Not Judging: Jurisdictional Hubris and Building a Common Legal World

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In its 2015 report, Canada's Truth and Reconciliation Commission (TRC) documents the history of Indigenous-settler legal, political and cultural relationships in Canada in order to ground its 94 Calls to Action (TRC 2015). The Calls to Action are directed at redressing the legacy of residential schools and working towards reconciliation, which the Commission defines in specific relational terms: 'To the Commission, reconciliation is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country' (TRC 2015, 16). In more detailed language, the TRC mandate identifies that reconciliation is 'an ongoing individual and collective process, and will require commitment from all those affected including First Nations, Inuit and Métis former Indian Residential School (IRS) students, their families, communities, religious entities, former school employees, government and the people of Canada. Reconciliation may occur between any of the above groups' (TRC 2015, 16).

Thus, for the TRC, "reconciliation" is not a political slogan nor a vague descriptor of social remediation for Indigenous peoples; it is a term exhorting people and governments to *create* and *maintain* mutually respectful relationships between Indigenous and non-Indigenous people. The TRC further identifies that '[e]stablishing respectful relationships…requires the revitalization of Indigenous law and legal traditions' (TRC 2015, 16). The relationships encompassed by the call

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for reconciliation include *legal* relationships, and the relationships between Indigenous and state legal orders.

The work of legal judgment in this context is complex. Judges making decisions in Canadian courts are individual agents and members of communities, families and cultures; they are among the 'people of Canada' who are part of the TRC's call for reconciliation. Judges are also situated in an institutional context in which they carry particular legal obligations and have a special role to play in how the Canadian state understands and participates in the relationships between Indigenous and settler communities and legal orders. This paper takes up Canadian constitutional law as a site where legal relationships are constituted on an ongoing basis, and where questions about the authorities and obligations of judges are of great significance. Here, the imperative to *judge well* reflects the aspirations of the state with respect to the creation and maintenance of just relationships.

In this context, the challenges for judging and judgment are daunting and present themselves in many forms. On one hand, the TRC meticulously documents the exercise of Canadian legal and political judgment that has imposed colonial frameworks on Indigenous laws, communities and bodies.[1] These exercises of judgment can appear as a form of jurisdictional hubris, wilfully or ignorantly imposing colonial standards in a way that maintains the invisibility of other norms and authorities and generating enormously damaging material consequences for Indigenous peoples. Given this, the desire to build just relationships might motivate a call to *suspend judgment*, to open our eyes to the realities of legal pluralism and colonial domination as undercutting the validity Canadian legal judgments about Indigenous people or laws, and to step away from this unjustified imposition of concepts and values. Like Western feminists assessing gender justice in non-Western societies, or historians critiquing the politics of different times and places, Canadian judges have uncertain standing with respect to judging Indigenous people and Indigenous law, and it is seems that an untroubled assumption of jurisdiction is legally unsustainable.[2] In the context of diversity and inequality, perhaps justice will require, not judgment, but the suspension of judgment. Not judging.

On the other hand, the TRC report also points to justice failures that do not seem fully captured by the exhortation to suspend judgment. For example, the absence or invisibility of Indigenous history in Canadian school textbooks does, to be sure, reflect an underlying judgment about the relative inferiority of Indigenous societies as compared with

[1] For example, the TRC summarizes the imposition of the *Indian Act* governance structures that are also the subject of the litigation explored in this paper (TRC 2015, 55).

[2] The Supreme Court of Canada both recognizes and ignores the contradictions inherent to Canadian constitutional jurisdiction over these lands. See for example *Tsilhqot'in Nation v. British Columbia* [2014] 2 SCR 257 at para. 69.

European societies.[3] However, the invisibility or absence itself seems inadequately captured by the notion of poor judgment; in this example, Indigenous history has fallen outside the range of things that it is possible to judge at all. A student reading such a textbook is not led to make critical or invalid judgments *about* Indigenous history; they learn that there is no such thing, nothing worthy of the critical evaluative lens that might be brought to European or colonial history. Here, the problem seems to be not (or not only) an expansive jurisdictional hubris, but the absence of a shared sense of what kinds of things are the proper subjects of judgment. The failures of collective memory, ongoing adherence to misleading colonial narratives and legal inattention to Indigenous interests and rights seem to speak, not about *too much* judgment, but about *failures to judge at all*. Here, instead of the hubristic imposition of colonial frameworks, we see unjust relationships sustained through refusal, privileged ignorance, abdication, and failures of responsibility. Not judging.

In this article, I explore the challenges of judgment that are of this kind; challenges that are, at their heart, about privileged refusal to engage and the incompleteness of the framework available to judge across legal worlds. I think through these challenges as *not judging*, and explore how to distinguish them from other kinds of judicial practices. Drawing on the definition of "reconciliation" articulated by the TRC and the particular context of Canada, I assess practices of judgment against the imperative to create and maintain just relationships between Indigenous and non-Indigenous communities and institutions in Canada. I ask whether our[4] practices of judging and not-judging work to support or undermine the kinds of relationships called for by reconciliation, and I argue that a theoretical account of legal judgment that conceives of it as world-disclosing helps provide criteria for determining when "not-judging" supports or undermines practices of legal judgment in the service of reconciliation.

The TRC is clear that "reconciliation" is a relational practice, calling on the actions and commitment of all parties. However, in this paper, I am concerned specifically with the obligations and justice demands that fall to the Canadian constitutional order and the judges whose work is embedded in that order. I am concerned with the "homework" [5] that

[3] 'Although textbooks have become more inclusive of Aboriginal perspectives over the past three decades, the role of Aboriginal people in Canadian history during much of the twentieth century remains invisible [...] So much of the story of Aboriginal peoples, as seen through their own eyes, is still missing from Canadian history.' (TRC 2015, 235)

[4] In this paper, I sometimes use the language of "we" and "our" to describe the people negotiating the problems of legal judgment. I use this language, not to conscript the reader but to include myself in the specific undertakings I am describing and to underscore their collective elements.

