Outline of Proposed Area of Research and Research Problem to be Addressed:

Searching for Reconciliation and the Rule of Law “Behind the Blockades”
Reconciliation is a divisive term in the area of Indigenous land rights in Canada. The Supreme Court of Canada has made it the “ultimate purpose of the honour of the Crown” and the “grand purpose of s. 35 of the Constitution Act, 1982”. Meanwhile, scholars from many disciplines and perspectives have commented on the constitutional principles and procedural mechanisms that the Court is constructing to steer law and society towards this inevitable goal. The division caused by reconciliation is not limited to a theoretical dispute amongst academics and judiciary, but is manifested on the ground in communities where industry and governments seek to sign so-called “Reconciliation Framework Agreements” with Aboriginal peoples.

As the guiding objective of Aboriginal law and Indigenous-Crown relations, the resultant divisiveness of reconciliation points to an inherent problem with the current legal definition of the term that must be addressed. In my view, the contradiction is evident in how the Court describes reconciling “pre-existing Aboriginal sovereignty with assumed Crown sovereignty.” Michael Asch frames this issue saying, “it is the question of how the Crown gained sovereignty that requires reconciliation with the pre-existence of Indigenous societies and not the other way around.” This is the question that I want to explore and I propose that one of the best places to start looking for answers is on the ground in a unique setting where existing Indigenous societies and asserted Crown sovereignty are coming into constant conflict: the blockade.

The blockade is essentially a physical and legal “reoccupation” of a defined area by Indigenous peoples. This can range from blocking a rail line for a few hours or days and building permanent structures directly in the path of proposed pipelines to declaring sovereignty over traditional territory and exercising territorial authority. The versatility and impact of the blockade makes it a powerful tactic for leveraging economic and political action, but also for forcing the law to examine the conflicting claims of sovereignty between the Crown and Indigenous peoples.

Proposed Thesis: Blockades and the rule of law
I expect that studying blockades will require an interdisciplinary approach drawing on areas beyond law including history, political science, anthropology and geography. My central argument is that blockades are necessary for the reconciliation of “pre-existing Aboriginal sovereignty with assumed Crown sovereignty”. This argument will make two key claims based on empirical research and the current literature: First, Indigenous blockades are evidence that there are existing Indigenous political and legal orders that are struggling to resist a hegemonic colonial order by creating, or forcing the recognition of a space that exists outside of the settler-colonial system. Second, as exercises of legal and political authority, Indigenous blockades demonstrate the need for a space outside of the settler-colonial system by exposing the limitations and the insufficiencies of the Canadian legal and political order to make the reconciliation of Canadians and Indigenous peoples feasible in the absence of fundamental change. If this argument has merit, then I believe it follows that nothing short of a radical transformation – what the late Secwepemc leader Grand Chief George Manuel called, “a genuine leap of imagination” – will be needed to break through the “major impasse” and ensure that reconciliation remains a possibility for future generations of Canadians and Indigenous peoples.

Theory: Assimilation vs. Resurgence, sorting facts from legal fictions
The Court has constructed a definition of reconciliation that proposes to resolve the internal conflict by constructing a legal fiction through the words “assumed” and “asserted”.

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However, legal fictions, while not uncontroversial, at the very least come with certain rules. For Lon Fuller, “fiction becomes wholly safe only when it is used with a complete consciousness of its falsity,” but “[a] fiction taken seriously, i.e., ‘believed’ becomes dangerous.” Scholars problematize the current definition of reconciliation by saying it is just another form of assimilation, the unwavering goal of the Crown since at least confederation. This criticism of reconciliation says that it is not a legal fiction, but a lie that ignores, covers up or advances the persisting racist narratives that support the continued existence of a settler-colonial system. In other words, “assumed” Crown sovereignty really means “accepted” Crown sovereignty, which is the very thing that has been contested by Indigenous peoples since contact.

In response, an emerging field of scholarship has started to articulate the resurgence of Indigenous peoples. Resurgence can be defined by the rejection of the colonial recognition and reconciliation discourse – the “recognition” of rights through negotiations or legal declaration – and this rejection is acted out by exercising Indigenous sovereignty and practicing Indigenous ways of living on the ground. In other words, while the Crown asserts de jure sovereignty, Indigenous peoples are exercising their de facto sovereignty.

The initial impression might be that blockades are antithetical to reconciliation since exercising Indigenous sovereignty, in any form not just blockades, within the current Canadian legal framework is presumptively unlawful unless proven otherwise. Arguably, that this presumption is relied upon by courts to declare blockades unlawful demonstrates that the objective of reconciliation currently defined by the Court is in fact assimilation.

Research: Reconciling with whom, searching for facts “behind the blockades”

In contrast to the assertions of the Crown, I propose to explore through field research whether blockades demonstrate that Indigenous sovereignties – legal, political and social orders – exist on the ground. I want to document how blockades occur in accordance with the Indigenous legal orders of those who set them up and maintain them. I want to find out who are the ones with “the power to speak the law.” The contested issue of who has the authority to speak for the collective nature of Aboriginal rights and title is an outstanding legal question in Canadian Aboriginal law and a prominent source of division within communities.

Proposed Methodology: A case-study of blockades in Secwepemculecw

I would like to conduct this research through a case-study of the Secwepemc people in the interior of British Columbia with whom I began developing a relationship with during my time in law school. In addition to the empirical questions outlined above, the purpose of the research will be to enrich my historical and legal understanding of blockades from the Secwepemc perspective and follow their ongoing resistance by attending meetings, observing direct-actions, continuing my education in the Secwepemc language and interviewing Secwepemc Elders, land users, community leaders and others.

