



‘Authorizing the Peril’: Mythologies of (Settler) Law at the End of Time

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Accepted: 2 June 2021 / Published online: 27 July 2021
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Abstract

The promised paradises of colonial capitalism and neoliberalism are set in a perpetually elusive future (Fitzpatrick 1992). This future is not a set destination, but an endless linear journey set to the thrum of ‘progress’ and ‘development’. This paper considers, in the context of recent cases relating to development in the Athabasca tar sands region, what the law of the Canadian settler state does when it is faced with interruptions and ruptures in its timescape. Drawing on Fitzpatrick’s seminal work, *The Mythology of Modern Law*, I argue that a conceptualisation of law’s behaviour in these contexts as functionally mythological highlights some of the elusive ways that settler law maintains a stranglehold over legal imaginaries of oil and gas developments: by distorting and flattening the pasts and presents of Indigenous societies that pre-dated (and continue to co-exist with) the settler state on ‘Canadian’ land, by mediating between the ‘origin’ of the settler state and the daily rhythms of colonial time through ‘Eternal Objects’ such as property and economic development, and by asserting a general ‘objectivity’ of law to evade any direct grappling with the stark possibilities of the ‘end of the world’ created by the climate crisis. I conclude, drawing on Indigenous scholarship and the work of de Goede and Randalls, that a meaningful response to the climate crisis requires re-enchanted attachments to life that necessitate a departure from the one-dimensional temporality of the mythologies of settler law.

Keywords Canada · Climate justice · Environmental justice · Peter Fitzpatrick · Protest · Settler colonialism

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Introduction

The Canadian tar sands region (located in what is today known as the province of Alberta, in the settler colonial state of Canada—comprising the Athabasca tar sands, and its nearby Peace River and Cold Lake oil deposits) is a locus at which the histories, presents, and futures of countless groups collide. A rich literature on popular depictions of the region (e.g. Cariou and Gordon 2016; Remillard 2011) demonstrates that the area houses a ‘cacophony’ of discourses (Byrd 2011) on how humans should interact with land and ecology. Despite this cacophony, there is ‘one trumpeting discourse’ (Simpson 2016, p. 3) that imbues itself with the singular authority to ‘speak the law’ (Pasternak 2014, p. 148) in the tar sands: that of the colonial settler state.

The ultimate consequence of the hegemonic jurisdiction of colonial capitalist imaginaries in this region could be, put simply, the extinction of all of humankind on the planet. The tar sands are frequently conceptualised as ‘one of the world’s largest carbon bombs’ (Firemping 2018)—the exploitation of these oil reserves can push the global climate past ‘tipping points’, setting in motion non-linear and irreversible processes that can ultimately result in human extinction (Huseman and Short 2012, p. 230; de Goede and Randalls 2009, pp. 868–869). Crystal Lameman, chief of the Beaver Lake Cree Nation (a signatory of Treaty 6, one of the treaties governing the relationship between Indigenous groups in the tar sands region and the Crown) explains that while the region is poised on the brink of a ‘tipping point’, development ‘has not yet destroyed everything worth saving and it is not too late to intervene’ (Lameman 2015). However, within a neoliberal capitalist paradigm, tar sands deposits contain the promise of a certain future paradise, as exemplified by Canadian Prime Minister Justin Trudeau’s infamous statement: ‘No country would find 173 billion barrels of oil in the ground and leave them there’ (Berke 2017). Nevertheless, broad scientific consensus on the imminent and devastating impacts of anthropogenic climate change poses a challenge to settler claims to colonial futurity—pushing past planetary boundaries and tipping points poses a threat not only to those on the frontlines of climate change, but to ‘all forms of economic activity’ (Adelman 2020, p. 40). The impact of the climate crisis is felt in drastically unequal ways in accordance with societal fissures imposed by colonial capitalism. However, the responses of the settler legal system to a crisis that threatens *its own existence* can be revelatory.

This paper is an attempt to elucidate some of the means by which the settler state grapples with the temporal paradoxes and challenges posed by links between tar sands development and the climate crisis. Drawing on Peter Fitzpatrick’s seminal work, *The Mythology of Modern Law*, I argue that understanding the operation of settler law in these cases as functionally *mythological* can elucidate temporal narratives situated in the ‘background’ of legal judgments. Such elucidation is worthwhile because it is precisely this backgrounding that renders these narratives metaphysically powerful. I examine this in the context of several cases (from 2012 to 2020) relating to development in the tar sands—primarily injunctions brought by companies against groups protesting these developments, but also cases brought by

Indigenous groups against the impacts of cumulative effects of generations of development in this region on their ability to exercise Treaty-enshrined rights to land.

