is, of course, colonization, which sounds more generous when cited as opportunity and implying a willing benevolence on the part of all the Indigenous Peoples cited within the acknowledgment. Yet, St. Michael’s land acknowledgment is one of the very few to cite gratitude.

²⁵ Jeffery G. Hewitt, “Reconsidering Reconciliation: The Long Game” (2014) 67 S.C.L.R. (2d) 259.

²⁶ *Id.*

²⁷ I am grateful for the research work of Ryan Stiles for generating a chart with land acknowledgments from all of Canada’s universities who have posted their statement online.

²⁸ The land acknowledgment of Canadian Mennonite University in Treaty 1 includes: “We are Treaty people, with relationships, roles and responsibilities.” The inclusion of “relationships, roles and responsibilities” recognizes the speaker — and by inference reminds the listeners — that there is more work to be done beyond the land acknowledgment. The University, however, does not have a link with the land acknowledgment to the reciprocal work being done with Indigenous Peoples.

²⁹ For more on slow violence and its impacts on Indigenous Peoples, see Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Cambridge, MA: Harvard University Press, 2011); and Jennifer Huseman & Damien Short, ““A slow industrial genocide”: tar sands and the indigenous peoples of northern Alberta” (2012) 16:1 *The International Journal of Human Rights* 216. See also the ongoing, sustained impacts within Indigenous communities of the long-standing colonization: A. Bombay, K. Matheson & H. Anisman, “The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma” (2014) 51(3) *Transcultural Psychiatry* 320.

should be developing, writing and declaring what specific actions are being taken to share peaceably. This too should and must deeply engage Indigenous faculty, students, communities, leaders and Elders. Such a process should begin with universities listening to Indigenous Peoples, not talking and taking, and should result in the conversion of ideas into action-based plans.³⁰

Without action-based commitments and strategies for change, parallel play is not so parallel. It is heavily one-sided. There is no sharing of resources, and while Indigenous and non-Indigenous people live in the same spaces, Indigenous Peoples are often not even seen — let alone acknowledged. Reading scripts that sound like a history lesson is not necessarily making Indigenous Peoples any more visible either. And it has not resulted in institutions dismantling colonial structures or sharing institutional power.

3. The Power to Deny Must Be Undone

Recall that my presentation originated at a constitutional conference to, in part, fête retired Chief Justice McLachlin. I was tasked with discussing her legacy in relation to section 35 of the *Constitution Act, 1982*, which reads:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

³⁰ Some universities include statements about Indigenous Peoples in their ongoing Strategic Plans. The action-based plans I am referring to are specifically designed by and with Indigenous communities, not solely by university committee and management (with the possible inclusion of Indigenous staff, faculty and students), for universities to contribute further to reconciliation. Though important and necessary, it is not enough to propose increasing the number of Indigenous tenured and tenure-streamed faculty and including more Indigenous students and course content without also examining and developing a plan to redesign the institution’s architecture. Otherwise, the effect is to graft Indigenous Peoples onto a colonial structure and call it reconciliation. Universities are also land holders and might consider ways in which lands will be returned to Indigenous Peoples.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

There have been over 60 cases arising from section 35 during Chief Justice McLachlin's tenure on the Court as both judge and Chief Justice. All of the cases sustain the doctrine of *terra nullius*. There is not one paragraph or even a single sentence in any of the section 35 cases wherein the Supreme Court of Canada sets out its legal rationale for accepting and sustaining the doctrine of *terra nullius*. Moreover, some of the cases, perhaps most notably, *Delgamuukw*, uphold the assertion of Crown sovereignty by opining, "aboriginal title crystallized at the time sovereignty was asserted".³¹ There is no subsequent explanation (including in any later case on so-called Aboriginal title), of what is so supernatural about the assertion of Crown sovereignty that it could unravel millennia of Indigenous Peoples' title to and occupation of lands. But there it is, all neatly accomplished in nine words.

Explaining the enduring acceptance of *terra nullius* and Crown sovereignty requires the confrontation of long-standing legal fiction that serves almost everyone in Canada but Indigenous Peoples. That is, in part, what is meant by ongoing colonial violence, which the settler population continues to benefit from — namely, lands, resources and the power to deny. The hard truth is that Indigenous Peoples were here at the time the Crown asserted sovereignty. The lands were occupied. The lands remain occupied by Indigenous Peoples. Moreover, without such statements in written land acknowledgments, Indigenous Peoples are further reduced to a historic presence.