[5] Sara Ahmed uses the language of "homework" to talk about spaces where we feel at home, where we work, how we assign ourselves work, how we build the places we inhabit, and how we can allow feminist theory to come home or be at home in the spaces we inhabit (Ahmed 2017).

needs to be done within non-Indigenous legal orders in order for just relationships to become possible, to identify and nourish "spaces for sharing" (Hanna, 2017).

This article has three parts. In the first part, I will expand this discussion of "not-judging" in order to more specifically identify what is at stake and situate these claims in a broader theoretical context. In the second part of the article, I describe one case example that provides a fruitful context for thinking about the complexity of the different legal and normative consequences of "not-judging." The case example is the 2015 decision of the Supreme Court of Canada in the case *Kawkewistawah First Nation v Taypotat*, and concerns the way the *Canadian Charter of Rights and Freedoms* interacts with the development of First Nations community election codes.

In the third part of the article, I draw on the work of Hannah Arendt to articulate a theoretical framework that provides useful resources for building the capacity of Canadian constitutional law to negotiate the risks and obligations of non-judgment. I argue that understanding the challenges of law and reconciliation through the lens of *judgment* theories allows us to focus on how relationships are being constantly created and sustained in law.

In the conclusion, I return to the questions raised by the *Kahkewistahaw* case and bring them into contact with the discussion of Arendtian reflective judgment in order to assess the usefulness of that encounter. I argue that Arendt's approach to judgment gives a different kind of value to a judge's ability to engage in critical self-reflection in the service of relationships, value that might be missed by other accounts. Specifically, Arendt's approach links reflective, accountable judgments to the creation of a shared world, and I argue that these arguments useful for thinking through some of the dilemmas posed by the *Kahkewistahaw* case. I argue that focusing on *judgment and non-judgment* makes it possible to maintain a rigorously critical posture towards the practices of judgment of our state-based, colonial and multi-juridical legal system, while also taking seriously the capacity of that legal system to move us towards (rather than away from) a space in which respectful relationships can be built and maintained.

1. Judging and not-judging

Talking about "judgment" in law is both familiar and unusual. While we use the language of "judges," and "judgments" to explain key institutional roles and tasks, and the language of "judgments" to describe the written reasons judges offer in support of their findings, there are many other ways that we describe what judges do. We might say they are adjudicating disputes, or applying the doctrine of precedent or the rules of evidence. We might say they are crafting outcomes that

they find politically acceptable, or acting through a set of institutional structures elaborated by the contemporary state. I think they are probably doing all of these things, but I think that we learn particular things about our practices, concepts and institutions when we conceive of legal judgment as a particular manifestation of a broad human practice of judgment, alongside aesthetic, political and moral judgment. In general terms, questions of adjudication, decision-making and "how judges decide" are the subject of longstanding conversations in legal theory (for example, Dworkin 1986). However, the idea of "judgment" invoked here is distinct from the idea of decision-making generally; it is more general in the way that legal judgment is conceived of as one form of a broader human practice, and more specific in that it evokes a particular mode of human decision-making. Focusing on "judgment" raises questions that may not arise when talking about "adjudication," for example.

Taking a broad view, "not-judging" can also describe a wide range of things, each of which might relate differently to the demands of justice and reconciliation. When searching for an alternative to "judgment," we find that judgment can be placed in contradistinction to a whole range of concepts and practices, many of which cannot be put on the same scale.[6] For example, "judgment" can be distinguished from *perception* or learning without assessment. Here, "not-judging" might signal a mental stage of perception prior to judgment, or perhaps an openness to engaging without evaluation. In a different way, judgment can also be distinguished from decision-making processes that rely on non-evaluative modes of assessment, such as the application of logical rules. In this context, "not-judging" is not prior to or different from decision-making, but a different *mode* of decision-making. Even taking up these simple aspects of judging and not-judging reveals complicated relationships to law and justice: openness and perception ("not-judging") are crucial aspects of just legal practices, as are binding rules that constrain and structure evaluation ("not-judging"). At the same time, judges making legal decisions carry an obligation to judge when called upon to do so, and to be held accountable for their judgments in particular ways. A "judge" whose practices could only be described as "not-judging" would be failing to live up to those basic obligations. Judges must apply rules ("not-judging"), but on any account of adjudication, all judges carry with them their own knowledge and experience in the way they interpret and apply legal rules and principles.[7] They *judge*.

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[6] Opposites of "judgment" could include: indecision, self-doubt, openness, deliberation, apathy and irresolution. Thanks to my research assistant Kendra Marks for broadening the range of possibilities canvassed here.

[7] For example, in the leading case describing the requirements of impartial judgment, the majority of the Supreme Court of Canada endorsed the view that: '…True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge

What criteria are available for assessing the justice of not-judging? In particular, set against the transformative demands of reconciliation for Canadian constitutional law, how should Canadian constitutional practitioners work with the tension between the legal requirement to judge and its history of jurisdictional hubris? Is non-judgment sometimes a good strategy in the face of this tension? How can we determine the difference between acts of non-judgment that might open space for making other legal norms visible, and acts of non-judgment that reaffirm the colonial map of what merits judgment?[8] In the subsequent sections, I develop criteria for thinking through the difference between non-judgment that proceeds from restraint or humility, and non-judgment that proceeds from refusal or abdication.

2. *Kahkewistahaw First Nation v Taypotat*: judging and not-judging discrimination

In the 2015 case *Kahkewistahaw First Nation v Taypotat*, the Supreme Court of Canada was called upon to assess whether provisions of a First Nations local election code (the *Kahkewistahaw Election Act)* were unconstitutionally discriminatory because of the inclusion of minimum education requirements for candidates. The Kahkewistahaw First Nation is an Indigenous community and an Indian Band in the southeast part of the province of Saskatchewan. There are about 2,020 members of the band, of whom about 670 live on reserve, and community languages include Cree and Saulteaux.[9] The community belongs to Treaty 4, which was negotiated between several Indigenous nations and the Crown in 1874.[10]

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nevertheless be free to entertain and act upon different points of view with an open mind' R. *v.* S. (R.D.), [1997] 3 S.C.R. 484 at para 119.