Myths tell us stories about 'our' origins, providing us with transcendent points of reference that enable us to organize our mortal, profane affairs on Earth. Myth, Fitzpatrick explains, 'both sets the limits of the world...and transcends these limits in its relation to the sacred' (1992, p. 16). Modern Western law is operationally mythological in that it serves both these functions. The sections below are thus organized in line with the function of myth: The 'Periodization' section considers the legally articulated origins of the Canadian settler state. Despite their mythic spirit, these stories of origin are not framed *as myth and lore*—and thus these legal articulations serve the purpose of diminishing what precedes the origin (Indigenous societies and epistemologies) and universalizing what succeeds and *embodies* the origin (the modern settler state). The 'Eternal Objects' section considers the ways in which settler law mediates between its origin and governance in order to enforce colonial capitalist time in response to assertions of Indigenous rights and responsibilities towards land that seek to disrupt it. The 'Collision of Emergencies' section considers how law reacts when asked to grapple directly with the reality of ecological destruction and the possibility of human extinction—in these cases, law resolves, or circumvents discussion of, these contradictions through the invocation (explicit or implicit) of transcendent points of reference. A sense of *faith* that the transcendent notions that imbue modern law with its substance will ultimately prevail over nature is detectable in these narratives. The final section ('Re-enchantments') concludes by arguing that it is not *myth in general* that we must seek to look beyond in order to address the climate crisis, but rather the central *denial* of the sacred and mythic in modern settler law, which paradoxically constitutes the very substance of the mythology of modern law. The 'disenchantment' that constitutes modern mythology must give way to *enchantments with life* if we are to respond meaningfully to the unfolding destructive effects of anthropogenic climate change.

Periodization

I begin this brief reckoning with the operation of mythology in the modern Canadian settler state with a sliver of settler folklore: journalist Agnes Dean Cameron's famed journey in 1908 'straight up through Canada...as far as God has any ground', chronicled in her book *The New North* (2004, 1910). Cameron says:

Colonization in America has followed the trend of the great rivers, and it has ever been northward and westward—till you and I have to look southward and eastward for the graves of our ancestors.

Cameron speaks to an imagined fellow colonial reader, a white subject, whose *pasts* are situated in the 'south and east'. Cameron imagines time mapping onto space in Northward and Westward directions—the inexorable direction of colonial conquest. But, she believes, 'the West that we are entering upon is the Last West, the last unoccupied frontier under a white man's sky' (2004, 1910).

Cameron's words quiver with anticipation at the colonial project's fulfilment of its destiny to tame, conquer, and impose order upon the Canadian 'wilderness'. Her prose resonates with modernity's 'invention of an encapsulated age against which a modern age is putatively set', in which 'various "non-Christian", barbaric or savage peoples [were] excluded from a universalized civility' (Fitzpatrick 2013, p. 67). This story characterised British colonial projects around the world. Mawani explains, for example, that

Britain's 'gift of law' to India was underwritten by a historicist and developmentalist logic; assimilating India into an overarching time of British law would bring its ancient civilizations forward, from a dark and anachronistic past into an enlightened present and future. (2014, p. 76)

This narrative is visible in the adjudications of Indigenous claims against developments in the tar sands today, in accordance with Borrows' broader observation of the legal construction of Indigenous rights and epistemologies as 'frozen' in the past in landmark Indigenous land rights cases (Borrows 2010, p. 60).

In the Beaver Lake Cree's (BLC) ongoing litigation¹ against the cumulative effects of developments in the tar sands region, Indigenous treaty-enshrined land rights, when fractured through colonial capitalist lenses, are construed as surviving features of a quaint and foregone past. For instance, the Beaver Lake Cree's Statement of Claim frames their treaty rights in terms of (among other things) the maintenance of the 'ecological, cultural and/or spiritual integrity of the Core Traditional Territory' (2012, pp. 20, iv). By contrast, the colonial language of Treaty 6 frames the BLC's relationship with land in the following terms:

the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered...saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering, or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government. (para. 22)²

The treaty-making moment is conceived of as a moment of *conversion* in which Indigenous rights and responsibilities to maintain the 'ecological, cultural, and spiritual integrity' of their lands are translated into rights to continue their 'avocations of hunting and fishing', subordinated to the material interests of colonial capitalist accumulation that might, 'from time to time', override these rights. The term

¹ The group's litigation journey began with the filing of their Statement of Claim in 2008 (amended in 2012)—in the intervening years, the group has successfully defended itself from numerous attempts by the province of Alberta and Canadian Crown to 'strike' the application. However, the group has faced challenges due to the high costs of litigation—they were awarded a rare advance costs order in *Anderson v Alberta (Attorney General)*, 2019 ABQB 746, which was overturned in *Anderson v Alberta (Attorney General)*, 2020 ABCA 238. The substantive litigation is scheduled to be heard in a 120-day trial in January, 2024 (as stated in *Anderson v Alberta (Attorney General)*, 2020 ABCA 238, para 3).

