***Dechen ts'edilhtan*: Implementing Tsilhqot'in Law for Watershed Governance**

by

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JD, University of Victoria, 2014

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We acknowledge with respect the Lekwungen peoples on whose traditional territory the university stands and the Songhees, Esquimalt and WSÁNEĆ peoples whose historical relationships with the land continue to this day.

Supervisory Committee

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Abstract

The people of the Tsilhqot'in Nation have, and continue to, govern their lands according to *dechen ts'edilhtan*, the laws of their ancestors. Through their history, their control over their lands and waters have faced opposition from outside forces which include neighbouring nations and settler governments into the colonial present. Over time, their laws have remained strong and deeply internalized, and yet have been exercised to maintain their contested control up to the present. One profound moment when Tsilhqot'in laws became apparent to outsiders was when laws relating to access to the *nen* (Tsilhqot'in land) effectively proved the Tsilhqot'in Nation's claim of Aboriginal title over a portion of their territory at Canadian law in 2014. This dissertation provides a deep analysis of *dechen ts'edilhtan* as it applies specifically to use of and access to surface water in the Tsilhqot'in *nen*. The purpose is two-fold. First, to continue the ongoing work of understanding and articulating Tsilhqot'in law. Second, to facilitate the identification of possible methods through which ancestral laws may engage Canadian legal and political systems for the benefit of Tsilhqot'in people, and indeed, all Canadians.

Table of Contents

Acknowledgments

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I thank the Law Foundation of British Columbia and the Social Sciences and Humanities Research Council for their generous support. Thank you to my wife, Yvette, who has stood by me through it all with love, caring, and unwavering support and encouragement.

Dedication

To the people of the Tsilhqot'in Nation.

Dreaming Raven

In a conversation with Gilbert Solomon, a Xeni Gwet'in *deyen* (medicine person), he explained the importance of dreaming. He explained that when the spirits need us to know something, they will tell us in a dream. They may come to us in any form, as human, tree, landscape, and quite often as animals. We may dream while asleep or awake, the sub-conscious mind makes little distinction between the two states. Gilbert's teaching was reassuring, as I have always had profound dreams that I could not explain. Recurring dreams that would show me places where I have not been yet, but where I would eventually find myself, often years after having had the dreams. I have dreamt while wide wake, and have been shown paths when I needed them. Gilbert helped me understand some of these dreams, explaining that having them is one thing; knowing how to listen to them is another – the part that many people fail to recognize.

I have struggled through feelings of anxiety and doubt regarding my dissertation, particularly relating to my location as an outsider writing on the Nation and their laws. Who am I to be doing this work? (My response to this is in the first chapter.) At some point in the work, I began dreaming Raven. As the trickster in the Tsilhqot'in world, Raven represents the best and worst in people. One Elder explained that Raven was once a man, full of knowledge, wisdom, and mischief. At some point, I subconsciously began seeking Raven's help. He responded in several ways, the latest of which was to check in on me as I was leaving the Xeni Valley recently, where I visited to complete the last bit of writing on this dissertation. I pulled off to the side of the gravel road between Xeni and Yunesit'in so Penny (my dog) and I could stretch our legs. I always bring a ball to throw for Penny – by far her favourite pastime activity. As we played a little fetch, Raven appeared out of nowhere, and circled low right overhead. He perched in one of those burned out pines right there with us, and watched. I continued to throw the ball,

Raven just watched, and then circled again. I thought he was going to land right there with us. I am not sure why he came to visit then. I likely won't know for a while yet. But he was there, visited for a spell, then was gone as abruptly as he had arrived. Those are moments that don't make a whole lot of sense. Gilbert would say they don't have to, as the meaning will come when we are listening.

At the beginning of each chapter, I include a piece on my dreaming Raven. It is not academic, nor is it meant to be. Perhaps it captures the artistic spirit or some sacred understanding, or perhaps just some comment on relationality. Whatever the case, if anything it is there to provide a shift from the abstract intellectual to remind readers of the human component in all of this. My short narratives are dreams, awake and asleep, imagined and real, evocative and personal. Whatever they are to the reader, they are there.

Datsan

As I sit hunched over my computer writing this dissertation, thoughts of Raven circle in my mind. Raven is the indomitable ancient trickster in many coastal First Nations' legends, and he is the trickster in Tsilhqot'in consciousness (Datsan in the language). My having grown up on the west coast, Raven has always been present, overhead, never too distant, clucking and jabbering, mocking and cajoling, teaching, watching, waiting, contemplative.