[8] Decolonial and third-world scholars critique the excesses of colonial judgment, but also the exercise of power that can attend "not-judgment." For example, feminist philosopher Uma Narayan argues that " 'Refusing to judge' issues affecting Third-World communities, or the representations of these issues by 'Insider' subjects, is often a facile and problematic attempt to compensate for a history of misjudgment. Such refusals can become simply one more 'Western' gesture that confirms the moral inequality of Third-World cultures by shielding them from the moral and political evaluations that 'Western' contexts and practices are subject to" (Narayan 1997, 150). Cited and discussed by Zerilli 2016, 165.

[9] City of Saskatoon: *First Nation Community Profile: Kahkewistahaw First Nation*. 2017. Available at <https://www.saskatoon.ca/sites/default/files/documents/community-services/planning-development/future-growth/urban-reserves-treaty-land-entitlement/fnp_kahkewistahaw_september2017.pdf> (visited May 31) achieved at [https://perma.cc/8MRF-WNAN].

[10] Indigenous and Northern Affairs Canada website. Available at <https://www.aadnc-aandc.gc.ca/eng/1100100020616/1100100020653> (visited 29 May 2019) Archived at [https://perma.cc/QKK5-C4LY]. An overview of Treaty 4 can be found at < https://www.aadnc-aandc.gc.ca/eng/1100100028681/1100100028683> (visited 29 May 2019) Archived at [https://perma.cc/99RQ-GMW3]. Treaty rights in Canada are constitutionally protected by s. 35 of the *Constitution Act, 1982*. For a concise overview of Canadian constitutional frameworks, see Webber 2015.

Under the federal *Indian Act,* the Minister can order that the Chief and Council of an Indian Band be selected through elections held in accordance with the terms of the *Indian Act*.[11] The vast majority of Indian Bands were subject to such orders at one time or another. Recently, the federal government has created statutory processes for the revocation of such orders, allowing bands to develop their own election codes, called "community election codes."[12] Pursuant to policies operating under the *Indian Act*, community election codes must meet certain requirements, including consistency with the individual rights protected under the *Canadian Charter of Rights and Freedoms*. In addition, such codes must be approved by the band Council and a majority of the members of the First Nation, expressed through a secret ballot.[13] As such, the development and adoption of community election codes can become an important site where the law and politics operational in Indigenous communities comes into contact with Canadian state law, and there is an interesting history of constitutional litigation about their meaning and effect.[14] The Kahkewistahaw First Nation engaged in this process and over a period of 13 years developed an election code (*Kahkewistahaw* para 5). The new election code stated that any candidate for Chief or councillor must have attained a Grade 12 education or equivalent (*Kahhewistahaw* para 6).

The claimant, Mr. Louis Taypotat, was elected chief of the Kahkewistahaw First Nation for close to 30 years, beginning in the 1970s. At the time of the Supreme Court of Canada judgment, he was 76 years old. Mr. Taypotat wanted to run again, but did not meet the new education requirement. Mr. Taypotat was a survivor of the residential school system, and although he had taken a GED test at a grade 10 level and had received a certificate from a college in recognition of his service to the community, Mr. Taypotat did not have a grade 12 education as required by the law. Mr. Taypotat challenged the education requirement in the Election Act on the grounds that it violated s. 15 of the *Charter*. Section 15(1) provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[11] *Indian Act* (RSC, 1985, c. I-5) s. 74. The Indian Act is a federal statute in Canada through which the state governs in matters relating to "Indian status," "bands," and "reserves."

[12] Conversion to Community Election System Policy. Available at <https://www.aadnc-aandc.gc.ca/eng/1433166668652/1433166766343> (visited 29 May 2019) Archived at [https://perma.cc/2WBS-8DXZ]

[13] Conversion to Community Election System Policy. Available at <https://www.aadnc-aandc.gc.ca/eng/1433166668652/1433166766343> (visited 29 May 2019) Archived at [https://perma.cc/97NJ-WE3M].

[14] For an interesting recent example, see *Whelan v Fort McMurray No. 468 First Nation* 2019 FC 732.

Before the Supreme Court of Canada (SCC), Mr. Taypotat argued that the education requirement was discriminatory because it had a disproportionate effect on older community members who live on reserve. The Supreme Court of Canada found that there was no breach of s. 15. The reasoning at the heart of this finding was that the claimant did not provide sufficient evidence to show that the education requirement had an adverse effect on an enumerated or analogous group (*Kahkewistahaw* para 15).

This is a complex case, both in terms of equality jurisprudence and in terms of legal plurality in Canada. [15] While this article does not fully engage with this case as a piece of equality rights jurisprudence, there are two aspects of this jurisprudence that I will highlight in order to provide context for my discussion. First, the current doctrinal framework for interpreting s. 15 of the *Charter* requires a claimant to show that they are experiencing unequal treatment *on the basis of a listed or analogous ground* (*Kahkewistahaw* para 16). In Mr. Taypotat's case, this meant that he would either have to show that he was being discriminated against on the basis of a listed ground (here, age or race), on the basis of an analogous ground already identified by courts (such as Aboriginality-residence), or on the basis of a ground that should be recognized as analogous to the ones in section 15 (such as level of education or social condition). While the comparative role of "grounds" is complex and disputed, and is not to be treated in a formalistic manner, connections between unequal treatment and these protected grounds is very important (Pothier 2001). Second, Canadian equality jurisprudence requires that there be some form of empirical foundation to support the factual claim that the law draws a distinction in a way that has a disproportionate effect on the relevant protected group. That is, if the law does not discriminate on its face, the claimant must *demonstrate* that it discriminates in effect.