Merely because an institution as powerful as the Supreme Court of Canada is unprepared or unwilling to acknowledge its role in colonization, does not mean post-secondary institutions and scholars should follow. Twice, the Soothsayer tells Caesar, "Beware the Ides of March."³² Brutus (ultimately one of Caesar's assassins), echoes the line.³³ It is more than a premonition. It is a warning that trouble is coming. Post-secondary institutions — and inevitably the Court — will have to confront the waning illusion of *terra nullius* and the fading magic of the Crown's assertion of sovereignty. This must be accomplished

³¹ *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 145 (S.C.C.) [hereinafter "*Delgamuukw*"].

³² *Julius Caesar*, *supra*, note 1, Act 1, Scene 2, Lines 103 and 109.

³³ *Id.*, Act 1, Scene 2, Line 105.

through actions that deconstruct not only legal mythology but also the systems that continue to sustain the power to deny. Avoidance is not defensible. Caesar's denial of the actions of those around him led to his assassination on the Ides of March by those whom he counted as enemies and those he assumed were friends.

4. Settling in Deeper: Reconciliation, Section 35 and Land Acknowledgments

Though not entirely beneficial to reconciliation, there are a few slivers in section 35 doctrine that may provide guidance for the practice of land acknowledgments and subsequent development of action plans. I briefly consider two such cases. In *Haida Nation v. British Columbia (Minister of Forests)*, the Court states: “[t]he historical roots of the principle of honour of the Crown suggests that it must be understood generously in order to reflect the *underlying realities* from which it stems.”³⁴ Honour³⁵ is not the exclusive purview of the Crown and is one means of approaching reconciliation.³⁶ The historic roots and underlying realities include a deeply one-sided system premised on the myth of *terra nullius* that made way for the assertion of Crown sovereignty. Recognizing this, the principle of honour becomes an entryway into a process of dismantling the current system by building a different one that ends oppression. Such a conversation could be advanced by underpinning the principle of honour in subsequent versions of land acknowledgments.

Among KAIROS' stated objectives for its land acknowledgment practice is that “[i]t is a way to counteract the ideologies operating in the Doctrine of Discovery by naming that the land was not empty when Europeans first arrived.”³⁷ Yet, all of the universities deftly sidestep such a declaration. Institutions and academics are implicated. As noted above,

³⁴ [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 17 (S.C.C.) (emphasis added).

³⁵ For a good analysis on the Supreme Court of Canada's use of the doctrine of honour in relation to the assertion of Crown sovereignty, see B. Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 S.C.L.R. (2d) 595.

³⁶ For more on accessing the doctrine of honour in relation to reconciliation, see D. Newman, “Reconciliation: Legal Conception(s) and Faces of Justice” in J.D. Whyte, ed., *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing, 2008), at 80-87 and T. Penikett, *Reconciliation: First Nations Treaty Making in British Columbia* (Vancouver: Douglas & McIntyre, 2006).

³⁷ KAIROS, *supra*, note 11.

responding that Indigenous scholars and students were on the drafting committee is not valid insofar as it perpetuates the oppression and avoids responsibility. None of the universities directly counter the assertion of Crown sovereignty over the land nor do any openly challenge the doctrine of *terra nullius*.

I reassert my hope that the practice of land acknowledgment continues and expands into more spaces. I also mean that I hope the practice continues with new versions rooted in honour (not obligation or avoidance), and openly question how the institutions (as well as readers) performing the acknowledgment find themselves on that land. Though more action is required beyond written land acknowledgments, more content is also required within the existing statements. Continuing forward without change sustains Caesar's view of Romans as but sheep and lets the wolf of colonization continue to devour reconciliation.

In *Delgamuukw*,³⁸ while also noting that Aboriginal title is a burden on the Crown, the Court stated that “if at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands”.³⁹ Indigenous Nations did have laws (not “if” as the Court proposed), and still do — contrary to Stratford's past verb tense referencing the One Dish wampum belt.⁴⁰ Indigenous Nations' laws relating to land⁴¹ are set aside in the existing system⁴² not only in relation to the assertion of Crown sovereignty but also because not all Indigenous Peoples are possessed of the view that land is property to be owned, possessed, bought or sold. It is also telling that the Court in *Delgamuukw* approached Indigenous land laws “at the time of sovereignty” for the purposes of “establishing *occupation* of

³⁸ *Delgamuukw*, *supra*, note 31.