² This excerpt is invoked in *Anderson v Alberta* (2020), the judgment that overturned the costs order awarded to the Beaver Lake Cree one year earlier.

'*surrendered*' enables the Crown to construct these Treaties as *permanent* transfers of Indigenous land to colonial 'ownership'. By contrast, an Elder of Treaty 6 frames the treaty relationship as an expression of

the will of the Creator that the White man would come to live with us, among us, to share our lives together with him, and also both of us collectively to benefit from the bounty of Mother Earth for all time to come. (Borrows 2010, p. 26)

This conceptualisation of the treaty, as the articulation of a relationship premised on sharing in which neither party's interests are subordinated to the other, is a marked contrast from the settler colonial legal construction of Treaty 6. Colonial constructions of Canada's Numbered Treaties as 'surrenders' of land contribute to the foundational legal fiction of 'underlying Crown title' to all Canadian land (Borrows 2015; Pasternak 2014)—in this way, the perceived moment of conversion (from Indigeneity to modernity) at the point of Treaty-making helps underwrite the sovereignty of the Canadian settler state.

Pinning the origination of the modern Canadian state to the point of Treaty-making is a means of sidestepping the simple notion that, even when read on colonial calendrical time, Indigenous occupation of 'Canadian' land laps that of the settler state tens of times over. If the timescape of these societies' presence on Canadian *land* were to be construed in linear, teleological terms (as a *timeline*), those of Indigenous societies would span approximately 12,000 years in duration (McMillan and Yellowhorn 2004, p. 25), whilst the duration of the settler state would span less than 200 (if the point of origin is the period during which the Numbered Treaties were signed). The aesthetic challenge posed by such a consideration is that the comparative maturity, sophistication, and—crucially—universality of colonial myths is undercut by its youth, its extreme brevity. Looking past 'the boundary of [the settler state's] own brief, agonizing history in the place it calls Canada' would necessitate a grappling with Indigenous life-worlds and timescapes 'and their sovereign consequences' (Weir 2013, p. 406).

Periodization in Canadian law affectively flattens what came before the origin point of the modern settler state ('Indigenous legal traditions that have existed for thousands of years' (McGregor 2018, p. 14)), by presenting what preceded this point as legally irrelevant. What followed, the modern settler colonial state, is thus presented as the universal paradigm of the present and future.

Eternal Objects

Periodization is one way that settler sovereignty takes hold of Canadian land by 'grasping and rearranging time' (Mawani 2014, p. 77). However, '[m]yth is creative not just in providing an origin but in being a sustained creative force extending itself to and ordering a temporal world, mediating continually between it and the sacred' (Fitzpatrick 1992, p. 42). Fitzpatrick continually invokes Nietzsche's notion of what we might do in a scenario in which 'God is dead and we have killed him'. In a world positioned putatively beyond myth, 'what sacred games shall we have to

invent?’ (Nietzsche 1974, p. 181, in Fitzpatrick 1992, p. 44). The sacred games law has invented are ‘Eternal Objects’, *ideas* that ‘mediate between the general and the specifically particular by appropriating the quality of the universal to themselves’ (Fitzpatrick 1992, pp. 49–50).

Philosophical/logical contradictions between rules can be resolved through references to these Eternal Objects, which ‘unites...and sustains the unity of being’ of the transcendent non-transcendence of modern law (1992, p. 49). The Eternal Objects of modern law include notions of society, property, and law itself, tales of which are ‘told with the constant repetition that characterizes the operation of myth’. These Objects become “‘exemplary models” against which the validity or reality of an act is measured (Eliade 1965, p. 28)’ (Fitzpatrick 1992, p. 49).

When Indigenous (and allied) activists illustrate essential connections between developments in the tar sands region and human extinction, the law is left scrambling to reconcile its sovereign claims to an infinite future on ‘Canadian land’ and a connection between its sovereign myths and a *finite* future. It is then that ‘tales of society, law, property and other Eternal Objects’ take centre stage.