Even just on the facts that can be discerned by reading the judgments in *Kahkewistahaw*, questions emerge about a whole host of matters, including the relationship between *Indian Act* laws and the Canadian constitution, the relationship between community election codes and Indigenous legal orders, the relationship between those constitutional orders and the legitimacy of democratic deliberation. In the following passages, I identify passages from the Supreme Court and Court of Appeal judgments that I think are important for thinking about the requirements of legal judgment. I focus on moments that might be characterized as "not-judging," and try to unpack the reasons we might have to critique or endorse these actions of non-judgment, in light of aspirations for the transformation of Canadian constitutionalism in the service of reconciliation.

[15] For analysis of the s. 15 aspects of this decision, see Hamilton & Koshan 2016; Eisen 2017.

2.1 No evidence: not judging?

In her judgment, representing the unanimous judgment of the Supreme Court of Canada, Justice Rosalie Abella found that there was *no evidence* to show that the educational requirement had a disproportionate impact on the claimant based on his membership in an enumerated or analogous group. The SCC looked first at age, and then "residence on reserve" as possibilities, and found that there was no evidence to support the claim that the education requirement had an adverse requirement on one of those groups.[16] The SCC quotes from the reports of the Royal Commission on Aboriginal Peoples in support of the claim that valuing education is extremely important to achieving justice for Indigenous people (*Kahkewistahaw* para 1), but does not mention residential schools or their legacy in the judgment, except to note that Mr. Taypotat did not raise this issue in his original pleadings (*Kahkewistahaw* para 20).

Justice Abella writes:

> There is no question that education requirements for employment could, in certain circumstances, be shown to have a discriminatory impact in violation of s. 15 [...] In this case, however, there is virtually no evidence about the relationship between age, residency on a reserve, and education levels in the Kahkewistahaw First Nation to demonstrate the operation of [...] [a discriminatory "headwind"]. Nor is there any evidence about the effect of the education provisions on older community members, on community members who live on a reserve, or on individuals who belong to both of these groups (*Kahkewistahaw* paras 23-24).

The issues of adverse effects and the possible grounds of discrimination were complicated by the fact that Mr. Taypotat's exact claim changed between trial and appeal, and the different courts all articulated their decisions on s. 15 in different ways (*Kahkewistahaw* paras 10-14). For present purposes, I am interested in exploring the possibility that Abella J.'s finding (that there was no factual basis on which to ground a judgment of discrimination) could be described as an exercise of non-judgment.

Given the repeated and extensive documentation of the policies and consequences of the residential school system, including the recent reports of the TRC, there are good reasons to pause over the claim that

[16] Interestingly, the Charter Committee on Poverty Issues and Canada without Poverty applied for leave to intervene in the case before the SCC, and were denied. They would have argued that level of education is properly understood as a "social condition," which should be accepted as an analogous ground of discrimination. See CCPI/CWP Application for Leave to Intervene, at para 6. Available at <http://www.socialrights.ca/docs/taypotat%20leave%20factum.pdf> (visited 29 May 2019) Archived at [https://perma.cc/Z4EF-3V8N].

there is *no evidence* that a formal education requirement would impact disproportionately on older members of Aboriginal communities who are themselves survivors of that system. To characterize Abella J.'s finding here as non-judgment would be to claim that, instead of exercising judgment, she has *deferred* judgment to a set of formalistic rules of evidence in which the party challenging the law (here, an elderly residential school survivor) is the sole source for judicial fact-finding. This sets aside possibilities such as the doctrine of judicial notice that demand a more active approach to the judicial role (Cochran 2007).

From the perspective of just relationships: does Abella J.'s refusal to look beyond admissible evidence constitute a kind of wilful blindness to the reality of the social context in which her judgment is exercised? If so, this form of non-judgment seems unlikely to live up to our aspirations for practices of good legal judgment. But this may not be a complete picture of the judgment practices engaged by Abella J. in this case. To draw out different aspects, I turn to how this issue is negotiated by the Federal Court of Appeal (FCA).

2.2 No law: not-judging?

Faced with the complex set of problems about facts, evidence, and social context that arise in *Kahkewistahaw*, the Federal Court of Appeal takes a markedly different approach than the Supreme Court of Canada. To provide adequate factual context for his analysis, Mainville J.A. takes judicial notice of 2006 census information available from Statistics Canada.[17] He writes:

> The education gap within the on-reserve aboriginal population of Canada is well-documented … Moreover, the education gap between older and younger Canadians is also well-known… [Therefore] the impugned provisions…. create a distinction that discriminates on the basis of both age and of Aboriginality-residence (*Taypotat v. Taypotat* 2013 FCA 192 para 48).

Thus, the judgment of the FCA in this case does seem to disclose a more active approach to the task of judgment, a willingness to put together a more robust picture of the context and to try and understand what this issue might mean to the people in the communities in question. For example, the court raises the possibility that 'elders who may have a wealth of traditional knowledge, wisdom and practical experience, are excluded from public office simply because they have no "formal" (i.e. Euro-Canadian) education credentials. Such a practice would be founded on a stereotypical view of elders' (*Taypotat* para 59).

[17] Statistics Canada has been endorsed by Canadian courts as a so-called "readily accessible source of indisputable accuracy" and thus a suitable source for information to be judicially noticed – see *R. v. Find*, 2001 SCC 32.

However, when it comes to the meaning and consequences of not-judging, there are further questions to raise. Perhaps most importantly: To what extent might the SCC be deferring, not to a constrained or formalistic view of impartiality and the judicial role, but *to the political processes undertaken by the Kahkewistahaw First Nation*? Viewed from this perspective, Abella J.'s moment of non-judgment looks less like an abdication, and more like an act of making space for the political judgment of a marginalized community.

For example, regarding the FCA's resort to judicial notice, Abella J. writes:

> Census data can certainly be a useful evidentiary tool to demonstrate that a law has a disadvantaging impact. But this case is about a particular Election Code in a particular First Nations community. I find it difficult to draw even a weak inference about the correlation between age and education among the almost 2000 members of the Kahkewistahaw First Nation from census data about the Canadian population generally (*Kahkewistahaw* para 31).