I can see Raven now. Decisive, he throws himself from a high branch on the fir tree outside and alights on my windowsill. His knowing black eyes quickly scan the room, head tilting up and down, mechanical impulses. "*Midugh,*" he mutters. I watch him watch me. "*Midugh, midugh.*" With a hop he snatches the wooden pencil from on top of my notebook. "*Nenqayni, midugh,*" he asserts with satisfaction. "Give me back my pencil." He twirls it in his beak before gripping it in his foot as he pecks and pulls at the shiny metal band at the end. As he picks at the eraser, I notice tiny clouds of sooty smoke form with each jerk of his head. There are little burnt wood shavings in his feathers.

"Steal any fire today?" I asked whimsically. Raven shoots me a look, and starts hopping around on the table, spinning one direction then the other, in a dance-like manner. He throws his head back, then down, spinning, hopping, clucking, never dropping his prize. Then, without warning, a soft breeze fills the window and he is gone. "Hey…" my pencil.

For a while, I ponder the meaning of his visit. The charred wood shavings. His dance. Taking my pencil. Raven is too wise for my limited understanding. So I leave it. But it doesn't leave me. It doesn't stop spinning, dancing in my mind. Raven, fire, dance, *midugh.*

Then, late that night, a breakthrough. An epiphany of sorts. I thought about the Tsilhqot'in legend where Raven stole fire from a person who hoarded it for his own benefit, and gave it freely to everyone. I consider this dissertation. The content is not mine to hoard, or to decide how it should be used. Who am I to do this work? How do I manage my role? I am reminded of the principle of sharing, but also of protecting, and therein lies the conundrum. Then suddenly, the *pencil*! An exchange for his teaching, creating an obligation.

Q: The dechen ts'edilhtan or laws made by the ?Esggidam, who does it apply to?

A: To all Tsilhqot'in and whoever goes into Tsilhqot'in land.

- Ervin Charleyboy, trial testimony[1]

1. Introduction

a. to Place

The first time I ever heard about the Chilcotin, I was a young kid listening to my great uncle's stories about the days he used to run teams of horses through Farwell Canyon in the early 1900s.[2] This was a place of fantasy and lore to a kid. Wild land, rushing rivers, steep cliffs, and cowboys and Indians. I didn't get to see the Chilcotin until I was old enough to get there on my own, when I took a job with one of the big ranches along the Fraser. I spent a lot of time driving my old 1960's Ford pickup through the back country, which I now know to be the Tsilhqot'in *nen* (land). There is a road from Dog Creek to the Gang Ranch that eventually passes through Farwell Canyon and out to Riske Creek at Highway 20. This was my first view of Farwell Canyon, where long held images captured in my imagination from my great uncle's stories collided with reality. The reality was that my imagination came nowhere near the actual beauty of the place.

If you travel through the canyon, you cross a bridge over the blue-green waters of the Chilcotin River. A person cannot help but stop and take in the essence of that place. High rock walls meets tan-coloured semi-desert landscape covered in a variety of grasses, lodgepole pine,

[1] Trial transcript, volume 82, 19 April 2005 (day 219) at 14261.
[2] The word 'Chilcotin' is the anglicised version of Tsilhqot'in, and is also the name for the geographic region in the central interior of British Columbia between the Cariboo region (east of the Fraser River) and the Coast Mountains to the west. For a reference, see British Columbia.com, *Chilcotin* online: http://britishcolumbia.com/plan-your-trip/regions-and-towns/cariboo-chilcotin-coast/chilcotin/.

and sagebrush. Climbing out of the canyon to the northeast, the road winds through some high plateau vistas with views that continue for as far as the eye can see. I spent many hours sitting in the grasses, taking in the scenery. Although I expected silence in those places, I was met with a profound cacophony of sounds. Winds rushing through the grass across the gentle slopes, Ravens clucking and cooing to their neighbours, a lone pinecone falling from a nearby tree. There is an undeniable presence there, visible and invisible. Voices, animals, spirits, memories, dreams. The land is constantly speaking, reaching inside to a visceral place, speaking in a language that human beings once understood fluently in our primal origins. A sudden realization of my insignificance washes over me as I sit in that place. I am a speck among this massive sprawling expanse of living earth. These are my experiences of one tiny part of the *nen* before I ever knew it as such, or that there was even a people deeply connected to it.