Indigenous theorists have noted a ‘resurgence’ in Indigenous resistance in the past decade, triggered by the introduction in 2012 of Bill C-45, an omnibus bill proposed by Canada’s Conservative federal government and passed into legislation on 14 December 2012 as the *Jobs and Growth Act*, which contained various reforms designed to mitigate environmental protection ‘obstacles’ to tar sands development (Coulthard 2014). Indigenous opposition to Bill C-45 began in late 2012 as a grassroots public education campaign initiated by four women (three Indigenous and one non-Indigenous ally) called ‘Idle No More’. The movement spurred activists throughout the country to use blockades to bring about temporary train and traffic stoppages to express solidarity with, and call attention to, Idle No More’s broader calls for reconfigurations of the settler state’s political and spiritual relationships with nature and (as a matter of material urgency) the rejection of developments in the tar sands region, including the tendrilled construction of tar sands pipelines through Indigenous land across Canada (Coulthard 2014, p. 160; Scott 2013).

Several of these blockades were quashed through interim injunctions obtained by the Canadian National Railway and Pipeline companies against protestors. An interim injunction request requires the court to consider whether there is a ‘serious question’ to be tried and to apply a ‘balance of convenience’ test, evaluating whether the harm done to those applying for the injunction outweighs the potential harm/injustice done to those against whom the injunction would be obtained. Factoring into this calculus is the question of ‘irreparable harm’—if it can be established that those seeking the injunction would suffer *irreparable harm* as a result of the actions of (in the cases below) protestors, then it is highly unlikely that the ‘balance of convenience’ will weigh in favour of the targets of the injunction.

In *Enbridge Pipelines v Jane Doe*,³ the judge, citing Mr. Justice Sharpe, says in no uncertain terms: ‘Under our system of law, property rights are sacrosanct...[t]he

³ 2014 ONSC 4716. In this case, an injunction was obtained against blockaders protesting an expansion of the Enbridge Pipeline to extract bitumen from the tar sands.

balance of convenience and other matters may have to take second place to the sacrosanctity of property rights in matters of trespass' (2014, p. 12). The judge goes on to note competing rights—for instance, freedom of expression—but the judgment proceeds from the axiom that property rights are sacrosanct whilst competing rights must argue for themselves—ultimately, this reasoning supports the granting of the injunction against the protestors. Similarly, in *CNR v. Chief Chris Plain* (2012), a case awarding an interim injunction against Aamjiwnaang First Nation members maintaining a blockade in solidarity with Idle No More in Sarnia, the judge explains: 'Persons are free to engage in political protest...but the law does not permit them to do so by engaging in civil disobedience through trespassing on the private property of others' (2012, p. 23). While the ideal of 'freedom of expression' is a point of pride within neoliberal frameworks (e.g. Whyte 2019), it must ultimately bow to private property, which is 'elevated in terms no less extensive than those attributed to the transcendence of myth...the foundation of civilization, the very motor-force of the origin and development of society...the modality of appropriating nature' (Fitzpatrick 1992, p. 50).

The legal rationale in these cases, however, moves beyond the foundational transcendence of property rights alone to a broader construction of *urgency* in Canadian law relating to the 'circuitry of capital' (Pasternak and Dafnos 2017, p. 7).

In *Canadian National Railway Company v. John Doe*,⁴ the judge explains the cascade of consequences that would ensue from the blockade's continuation:

All the eastbound and westbound traffic between Toronto and Montreal will quickly become backlogged...This is because start up problems amount for every hour the Main Line is blocked—customers simply cannot process two days' worth of traffic in one day, resulting in further backlogs. In turn, this will produce a shortage of empty equipment for subsequent loading, creating a further compounding effect. By the time the backlog is cleared, costs of these compounded delays will be much greater than the sum of the costs of the individual train delays. (2013, para. 22)

This colonial-capitalist cluster of interdependent urgencies is not a universal means of understanding and organizing time. Mawani explains that '[c]onceptions of a homogenous, linear, and secular time were an integral aspect of the common law's ontology in the empire' (2014, p. 75). We can find evidence of the overlaying of colonial capitalist time over Indigenous temporalities in Agnes Dean Cameron's notes from the Athabasca Landing a century ago:

the freight is all at Landing, but for three days the...boatmen drag along the process of loading, and we get our introduction to the word which is the keynote of the Cree character—'Kee-am,' freely translated, 'Never mind,' 'Don't get excited,' 'There's plenty of time,' 'It's all right,' 'It will all come out in

⁴ 2013 ONSC 115. In this case, an injunction was awarded to CNR against a number of First Nations people showing support for an upcoming meeting between First Nations chiefs and then Canadian Prime Minister Stephen Harper to discuss Idle No More's demands.

the wash.’ When the present Commissioner of the Hudson’s Bay Company entered office he determined to reduce chaos to a methodological exactness and framed a time-table covering every movement in the northward traffic. (2004, 1910)

It is possible to see a continuity between the ‘methodological exactness’ anxiously and coercively imposed on Cree people at the Athabasca Landing in the early 1900s and the disastrous consequences of the railway blockade frenziedly outlined by the judge in 2013.