More importantly:

> I think intuition may well lead us to the conclusion that the provision has some disparate impact, but before we put the Kahkewistahaw First Nation to the burden of justifying a breach of s. 15 in its Kahkewistahaw Election Act, there must be enough evidence to show a prima facie breach. While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct (*Kahkewistahaw* para 34, emphasis added).

The trial court and appeal decisions reveal that the process leading up to the adoption of the *Kahkewistahaw Election Act* was a disputed one. It is not at all obvious to an outsider if and how the process is related to legitimate political engagement by the community. The facts are complex and, on their face, point to opposite conclusions. For example, the referendums leading to the ultimate approval of the election code were plagued by low voter turnout. However, the turnout for those referendums was actually higher than usual participation in the band council election processes (*Taypotat* FC para 41). The parties to the dispute raised issues about voter disengagement and the degree to which the formal procedure reflected genuine community debate. There were people who voted in favour of the new Act, but then later signed a petition to oppose it (*Taypotat* FC para 43). There is the issue of Mr. Taypotat's longstanding position as Chief, and the possibility that a new generation of leaders was trying to take power, either legitimately or illegitimately; in the most recent election for Chief, Mr. Taypotat lost to his nephew by just four votes (*Taypotat* FC para 3). There is a sense that a generational shift was afoot, with both positive and negative

connotations being attached to that: there was a recognized need for new leadership, and recognized fears about the mistreatment or marginalization of elders (*Taypotat* FC para 7). And finally, the Court faced a moment in which an Indigenous community has engaged in a political process, but some members have called upon the Canadian state to intervene in that process to protect their right to equality.

The Federal Court of Appeal grapples quite directly with the question of the role of Canadian courts with respect to individual citizens of the Kahkewistahaw First Nation. For example, the FCA finds that the education requirement breached, not only s. 15 of the *Charter*, but also the anti-discrimination provisions included by the First Nation in their own *Election Act*. In order to make this finding, Mainville JA has to bring the Council of the Kahkewistahaw First Nation into the Federal Court's jurisdiction – and under *Charter* scrutiny – by describing it as 'government' (*Taypotat* para 36). Mainville JA writes that 'to decide otherwise would be to create a jurisdictional ghetto in which aboriginal peoples would be entitled to lesser fundamental constitutional rights and freedoms than those available to and recognized for all other Canadian citizens' (*Taypotat* para 39).

Thus, Mainville JA takes an active and encompassing posture when undertaking the task set before him, and this affects both his treatment of facts and law. Tested against criteria for good legal judgment, concerns arise, not about a failure to fully engage, but a potentially overly ambitious mode of incorporation, with the risk of universalizing the partial laws of the settler state.

All of this discussion underscores the complexity of this case as a whole, and the difficulty of identifying the structure of the legal judgment that must be exercised in this case in order to rise to the demands of justice and reconciliation. In some respects, this is a dilemma that is very familiar to the Canadian common-law tradition. There are a variety of concepts and doctrines that have developed to provide resources for thinking about the legitimate scope of legal judgment: jurisdiction, conflicts of laws doctrines, constitutional division of powers, and judicial review of administrative action. Many of these concepts can provide guidance on the question of how far judging can or should go. (Put in the terms used by the FCA and SCC in *Kahkewistahaw*: judges should be cautious when they consider compelling a government to justify its actions legally, but they must not create jurisdictional ghettos).[18]

[18] The concept of "jurisdiction" is also a fruitful locus for discussion of legal pluralism and relational justice. In this paper, exercises or assertions of jurisdiction are read through the lens of "judgment" and characterized as "judging" or "not-judging." The particular value of the present approach has to do with focusing attention on relationships, but there may also be a loss of the concretely *territorial* components of legal authority. For discussion of "jurisdiction" as a concept that creates relationships between land and authority in a settler colonial state, see Pasternak 2017; Dorsett & McVeigh 2012.

For example, an approach focusing on the "rule of law" might insist, with Mainville JA, that a rights documents such as the *Charter* must be applied universally in Canada. This claim might decide certain legal outcomes. But it does not really address – or even make visible – some of the questions that sit at the heart of not-judging. For example, the rule of law may draw a matter into a court's jurisdiction on the grounds that the court cannot refuse to decide an issue that falls within its purview, and to do so would be to undermine the essential idea that the law be applied equally to everyone. This is, to be sure, about drawing the boundary of the court's jurisdiction, but it also adds an element of obligation; a judge cannot escape the responsibility to judge in these circumstances. This is not only about the *scope* but the *character* of judging and not-judging.

Further, many well-developed intellectual and doctrinal frameworks focus primarily on the capacity of the court to bring its own standards to bear on the facts at hand. Given the contested processes leading up to the creation of the *Kahkewistahaw Election Act*, one might ask, is it the Canadian court's role to inquire into and judge the legitimacy of this process? There is a sense that where the court sees itself on shaky ground, it should proceed with caution; the idea that non-judgment, in the face of difference or dispute, is a way to create space for pluralism.

However, here too we seem to step around certain crucial questions. Most importantly, the call to restrain or suspend judgment can leave unscrutinised the practices of the judge and their judging community. We attend to the contested legitimacy of the Kahkewistahaw First Nation government, but not the contested legitimacy of the Canadian state. We risk assuming that non-judging leaves space for pluralism, without thinking through the relationships that are created, maintained, undermined or consolidated through that non-judgment. While not rejecting any other approaches as possible sources of wisdom on the question of not-judging, I am offering a reading of the *Kahkewistahaw* case that is oriented to a specific set of questions about judgment and relationships. Returning to the paradoxical tension between jurisdictional hubris and the abdication of responsibility to judge, I think that the usefulness and dangers "not-judging" are at the heart of the challenges for Canadian constitutional law in the context of justice and reconciliation. To aid in this endeavour, I turn to the writings on reflective judgment in the work of political theorist Hannah Arendt.