My experience with place preceded my experience with the people, reminding me of the concept of a *terra nullius*, an empty place, and how that concept might be initially perceived. But as I quickly discovered, although I saw no other person there, the place was anything but empty. It's bullshit – *terra nullius*. No matter where a person is, someone from that place will show up before long. A truck comes by, and I get a nod from guy in a cowboy hat – a Tsilhqot'in. He pulls over to ask if I needed any help. "No thanks." He nods and pulls away in cloud of dust. As I headed back to my truck, I could read the word "Anaham" on the tailgate, or maybe it was the back window. I remember thinking at that moment something had changed in me. I felt a connection to the place, somehow curious, longing for answers to questions I didn't even have yet. Little did I know that the magnetism of that place that I visited in the 1980s would stick with me through a career, and lead me into the research within which I now find myself entangled, searching for answers to the questions that have taken at least a couple decades to formulate.

I never left the Tsilhqot'in that day. I mean, physically, I returned to my home in the Fraser Valley, but my spirit was tied there to that place. A few short years later, after training in telecommunications, I ended up on a bit of a journey that brought me around the province and landing me just north of Williams Lake. I remember being in the Riverside Forest Products offices listening to people grumble about how Tsilhqot'in people were being difficult and not allowing any logging in the Nemiah. This was the early 90's. Another decade goes by and I find myself in university as a mature student. I believe somehow inevitably I wound up doing a master's degree on the Tsilhqot'in trial decision. A few more years, and I am sitting down with Elders in the six Tsilhqot'in communities learning about their laws.

What does all this mean? I am still not sure. It is a journey. Not with a beginning and an end, but a definite path that circled around over long stretches of time. I am still not at its end. As I return to the *nen*, just having come back from Xeni Gwet'in, I am still on a round. Circling round. From this work, this learning, will come more learning. Whatever it is that is there, in that place, it is powerful, cutting through space and time in large sweeping arches, teaching me about place, community, existence, relationship, sustainability. I am learning from the people, the land, the water, the animals, and all those whom I cannot see but who speak to me through these vessels. And I do so with respect. I abide by the laws because the laws apply to everyone who enters the *nen*. That is what I have learned.

b. to People in Context

The people of the Tsilhqot'in Nation have lived in their country since before Europeans arrived.[3] The length of this time span is irrelevant for the purposes of this introduction. They are

[3] I will not give an elaborate historical or anthropological account describing *who are the Tsilhqot'in* here. The words and actions of the people themselves render their identity and history in the pages of this dissertation.

there, and have been there for as long as it matters to the Canadian legal system to declare that Tsilhqot'in have Aboriginal title to their *nen*, at least in part.[4] The BC Supreme Court held they have been there for at least 350 years.[5] The people themselves have no collective recollection of migration from anywhere else into the area.[6] Again, when the people arrived or whether they have been on the *nen* since time immemorial is not relevant.[7] Tsilhqot'in have been there long enough to have established a complex set of relationships with the land, out of which arises a legal order which maintains the social, political, economic relationships that frame those relationships with the land.

Tsilhqot'in people have occupied their *nen* since the time of their *?esggidam* (ancestors). They have maintained control across time through a complex set of interconnected, interdependent relationships with all things connected to the *nen*, particularly water. These webs of interdependent relationships comprise Tsilhqot'in authority, and are governed through current Tsilhqot'in laws and *dechen ts'edilhtan* (laws of the ancestors) forming a system of governance that reaches back from the present to the distant past known as *sadanx* (the time of Tsilhqot'in origins).[8] How the knowledge from the past informs the present is a question many First Nations ask.[9]

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[4] The SCC in *Tsilhqot'in v British Columbia*, 2014 SCC 44 held that the Tsilhqot'in plaintiffs had successfully proven Aboriginal title to the claim area, which was roughly 2,200 sq km, at 59, 65, 66.