Pasternak and Dafnos explain that ‘[o]ver the past few decades, just-in-time and on-demand commodity production has increasingly reorganized economic space through the architecture of “logistics”—a military science developed to overcome geopolitical obstacles to supply chain circulation (Cowen 2014)’ (2013, p. 3). These ‘obstacles’ are frequently the ‘threats’ posed by ‘assertions of Indigenous rights and responsibilities towards their lands’—e.g. the blockades staged along the route of the Canadian National Railway in alliance with Idle No More (2013, p. 3).

Preston demonstrates how neoliberal logics of unlimited extraction/consumption have fused with notions of ‘national interest’ in Canada in recent decades—leading to the creation of ‘national security’ mechanisms such as an RCMP Integrated National Security Enforcement Team (anti-terrorism unit) created in 2012 to protect ‘critical infrastructure’ relating to the tar sands industry (Preston 2013, p. 44). The fusion of ‘national security’ with tar sands development, and the risk-based approach to mitigating ‘threats’ to this development, is conceptualised by Pasternak and Dafnos as an: ‘all-hazards emergency management approach...the pervasive, always-in-the-future potential of emergency—rationalizes interventions undertaken in the interests of the health, safety, and ‘well-being’ of people, property, the economy and government’ (Pasternak and Dafnos 2017, p. 11).

Narratives of emergency and urgency are thus embedded in the everyday of colonial capitalist life and reproduction. The ultimate temporal thesis underlying colonial mythology reveals itself here: that of *infinite progress*, a relentless project of perfection, integration, and accumulation set to the breakneck rhythms of colonial capitalist production. This is affectively generative: it fixes colonial and modern enchantments in the *future*—the mundane, frenzied present is sustained in service of a ‘perfect’ future that (if modernity is to survive) will never be realised. The infinite nature of the progress, the project, is sustained in contrast with the ‘Other’—primarily and conspicuously, assertions of Indigenous jurisdictions as ‘Indigenous peoples’ self-determination poses a perpetual emergency for the settler-colonial state’s claim to absolute sovereignty’ (Pasternak and Dafnos 2017, p. 11), though other ‘Othering’ narratives exist in relation to tar sands development, e.g. narratives expounding the dangers of ‘foreign oil’/framing the Canadian tar sands as a ‘haven of blood-free petroleum’ in popular discourses promoting tar sands development (Nikiforuk 2011).

Despite modernity’s illusory narratives of infinite forward movement and progress, settler law’s work is to fix Eternal Objects such as property firmly (spatially and temporally) in place. The *temporal transcendence* of Eternal Objects thus serves as a powerful mythical counter to ‘end of the world’ temporal narratives

posed by the climate crisis. As will be shown in the following section, the narrative's mythic skeleton becomes visible when courts are asked to confront these narratives directly, exposing the ultimate mythic appeal of modern settler law: *a denial of transcendence*.

A Collision of Emergencies: Preserving Progress

When law's Eternal Objects are violated, resulting in 'irreparable harm', the law mobilises quickly to realign the rhythms of life with colonial time. This can be contrasted with the legal treatment of irreparable harm *created by* these Eternal Objects. Interim for Railway and Pipeline companies are designed to be granted and enforced within hours—in *Canadian National Railway Company v. John Doe*, the judge expresses anger that the injunction awarded in *CNR v. Chief Chris Plain* several weeks prior was not immediately enforced by the RCMP, as 'the evidence showed that significant irreparable harm resulted from each hour the blockade remained in place' (2013, para. 20). By contrast, the Beaver Lake Cree's litigation proceedings commenced in 2008 and the substantive litigation is not scheduled to be heard until 2024.

The mythic thrust of modern law's Eternal Objects, and the underlying promise of infinite progress, can perhaps explain the court's submissive approach to ecological destruction. If these myths have *sacred* significance, then it is possible that Eternal objects inspire in their adherents a genuine sense of *faith* that these Eternal Objects will deliver us from peril. Perhaps there is an undying devotion to the underlying tenet of modern mythology: that in the end, all will be absorbed, all will be progressed, developed, transcended, perfected (Fitzpatrick 1992, p. 50).