3. Hannah Arendt, the community sense, and responsibility for judgment

The concept of judgment plays an important role in Hannah Arendt's political theory. For Arendt, *judgment* is a form of reflective practice, distinct from thinking, acting or willing, in which a person develops an

evaluation of a particular thing (Arendt 1982, 66). To develop this account of judgment, Arendt draws on the work of Immanuel Kant and his concepts of aesthetic judgment and taste. Arendt's interpretation of Kant is controversial, both among those who think Arendt wrongly construes Kant's ideas, and among those who argue that the incorporation of Kantian transcendentalism undercuts other elements of Arendt's own work.[19] For present purposes, these debates will be mostly set aside. Instead, I will focus on drawing out those aspects of Arendt's concept of judgment that I think are helpful for understanding and evaluating practices of *legal judgment*. In this endeavour, I rely on writings of feminist and democratic interpreters of Arendt, and in particular, the work of Jennifer Nedelsky and Linda Zerilli (Nedelsky 2012; Zerilli 2016).

At the heart of Arendt's appropriation of Kant is the notion that judgment essentially involves a subjective component. My judgment is *mine* in important senses: it arises from feelings, preferences, and evaluative impulses that I have when encountering something (Arendt 1982, 66). This can be contrasted with other practices such as purely rational rule-following or deduction. Claims arising from practices such as logical deduction make claims to universal validity; they claim to be *true* in some sense, in a way that applies beyond the experience of any individual person doing the reasoning. In Arendt's language, these kinds of rational practices "compel" agreement.

At the same time, *judgment* does not collapse into preference, identity or arbitrariness; while it is essentially subjective, judgment does not stop with these feelings or preferences. Indeed, Arendt argues that unlike taste, *judgment* can possess a certain kind of validity (Arendt 1982, 72). It is not the compulsory, universal validity of rational truth claims. Instead, judgment claims validity grounded in the reflective engagement of the judge with her or his community. Arendt argues that judgment is valid to the extent that the judge has imaginatively engaged with a community of judging others (Arendt 2001, 20). Arendt calls this the achievement of an "enlarged mentality." I may begin with a subjective preference, feeling, or instinct, but this does not transform into a valid judgment until I think about how I could communicate my view to others, whether they would agree with me, and what reasons I could offer that might persuade them. If I say I think the action someone has taken is *right*, it may be that the action made me feel a certain way, but it's not just that. I have *reasons* to support my judgment. And while it wouldn't make sense to say my judgment is "true" or universal, I do think there are some other people who would agree me with, who would be persuaded by my reasons. In this way, the act of judgment allows me to gain critical insight into the value of my own initial preferences, and

[19] For discussion and critique from several perspectives see Garsten 2007; Marshall 2010; Beiner 2001; Zerilli 2016.

to move the standards of my own judgment into the space of a common world (Arendt 2001, 22).

Bringing this perspective to bear directly on the validity and impartiality of *legal* judgments, Nedelsky argues that it is the enlarged mentality that makes good judgment possible. In a passage cited by Justices McLachlin and L'Heureux-Dubé in their concurring judgment in Canada's leading case on judicial impartiality, Nedelsky writes:

> What makes it possible for us to genuinely judge, to move beyond our private idiosyncracies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective [...] It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible. (Nedelsky 1997, 107.)

On this view, the validity of judgment is intersubjective and requires engagement with a community of other judges. In order to make my judgment valid, I have to think about the scope of the community with whom I am engaged through my judgment. I have to think about whom I imagine persuading by my reasons, and to whom I think I am obliged to listen.

When bringing this approach to bear on questions of legal judgment – especially those made visible by the injustices of Canadian colonialism – there are three fundamental requirements for judgment that I think provide aspirational but concrete guidance for assessing practices of judging and not-judging in law. First, judgment essentially requires engagement with others. It is other-directed in the sense that it requires judges to think about others in the community across which they claim validity, and the kinds of reasons that would persuade fellow judges in that community. Valid judgment can never happen without consideration of views and values that go beyond what I know already; in order to judge well, I have to take active steps to ensure my knowledge and perspective are adequate to the task at hand. Without this full context, my judgment can only be partial, not impartial (Nedelsky 1997; Matsuda 1989).

Among interpreters of Arendt and those who debate the merits of her approach for political or legal judgment, there is disagreement about whether the process of developing an "enlarged mentality" necessarily entails actual communication between real people, or whether it is something that takes place solely in the imagination of the judge. Arendt's own writings can support both approaches, but in this paper I accept that this actual communication is both essential for the

usefulness of the concept of judgment, and also possible on the best reading of Arendt (Young 1986; Nedelsky 2011).

The question of communication is important for good *legal* judgment because judges in a court of law are constantly presented with this kind of difficulty about the sources of their knowledge. For example, when should a judge require that parties present admissible evidence on a factual question? In what circumstances is the judge's own knowledge a source of adequate or legitimate information? This requirement of judgment demands the active and rigorous engagement with the views and knowledge of others. Such engagement may well be difficult to achieve in the context of the institutional constraints facing a judge on the bench of a common law court. However, Arendt's notion of judgment demands that we try.

The second requirement that helps elaborate the consequences of non-judgment is the idea that judgment requires critical self-reflection. As a judge, I cannot ignore my subjective feelings and mental defaults; instead, I have to engage with them and test them against the judgments of others. This exercise requires that I view my own preferences and initial views with a certain kind of objectivity; in Arendt's language, I adopt the view of a spectator.[20]

For Arendtian reflective judgment, the idea of the spectator is very important. It is the aspect of her notion of judgment that is uncompromising in its demand for accountability. Good judgment requires that I *judge*, that I make an evaluative assessment, and that I not simply accept what I (or others) think at the outset. Like an audience member at a dance performance, a person making a legal judgment has to assess what they see in front of them, to think about what criteria are important and whether the rest of the audience shares that sense.