³⁹ *Id.*, at para. 148.

⁴⁰ For more on Indigenous laws, operating both prior to contact and since, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Jill Doerfler, Niigaanwewidam, James Sinclair & Heidi Kiiwetinewinewin Stark, eds., *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing: Michigan State University Press, 2013); Val Napoleon, “Thinking about Indigenous legal orders” in *Dialogues on Human Rights and Legal Pluralism* (New York: Springer, Dordrecht Heidelberg, 2013) 229; Leanne Simpson, “Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships” (2008) 23:2 *Wicazo Sa Review* 29.

⁴¹ See, as examples, Matthew Wildcat *et al.*, “Learning from the Land: Indigenous Land-based Pedagogy and Decolonization” (2014) 3:3 *Decolonization: Indigeneity, Education & Society* I-XV; and Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, Vol. 171 (Toronto: Oxford University Press, 1999).

⁴² Bonita Lawrence, “Rewriting Histories of the Land: Colonization and Indigenous Resistance in Eastern Canada” in Sherene H. Razack, ed., *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) at 21.

lands”,⁴³ not control over lands. In other words, at best Indigenous Peoples might be afforded some form of tenancy but not decision-making power over lands. Here, the Court reaffirms the importance of Crown sovereignty while glossing over the sovereignty of Indigenous Nations before and after the arrival of the Crown.

If land acknowledgments are to perform some of the lifting toward reconciling, the text must go beyond the present tense of citing Indigenous sources of law, such as the One Dish wampum belt, and reaffirm the unbroken sovereignty of Indigenous Nations. Changing the narrative of the existing system is vital because the existing system is what needs to change. Words such as “reconciliation”, “Indigenization” and “decolonization” are often rolled out to describe post-secondary institutions’ initiatives in relation to Indigenous Peoples and land acknowledgments. Yet, without specific action they all amount to little improvement in the imbalanced relationship with Indigenous Peoples and risk generating more distance.

My point is, land acknowledgments should not make the reader or listener feel good. This is another tactic serving the colonial imagination. In “Decolonization is Not a Metaphor”,⁴⁴ Eve Tuck and K. Wayne Yang examine the growing comfort with “decolonization” that propels the settler population to innocence by handily glossing over colonial violence. They remind us that decolonization is about decentring settler perspectives, structures and power regimes. It is not about settling in deeper. It is about addressing the taking and controlling of lands that were neither vacant nor for sale. Without an examination into purpose, practice and wording, land acknowledgments are in jeopardy of becoming part of the apparatus of colonial comfort that further displaces Indigenous Peoples. Beware the Ides of March.

5. A Duty to Learn and Honour Revisited

Change is possible and post-secondary institutions are well placed to lead the way because change necessitates learning — a particular expertise of post-secondary institutions. Upon his retirement from the Bench, then Chief Justice of British Columbia’s Court of Appeal Lance Finch said: “[A] more widely applicable concept of honour imposes on

⁴³ *Delgamuukw*, *supra*, note 31, at para. 148 (emphasis added).

⁴⁴ Eve Tuck & K. Wayne Yang, “Decolonization is Not a Metaphor” (2012) 1:1 *Decolonization: Indigeneity, Education & Society* 1.

all members of the legal profession a duty to learn: at the very least, to holding ourselves ready to learn.”⁴⁵ By way of example, though the section 35 doctrine does not unpick the doctrine of *terra nullius* and endorses the assertion of Crown sovereignty, in 2015, Chief Justice McLachlin stated that Canada attempted to commit “cultural genocide” against Indigenous Peoples, in what she referred to as the worst stain on Canada’s human rights record.⁴⁶ This statement from a sitting Chief Justice was significant insofar as no other person occupying a key position of authority with the Court had asserted such a stance. It is the kind of moment reflective of Justice Finch’s “duty to learn”.

In my presentation at the Constitutional Cases Conference I proposed this is also an example of what it means to be brave. I challenged the room of scholars and lawyers to consider their own actions. If the then Chief Justice could further entrench the doctrine of *terra nullius* and uphold Crown sovereignty, yet later publicly acknowledge Canada’s “cultural genocide” attempts against Indigenous Peoples, then the practice of land acknowledgments could take note and inject some bravery too. We all have a duty to learn.