The operation of this faith can be seen in *Trans Mountain Pipeline ULC v Mivassair* (2019). In this case, protesters were charged with criminal contempt for defying an injunction that sought to restrain them from obstructing Trans Mountain's access to locations at which work was being done to enlarge a pipeline to transport petroleum from the Alberta tar sands. They applied for leave to raise the defence of necessity based upon the 'peril' of climate change that would be exacerbated through the construction of the Trans Mountain Pipeline, arguing that '[t]he "extreme gravity" of the threat posed by global warming beyond 2 °C left the applicants with "no viable or reasonable legal alternative" but to "act by attempting to block construction work at the Burnaby Terminal"' (2019, para. 23).

The court framed the protesters' positions in terms of 'the hypothetical case of the "lost alpinist"' who faced "imminent death" if shelter was not found by illegally breaking into a cabin, [in which case] it would be "unthinkable" to choose not to act in disobedience of the law' (2019, para. 16). However, the judge ultimately found that 'there was no "air of reality" to the defence of necessity', based on two primary reasons: that the Defendants had 'alternatives to breaking the law', i.e. applying to the court to have the injunction set aside prior to being arrested, and the judge's doubt that 'the defence of necessity can ever operate to avoid a peril that is lawfully authorized by the law' (2019, para. 46). Thus, the law was not 'authorizing the

peril', as alleged by the claimants; it was merely authorizing that which was already permitted/lawful: the construction of a pipeline (2019, para. 26).

In this way, the law is positioned as transcendent above/external to even imminent perils that might affect all of humanity: 'it is in such standing apart that law provides the transcendent point from which positive determination can flow...[s]uch vacuity, the inability to be fixed to any positivity, enables law to effect a transcendence that is "pure" in its not being implicated with a transcendence that is enduringly positive' (Fitzpatrick 1992, p. 50). Thus, Fitzpatrick invokes Blanchot's words: 'to law alone, transcendence' (2013, p. 76).

The court in *Mivasair* also doubted whether the 'clear and imminent peril' alleged by the applicants was adequately demonstrated, stating that 'the peril' must be on the 'verge of transpiring'. The court acknowledged that the evidence the applicants sought leave to put before the court 'would demonstrate that without immediate remedial action, climate change will become irreversible and catastrophic damage to life on this planet will be inevitable' (2019, para. 54). However, the court argued that this alone would be insufficient to demonstrate that the 'peril' of climate change was 'on the verge of transpiring' because:

[d]espite a historical lack of initiative to curb emissions over these same decades, adaptive societal measures may be taken to prevent such a dire outcome. Whether government, private industry, and citizens take these measures is a contingency that takes these consequences outside of 'virtual certainty' and into the realm of 'foreseeable or likely'. (*Latimer*, at para. 29, cited in *Mivasair* 2019 at para. 55)

Law paradoxically seems to be asserting not its transcendence but its *impotence* here—its incapacity to act due to the possibility that action might emerge from another arena (e.g. private industry or civil society). But it is in precisely this way that law transcends—through its denial of transcendence, its central claim to 'objectivity', here expressed through its purported 'standing apart' from politics and society (Fitzpatrick 1992, p. 50).

A sense of faith is visible here—that while we cannot clearly see *now* how, e.g. private industry, might rescue us from extinction, it is still possible that it *might*. The colonial project's beauty lies in its temporal elusiveness. It is never quite done, never quite will be: '[a]ny revelation that there are limits after all in the universality of the West is but the indication of passing imperfection which progression continually transcends' (Fitzpatrick 1992, p. 41). A linear understanding of *time in general* underscores the idea of 'constant and accumulative creation', 'progression... from pre-creation to the manifest' (Fitzpatrick 1992, p. 51). This perhaps translates to a notion that the obverse of constant accumulation, ecological and environmental destruction, will also unspool in a linear manner. However, it is broadly accepted that climate change is *not* unfolding in a linear way—climate risk models provide approximations of the future, but these are rife with uncertainty, and 'tipping points' can set non-linear trajectories in motion (de Goede and Randalls 2009).

The understanding of time and progression as linear facilitates a central mythology of modernity: the notion of man's mind as transcendent above, and thus able to fully predict and 'master', nature (Adelman 2015). This is perhaps yet another

form of 'faith' that enables legal and political 'sidestepping' of the climate crisis. Nature (a figment of 'pre-creation', the eternal 'Other') can and will, according to the mythology of modernity, ultimately be subordinated in the 'manifest' (Fitzpatrick 1992, p. 50).