The Secwepemc have a consistent notion of struggle for the recognition of their Indigenous rights and institutions that can be traced from at least 1910 to the present day. This notion is intertwined with a rich history of blockades that visibly inspires the ongoing resistance of the Secwepemc to industrial activity that continues to encroach upon their territory, Secwepemculecw, most notably through the proposed expansion of the Kinder Morgan Trans Mountain pipeline, the recent Mount Polley Mine tailings pond breach and the Ruddock Creek Mine situated in the sacred headwaters of the world’s largest remaining sockeye salmon run.

While on the ground, I want to highlight the individuals behind the blockades and their stories. I want to situate the personal moral commitment of blockaders within existing Indigenous sovereignty vis-à-vis their presumed illegality under Canadian law. Individuals who
know full well that their actions are illegal under Canadian law and will inevitably face significant long-term hardship, criminalization, marginalization and even physical force. A question to consider will be whether this level of commitment shows that these Indigenous legal orders are struggling to survive under a hegemonic colonial system and what insight might be gained from applying theoretical analysis to that characterization of struggle.

My experience as a journalist covering marginalized communities and my current connections in the Secwepemc community will serve as good starting points, and give me the tools to anticipate and hopefully meet any challenges that may arise.

**Proposed Remedy: Beyond the blockades**

If the current definition of reconciliation is to be rejected in favour of resurgence, then using factual findings and theoretical analysis to develop a workable remedy on the ground is a challenge I want to eventually pursue with this work. I want to ask: What law is capable of “protecting” Indigenous legal orders from colonization so as to preserve the objective of reconciliation for future generations? I think the answer for this question begins, as the resurgence thesis does, with the scholarship on decolonization. Decolonization is both an objective and a process. As an objective it requires the repatriation of Indigenous land and ways of living. As a process it requires the recognition or creation of a space or process outside of the settler-colonial system. Canada's constitution, and lived reality, is definitively a settler-colonial system. Although the contrary was proclaimed by the Crown in 1763, and is now enshrined in ss. 25 and 35(1), the reality in fact and law is that Indigenous land was stolen and given to settlers to live on, use and exploit for their own enrichment. The legal fictions of “protection” and “recognition” are factually a lie.

Building on the blockades thesis, I will argue that by asserting Indigenous legal orders over physical space, by exercising jurisdiction, blockades create, or force the recognition of, the process that decolonization requires. They ensure that, in the face of incredible oppression, the objective that decolonization requires, the repatriation of Indigenous lands and ways of living, remains a possibility. They expose the truth on the ground and draw attention to the lie and in doing so they help to restore a rule of law that the settler-colonial reality has covered up. The restoration of the rule of law requires substantive and procedural change. I will propose that the way the law interacts with blockades must therefore change. I will suggest that decolonization can and must be practiced and implemented in everything from the way police forces interact with blockaders, to how Crown counsel proceeds with charges and how courts apply the principles of ss. 25 and 35(1) to everything from civil interlocutory injunction applications to criminal charges of mischief and trespass under the *Criminal Code*.

**Closing**

My interest in Indigenous rights and blockades was one of the early precursors that sparked my intention to go to law school. That interest helped steer me towards academic excellence in law school and to find strong mentors. Although I am shortly finishing up my articles and being called to the bar in British Columbia, that same interest and the present political, economic and legal landscape now compels me to apply to do this work through Osgoode’s graduate studies program. Given my experience and interest in these issues, I am confident in my ability and commitment to fully engage in the proposed research project and see it to completion.
ENDNOTES

3 Beckman v Little Salmon/Carmacks First Nation, 2010 SCC 53 at para 10.
6 Rt Hon Beverley McLachlin, “Defining Moments: The Canadian Constitution” (Speech delivered at the Canadian Club of Ottawa, 5 February 2013) online: <http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2013-02-05-eng.aspx>. (In this speech, McLachlin CJC reiterates Lamer CJC’s notorious line “We are all here to stay” by saying, “[T]his is too late to separate. We have no choice but to live together and reconcile our differences.”)
7 For example: Both the T’kemlups and the Skeetchestn Indian Bands have officially signed “Reconciliation Framework Agreements” see: British Columbia, Ministry of Aboriginal Relations & Reconciliation, Reconciliation - Moving Forward, website (Victoria: Ministry of Aboriginal Relations, 2013) online: <http://www.newrelationship.gov.bc.ca/agreements_and_leg/reconciliation.html>. Meanwhile, other Secwepemc bands have refused to sign and have expressed clear opposition to these instruments. See: Arthur Manuel, “Secwepemc Reconciliation Framework Agreement” posted on Scribd, (8 April 2013) online: <http://www.scribd.com/doc/134883723/Secwepemc-BC-Reconciliation-Agreement-Apr-8-2013>.
8 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 20. (The Court has phrased this same statement differently numerous times since at least R v Van der Peet, [1996] 2 SCR 507, arguably with the same effect of somehow recognizing Aboriginal rights without disrupting or questioning the colonial framework – the assertion of sovereignty – that underpins the legal system.).
9 Asch, supra note 4.


23 Coulthard, *supra* note 4; Christie, *supra* note 5.

24 *Ibid*.


26 Coulthard, *ibid*.

27 The operation of this presumption is demonstrated over and over by the courts. See, in the Secwepemc context, for example: *R v Manuel*, 2008 BCCA 143, *R v Pena* (1997), 148 DLR (4th) 372 [BCSC]

28 Pasternak, *supra* note 16.

29 *Behn v Moulton Contracting Ltd*, 2013 SCC 26


33 Tuck & Yang, *supra* note 16.

34 Keenan, *supra* note 16.