6. Is More Really Necessary?

The seemingly overriding fear of making a mistake, being criticized and the power to deny has resulted in a practice of land acknowledgments that are polite. There is nothing polite about colonization. Colonization is violent. CAUT states that healthy, reciprocal relationships are key to reconciliation and KAIROS affirms land acknowledgments should counteract the doctrine of discovery. Statements and action plans detailing how healthy, reciprocal relationships will be established are vital. The acknowledgments I have read do not include this or a link to such plans. But they could. Reciprocity means giving. What have post-secondary institutions given to the Indigenous Nations enumerated in their respective land

⁴⁵ The Honourable Chief Justice Lance S.G. Finch of the Court of Appeal for B.C., Vancouver, B.C., for the Continuing Legal Education Society of British Columbia, November, 2012, <https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf>.

⁴⁶ Sean Fine, “Chief Justice says Canada attempted ‘cultural genocide’ on aboriginals” *The Globe and Mail* (published May 28, 2015; updated May 15, 2018), online: <<https://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/>>.

acknowledgments? Where is the counteraction to the doctrine of *terra nullius*? Not one of the university acknowledgments online directly challenges the legal validation of *terra nullius* — ironically, while acknowledging Indigenous Peoples’ occupation of various lands.

Rather than draft acknowledgments as a recitation of which Indigenous Peoples lived where, institutions should include content about the side of the equation that is rarely, if ever, mentioned — the colonial side. Develop action-based strategies for new institutional architecture that is not built upon oppression. Acknowledge the deep problems with colonization and ongoing dispossession of lands. None of the land acknowledgments from Canadian post-secondary institutions even use the word “colonization”.

Reconciling any relationship means admitting something is wrong and then setting about the sometimes awkward and tough work of changing the behaviour that resulted in the harm. Reading post-secondary institutions’ land acknowledgments, one would be forgiven for missing the admission that something is wrong. Scripting a land acknowledgment in English or French while purporting to contribute to reconciling the relationship with Indigenous Peoples who continue to be impacted by colonization, and steadfastly omitting the word “colonization”, is not reconciling. It continues to prioritize settler comfort while simultaneously compounding harm against Indigenous Peoples.

Without exception, we are all involved in this. Though parallel play might allow all of us to appear to be playing side by side — sharing the same lands, benefitting from the same resources, going to the same schools, maybe even being friends and family — when only one of us has taken all of the lands and resources and refuses to acknowledge the obvious, even parallel play becomes an unsustainable fiction.

Scripting land acknowledgments is a move forward but it does not absolve either reader or listener of obligation. Care must be taken to avoid comfort and inertia in any decolonizing act. Tuck and Yang remind us that decolonizing should not be convenient or easy and if we are not cautious in examining our actions, we may be reaffirming existing power lines without substantively addressing the underlying issues.

This is by no means reason not to proceed — just the opposite. If we are to fulfil our duty to learn, if we are to make room for Indigenous laws, challenge *terra nullius* and Crown assertions of sovereignty and right the relationship, then we should be advancing the understanding of our respective roles in reconciling. Here’s the rub. We cannot be “but sheep”. We have to talk directly about land that was wrongfully taken

that everyone but Indigenous Peoples continue to benefit from. We have to develop plans for the return of lands and establishing sustainable ways to “peaceably share”.

Proceeding with statements about land and Indigenous Peoples while failing to confront colonial systems subverts reality, as Fanon reminds us. Adams sets out that colonization is the most complex, violent and traumatic relationship in human history. Unravelling it and healing from it cannot be one-sided and will require challenging, even frightening discussions, which should no longer be ignored.

Perhaps there is tendency to avoid connection and responsibility in favour of scripting because the fault is not in our stars but in our fears. Fear of correction. Of critique. Of change. Of responsibility. Of loss of control. Of a future that cannot be seen. Land acknowledgment scripts, in their current forms, are at risk of becoming a history lesson masking a complex web of faults generated by colonization. If we are serious about land acknowledgments, I have offered a number of ways to move forward with them. Each of us has a contribution to make to the dismantling of colonization and oppression. Failing to do so is a fault within us, not in our stars. No prepared written statements minimizing responsibility should allow post-secondary institutions (or any of us), to dodge these daunting tasks indefinitely. Otherwise, as Julius Caesar discovered on the Ides of March, it becomes an almost impossible task to distinguish between assassins and friends. “Et tu, Brute?”⁴⁷

⁴⁷ *Julius Caesar*, *supra*, note 1, Act 3, Scene 1, Line 1286.