Re-enchantments

Understanding the mechanics of the settler Canadian legal system's operation of power against Indigenous groups as premised upon *myth* can be a powerful affective and aesthetic exercise, because '[m]odernity in general', Fitzpatrick says,

is not supposed to be about myth...The very idea of myth typifies 'them'—the savages and the ancestors 'we' have left behind. Myth can now only be a residue or an aberration, a faint evocation of paradise lost or a resurgence of monsters (Fitzpatrick 1992, p. ix).

Fitzpatrick (1992, p. 27) cites Adorno and Horkheimer's (1979, p. 3) assertion that 'the program of the Enlightenment was the disenchantment of the world: the dissolution of myth and the substitution of knowledge for fancy'. While modern Western law, despite its denials, 'continues to bear the characters of God...it does this now in a mundane world' (Fitzpatrick 1992, p. 55). This mundaneness has consequences in the context of the climate crisis. De Goede and Randalls (drawing on broader theories of 'emergency') argue that apocalyptic imaginaries of the climate crisis, within colonial capitalist systems, do little to spur radical action to pre-empt potentially catastrophic outcomes. Instead, the uncertainty posed by the crisis drives 'precautionary' thinking that results in "an insatiable quest for knowledge" in the form of, for example, "profiling populations, surveillance intelligence... catastrophe management, prevention, etc." (Aradau and van Munster 2007, p. 91, in de Goede and Randalls 2009, p. 868). This framework enables us to '[i]magine ourselves as gods so that we can anticipate threats to the environment and then manage them' (2009, p. 867). This facilitates a displacement of philosophical and political thinking about the nature of life in favour of a 'banal, technocratic focus on risks' (2009, p. 871).

Resulting 'ecomodern' approaches—commitments to carbon pricing and green capitalism (see, e.g., Gilbertson 2017)—sit comfortably within the mythological substance of modern law. Within this framework, the climate crisis is simply a sign that 'we have not been modern enough'—the crisis is an indication of the need for *more development* through further 'harnessing' of nature by Man (Adelman 2020, p. 42). However, the reality of the climate crisis defies control through these mechanisms (and perhaps control in general)—its temporality is non-linear, and the rational approaches to climate prediction deployed thus far (e.g. through risk modelling) are subject to enormous margins of error (de Goede and Randalls 2009, p. 870).

Devotions to notions of pure rationality and detachment might thus fail us—de Goede and Randalls argue that '[i]n order for tragedy and disaster to translate into meaningful political action...an enchanted attachment to life has to be cultivated' (2009, p. 874, emphasis added). While the enchantments of Western modernity are

constituted in negation, what is needed to meaningfully contemplate the climate crisis is a sense of *enchantment with specific modes of attachment to life*. This requires us to look past not necessarily myth in general but the mythology of modern law specifically. There is a reason Fitzpatrick selects white mythologies of modernity for such a sustained and focused critique. For:

[n]o matter what its uses elsewhere, narrative is a simple mode of mastery characteristic of the West. Through narrative, in mythic style, order is created and sustained in tightly linear and irreversible sequences flowing from an origin or an original transition. Through narrative, progressive domination and hierarchy integrally correspond to the sequence's forward thrust [e.g. through periodization, construction against the 'savage other', the 'uncivilized past']. (1992, p. 42)

This particular modality of narrative is not characteristic of *all* narratives about origin that seek to mediate between pasts, presents, and futures. Borrows explains that '[l]egal traditions based on spiritual principles form an important part of most every culture's legal inheritance' and that 'some Indigenous laws have sacred sources', stemming 'from the Creator, creation stories or revered ancient teachings that have withstood the test of time' (2010, p. 24). A number of Indigenous groups recognize Treaties as 'flowing from a sacred source' (p. 26). It is conceivable that the putatively *non-sacred* interpretation of Treaties by the settler colonial state in part enable the state's constant violation of Treaties (e.g. its violations of Treaties 6 and 8, as alleged by the Beaver Lake Cree and Blueberry River First Nations, respectively). The tar sands illustrate this in material way—the bitumen extracted, exported, and burned is a composition of past life on Earth (the ancestors 'we' have left behind) (Raupach and Canadell 2010, p. 210).⁵ A sustained *disconnection* from (or desacralization of) the past in colonial capitalist orders perhaps in part enables the large-scale extraction and exploitation of bitumen seen in the tar sands today.