For Arendt, these aspects of judgment tied to self-reflection and critical assessment are measured against her thinking about the trial of Adolf Eichmann (Arendt 2006). Arendt's fundamental assessment of Eichmann was that he had failed to think or judge for himself. Philosopher Brian Garsten summarizes his interpretation of Arendt's view:

> What Eichmann lacked, on Arendt's account, was the interior space in which that imaginative work could occur, the internal space that judgment requires. Too satisfied with his own identity, too comfortable in his own private life, his banality consisted in a lack of imagination. His failure did not lie, she thought, simply in choosing the wrong standards to use when judging. Nor did his failure lie in not knowing which standards to use. Instead, he failed by not judging at all, by not being able to see himself from a spectator's vantage point, and by not creating within

[20] For discussion drawing out the significance of the spectator role in judging, see Etxabe 2012; Bilsky 2001.

> himself the plurality and capaciousness that judging-spectatorship requires (Garsten 2007, 1097).

Thus, for Arendt, the failure of critical reflection and the failure to critically assess the content of one's own thoughts and feelings is an abdication of responsibility.

It is in this sense that the failure to judge is *not itself a judgment* in Arendtian terms. It may be a choice or a decision in some way, but it is not a *judgment*.[21] Further, for Arendt, the absence of genuine judgment is always a negative; non-judgment or the suspension of judgment is a failure to take on the responsibility for reflecting critically on one's views and actions and to take one's perspectives into a public world that is shared with others. Thus, the failure to judge is not just a problem because it compromises the quality or validity of the decisions we make. It results in the absence of a common space in which decisions can be made collectively and validly at all, and thus heralds the death of political life (Zerilli 2016).

Placed in the context of *legal* judgment, this criterion – critical self-reflection – calls for scrutiny and, where necessary, critique of existing legal concepts and norms. Moreover, it calls for judges to make the evaluative assessments that are the hallmark of *judgment*, not deference to rules. Where judges in a court of law engage in non-judgment that results from the technical application of rules, we should be concerned about the possibility of the abdication of responsibility and the avoidance of responsibility. On my account, for Arendt's reflective judgment, accountability is the heart of judgment.[22]

The third aspect of Arendt's judgment that is constructive for the purpose of thinking about good legal judgment is its focus on the creation and maintenance of relationships. The consequences of reflective, intersubjective standards for judgment are that people must engage with themselves and with each other in order to make valid judgments. In this way, Arendt argues that practices of judgment are constitutive of political life and the relationships that attend it: Judgment is world-creating.[23] Judgment, Arendt says, is like a table in that it both connects and individuates (Zerilli 2016, 279). Placed against this theoretical context, *not*-judging, whatever else it is, becomes a practice that fails to contribute to the building of a common world.

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[21] Etxabe arrives at a different conclusion, though I share his views with respect to accountability for the consequences of both judging and not-judging in law. See Etxabe 2012, 81.

[22] Zerilli argues that what relativism and objectivism share is a rejection of responsibilities for knowledge claims, and she develops a theory of judgment to meet this requirement (Zerilli 2016, 174).

[23] For a sustained engagement with this idea for democratic societies, see Zerilli 2016.

4. Judgment, reconciliation and just relationships

How can we know whether not-judging supports or undermines the creation and maintenance of just relationships between Canadian and Indigenous people and laws? In the face of the Arendtian claim that the failure to judge undermines the very conditions on which shared life may be possible, what should we make of the need to prevent or slow down the overreaching, over-confident reach of colonial law?

Returning to the *Kahkewistahaw* case, these questions become more specific. For example, when Abella J. holds that there is insufficient evidence to support the claim that the educational requirement disproportionately affects older residents on reserve, is this a moment of deferral to a set of rules about evidence, and thus not judgment at all? Or does it disclose a self-critical assessment of the limited impartiality that is possible under the circumstances? Is this an example of courage or hubris? Abdication or space-making?

Arendt's concept of judgment and the criterion of the enlarged mentality do not necessarily answer these questions in a straightforward way, but they do provide a rich ground for determining what is important as we go about addressing them. Specifically, I suggest that adopting the standards of reflective judgment compels attention to relationships and the quality of those relationships.[24] I suggest that these relationships are both personal and institutional, such that judges in Canadian courts can constructively attend to them when deciding how to meet the demands of their institutional role.[25]

On its face, the Supreme Court of Canada's judgment in *Kahkewistahaw* is not about reconciliation in a broad and aspirational sense. Indeed, it could be characterized as being merely about the application of Canada's state-based individual rights instrument to Canada's state-based colonial legal ordering of Indigenous people as "Indian Bands."[26] However, I suggest that even this characterization reveals that Canadian judges are unavoidably entangled in a multi-juridical constitutional order. Deciding whether and how Canadian courts should apply the *Charter* to legislation created under the *Indian Act* does provoke some of the core questions of constitutionalism in a settler state, and makes visible the complex and paradoxical consequences of not-judging.

Understanding the role and obligations of judges through this lens means that the Canadian judges in *Kahkewistahaw* are involved in the

[24] For analysis of Canadian equality law, including the *Kahkewistahaw* case, in relational terms, see Eisen 2017.

[25] The idea of judgment as helping to build a common space for legal contestation resonates with theories of constitutionalism developed by scholars such as Webber (2015) and Borrows (2010).

[26] For an exploration of the potential of *Indian Act* by-laws to advance Indigenous self-governance, see Metallic 2016.

construction of Indigenous-settler legal relations, regardless of how they decide. It means that the quality of this relationship is made central to how we should assess judicial conduct and the adequacy of the ideas and institutions that exist to support judges in the Canadian legal order.

A model of reflective judgment that takes seriously Arendt's ideas of validity and the enlarged mentality demands that a judge attend equally to self and other. This focus provides one way to think (and act) through some of the familiar dilemmas of relationality in the context of colonial inequality and power. When articulating the demands of good judgment in the service of reconciliation, there is often a focus on the extent to which settler legal actors must open their minds to new knowledge and ways of being in the world.[27] And this is surely a crucial part of developing an enlarged mentality in the support of good judgment. This is the perspective that might generate a call for suspension of judgment.