An anatomical difference between the role of narrative for Indigenous groups in the tar sands region and those of the settler state can be further seen in the two juxtaposed statements about the tar sands below:

As Denesuline peoples, we have an intricate relationship with Mother Earth and our customary practices have allowed us to live in harmony with her. Our lands are medicine for the soul and the Athabasca has kept our people's physical, mental, emotional and spiritual well-being in balance. Denesuline culture and identity is rooted in where we come from; without the Athabasca Delta we could not continue to be K'ai Taile Dene. (Chief Allan Adam, in Helbig 2014, p. 15)⁶

⁵ This idea was shared by Thomas Joseph, a member of the Hoopa Valley tribal council, at a workshop on carbon colonialism organized by the Indigenous Environmental Network in January 2021. Joseph said: 'we are burning the remains of the last great extinction to bring about the next one'.

⁶ Chief of Athabasca Chipewyan First Nation.

No country would find 173 billion barrels of oil in the ground and just leave them there. (Justin Trudeau, Prime Minister of Canada: keynote address at CERAWeek's annual energy conference in Houston, Texas, 2017)⁷

While Chief Adam's statement begins with the qualifier '*As Denesuline peoples*', Trudeau's—despite espousing several of *his people's beliefs* (the notion of the nation state, the notion that humans have the imperative and right to extract from nature limitlessly)—qualifies nothing. Trudeau's universalizing statement speaks to a process by which 'local spaces are evacuated of meaning, abstracted into the service of capital flows as geographies to be measured and homogenized' (McCreary 2020, p. 129) according to the logic of commodity exchange. In contrast to the time–space compression that characterises commodity flows, McCreary discusses the notion of the 'gift' that characterises the economic governance of groups such as the Witsuwit'en in the West of Canada. The logic of the gift is premised upon 'place-time *extension*', which generates 'geographies of responsibility that extend connections to place across lifetimes and over generations' (2020, p. 131).

This can be felt viscerally in, for example, Eriel Tchekwie Deranger's⁸ statements about her devotion to protecting her community's traditional lands in the tar sands region:

Canada's Boreal Forest is such an amazing and beautiful ecosystem. We [as Dene people] flow from the land and our namesake connects us with those spaces. I was fortunate enough to grow up with parents that taught me about not just the ecosystems but our relationships with those ecosystems—the rocks, the rivers, the grass, the trees, the plants, the medicines, the birds, the fish, the moose, the caribou, the bison, the deer, the rabbits. (Mothers of Invention 2019)

She left her territory when she was 12 years old, and did not return again until nearly a decade later, after oil sands development had expanded significantly—only to find desolation where there was once lush life. Deranger says:

Imagine those places are your relatives that have been torn apart...and left as nothing but corpses and bones...I remember feeling like someone was sitting on my chest...I was overwhelmed by grief...I couldn't breathe and my ears started ringing and I just sat there and started crying...and it was that moment that changed me for the rest of my life. (Mothers of Invention 2019)

Deranger, as well as the many Indigenous people defending the tar sands from ecological destruction, not only want to *prevent the end of the humanity* but are also *deeply committed to saving and preserving particular life-worlds* 'embedded in Place' (McGregor 2018, p. 14) and 'forged within the distinct rhythms of Indigenous life and historical consciousness' (McCreary 2020, p. 125)—this distinction, as

⁷ Justin Trudeau, Prime Minister of Canada: keynote address at CERAWeek's annual energy conference in Houston, Texas, 2017.

⁸ Executive Director of Indigenous Climate Network and campaigner against destruction in the tar sands region; a member of the Athabaskan Chipewyan First Nation.

per de Goede and Randalls (above), is subtle but crucial in the context of the climate crisis, marking the difference between movements driven by love and movements driven by a nebulous fear.

Crucially, however, engaging with these notions requires a broader departure from colonial capitalist temporalities that situate not only Indigenous peoples, legal orders, rights, and epistemologies in the past, but also colonial *violences* (Coulthard 2014). The Beaver Lake Cree's ongoing litigation brings attention to this by holding the state responsible for the cumulative effects of generations of development in the tar sands, asserting the destructive obverse of the state's history of 'constant and accumulative creation' (Fitzpatrick 1992, p. 51). Like people, land and nature hold within them trauma from the past (McGregor 2018) and (as the intertwined environmental and climate crises clearly show) need healing—but cannot heal under the violent weight of the settler colonial structure.

The mythologies that underlie this structure, which derive their velocity from eternal Othering and an infinite vacuity, must be displaced in favour of narratives that *contain something*—narratives and knowledges that are constituted in multi-dimensional temporalities and, through this multidimensionality, make the Earth worth saving. For Indigenous resurgence movements in Canada, this has meant 'survival' (Vizenor 2008, p. 1) and resurgence (Simpson, 2014); for the settler colonial state, this must mean accepting responsibility for past and present violences.

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