However, without equally attending to the way *Canadian* law is shaped by the relationship in question, there is a risk that crucial aspects of legal relations may escape critical attention. For example, in *Kahkewistahaw*, Justice Abella articulates a standard for s. 15 which leaves open the possibility for the First Nation to exercise its lawmaking authorities with less intervention from the Supreme Court of Canada. It is possible for this to help build discursive and political space for the development of legal and political debates in the Kahkewistahaw community. However, it is also possible for certain critical aspects of Canadian law to fall out of view, and their role in maintaining unjust legal relations may escape critical scrutiny.

Without *judging* the law and the inter-societal relationships that flow from it, focus remains on questions about, for example, whether the *Kahkewistahaw* election code might unjustly discriminate against residential school survivors, and not how Canadian law might work to support the participation of those survivors in all democratic processes. Moreover, while the outcome of the decision potentially creates lawmaking space, it also upholds or is at least consistent with a more formalistic approach to Canadian equality law. It might work to naturalize the justice of s. 15 anti-discrimination norms as distinct only from injustice or inequality. Are these approaches to state law more or less useful in the creation of just relations?

The question of judgment in this context should not only leave practical and rhetorical space for Indigenous governance, it should also leave Canadian law transformed in some way. There is no doubt that *judging* carries risks of overconfidence and domination, and Justice Mainville's decision in the Federal Court of Appeal invokes some of these risks by endorsing a monist image of law in which the absence of Canadian state law results in "jurisdictional ghettos." But *not-judging* also carries with it a lack of inward-directed critical attention, and a potential lack of commitment to building a common world.

[27] For an example of legal actors taking up this challenge, see Finch 2012.

This requirement – to leave the judge transformed and a common world disclosed – means that the idea of judgment can provide a way to understand and evaluate what judicial decision-makers do and saw when presented with constitutional challenges. But it also works more broadly to provide a way of engaging with law that allows us to practice skills of learning and analysis that are attuned to relationships in the relevant ways, and that have the potential to generate accountability. That is: good judgment requires me, a settler Canadian scholar researching the core institutions of the colonial legal system, to learn about Indigenous communities and listen actively to a wide variety of views. But, equally, I must make space within myself for the possibility of better relationships. The rhetoric of non-judgment is sometimes too close to the rhetoric or closure or disengagement; strategies that can leave the dominant party in a relationship too comfortable and the status quo too untouched.[28] If I am allowed to set aside – to not judge – there is the potential that this lets me off the hook, because it is settler institutions and principles which require active transformation, in order to create a new relationship with Indigenous peoples.[29]

Arendt's approach provides ways to distinguish between, on the one hand, legal decisions that allow pluralism to flourish, and, on the other, the refusal to see multiple norms as occupying a shared space for contestation. The refusal to judge across communities can reinforce the neutrality of the dominant norms themselves or, like the absence of Indigenous history from Canadian school textbooks, deny that there is anything worthy of judgment at all. Arendt's criteria for judgment are, indeed, about relating to others. But they are also about relating to one's self. Addressing this same theme, the TRC writes:

> Aboriginal children and youth, searching for their own identities and places of belonging, need to know and take pride in their Indigenous roots….Of equal importance, non-Aboriginal children and youth need to comprehend how their own identities and family histories have been shaped by a version of Canadian history that has marginalized Aboriginal peoples' history and experience…..This knowledge and understanding will lay the groundwork for establishing mutually respectful relationships (TRC 2015, 185).

In negotiating the problems of not-judging, I suggest that the three requirements of judgment described above – intersubjectivity, critical self-reflection and relationality – assist in generating new and useful ways for thinking about the challenges faced by Canadian

[28] For explorations of ignorance and privilege from a philosophical perspective, see Sullivan and Tuana 2007.

[29] For discussion of responsibilities and knowledge from a pedagogical perspective, see Regan 2011.

constitutionalism with respect to justice and reconciliation. I think that these requirements invite the possibility that in the face of jurisdictional hubris, the suspension of judgment is not inevitably space-making or pluralistic. Not-judging can also facilitate wilful blindness and a sense of neutrality with respect to colonial standards and categories. And most important, not-judging can undermine the disclosure of a common world in which we might build the respectful relations that justice requires. In the context of the demands of reconciliation, we need the defamiliarization that is valued as part of judgment and concomitant with attempts to judge well as a community (Zerilli 2016, 180).

By centering judgment as a practice of constitutionalism, it is also possible to see how practices of state legal decision-makers can contribute to (or undermine) the work of building a common world in which legal norms can be debated and judged. This approach has quite practical aspects: judgment is not only an aspiration ideal we can use to measure our conduct. Rather, it demands that we take action to create the conditions that make the practice of good judgment possible. It is a *practice* in the sense that it takes work to achieve, and this work can be made harder or easier by its surrounding context.[30] Calls to suspend judgment risk endorsing the idea that changing that context, or doing the work needed to *practice* good judgment, is either impossible or otherwise not worth attempting.

In this way, uncritically valuing non-judgment also carries the risk of a further loss. It is the risk that the Canadian legal order might remain limited by its unwillingness to relate justly to other legal orders.[31] The risk that the Canadian legal order may continue to rely on power – not-judging – to cover over the paradoxes in its foundations. I take guidance from the TRC and constitutional scholars who show that there are other ways that legal relationships based on respect and justice are possible (Borrows 2010). In the context of Canada's pluralistic constitutional order, set against the enormous justice demands of reconciliation, *judgment* is necessary and necessarily difficult, and should be taken up as a framework for *resisting* jurisdictional hubris in favour of a practice that can help build a shared legal world.

[30] The importance of structural context for enabling certain kinds of critical judgment is also central in the work of Antonio Gramsci, particularly with respect to freedom of speech and of the press (Gramsci 1971).

[31] For a related argument about relational legal authority, see Roughan 2013.

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