[5] *Tsilhqot'in v British Columbia*, 2007 BCSC 1700, "Athapaskan speaking people have populated the Chilcotin Region for hundreds of years. Dr. Matson concluded that Tsilhqot'in people have been in the region since at least 1645 - 1660 AD," at para 218. [*Tsilhqot'in* BCSC]

[6] Robert Lane, "Chilcotin" in June Helm ed, *Handbook of North American Indians, vol 6: Subarctic* (Washington, D.C.: Smithsonian Institution, 1981) 402 at 402.

[7] Time immemorial being the time before the earliest point of collective memory.

[8] Aaron Mills proposes that origin stories form the roots of an Indigenous rooted constitution, which anchors and nourished the trunk (constitution), branches (legal processes and institutions, and leaves (laws), in his dissertation, *Miinigowiziwin: All That Has Been Given for Living Well Together. One Vision of Anishinaabe Constitutionalism* (PhD Dissertation, University of Victoria Faculty of Law, 2019) [unpublished] at 14. I suggest, and this is likely a restatement of Mills' analogy in different words, that the first relationships which are preserved in origin stories, are those which functionally comprise the roots of a legal order.

[9] Tsilhqot'in, Secwepemc, and Dene people have asked me this and other similar questions, such as how can these laws be used today?

Working out how contemporary Tsilhqot'in people effectively govern access to and use of water while remaining responsive to the laws of the people in their tradition, *dechen ts'edilhtan*, is a useful, albeit arduous, commitment. The task of translating Tsilhqot'in legal knowledge into common law concepts is inevitable if the Nation is to engage the Crown in a government to government relationship, and when trying to prove Aboriginal rights and title through litigation. Through my work I entertain a concern about translating *all* that is Tsilhqot'in into common law concepts, not that this momentous task would be possible, and almost certainly not beneficial.[10] Intelligibility across concepts for the purpose of facilitating conversation and commensurability is potentially helpful if Canada is sincere about reconciling state society with Indigenous peoples.[11] Indigenous laws could be recognized within their own contexts, or at worst, may end up being completely subsumed within the Canadian legal hierarchy. Or perhaps, we may find some new means of respectful interaction. To deter efforts that would see

[10] Translation is often discussed in terms of codification of Indigenous laws. Val Napoleon argues that codification of Indigenous laws into simple rules ignores the "intellectual processes that are an integral aspect" of a nation's legal practice. Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, 2009) [unpublished] at 302. Often, rules are confined to the particular context for which they emerge and apply. The dynamic property of Indigenous law means rules and principles are largely context specific with limits and exceptions that may change according to the facts of a given situation. Fluidity does not prevent positivism, a knowable system of laws, rather it emphasizes the need for laws to be responsive to living, breathing, social societies. Trying to pin down laws into a set of written texts only captures concepts in a particular moment and context. Trying to imagine all possible scenarios to which a rule or principle may apply is likely impossible, and would result in volumes of law texts that would miss much of the vitality of the legal order it attempts to embody. Alternatively, John Borrows is not opposed to translating "Indigenous law into common or civil law categories" as a secondary approach to understanding and organizing Indigenous laws (his primary approach is to work with Indigenous laws in their own setting), John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795 at 815 [Borrows, *Heroes*], but rejects the idea of codification, John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 15, 26.

[11] There are many discussions about the meaning of reconciliation. The Supreme Court of Canada (SCC) has familiarly defined reconciliation to mean "the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty," which is "one of the fundamental purposes of s. 35(1)," *R v Van der Peet* [1996] 2 SCR 507, at para 49 [*Van der Peet*]. For a rich discourse that considers the impact of basing reconciliation on the unquestioned validity of the Crown's asserted sovereignty, see Joshua Nichols, *A Reconciliation without Recollection? An Investigation into the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020).

Tsilhqot'in laws and governance subsumed within Canadian legal and political hierarchies, as merely another *level* of legislation or government, I use the language of strategy.

I argue that the legal order of *dechen ts'edilhtan* continues to operate internally within communities and the hearts, minds, spirits, and bodies of Tsilhqot'in people. I choose not to depict this internalized logic for any reason beyond showing that the internal legal logic exists validly on its own merits. However, Tsilhqot'in people exist in a colonial world imposed upon them. Based on this undeniable contemporary reality, I hope to show how the legal order that continues to exist internally may be utilized to manage the relationship with the external forces bearing upon the Nation. To accomplish this, I am compelled to highlight some key insights between Tsilhqot'in and Canadian legal orders. The purpose is not to compare, or suggest one is better, rather to merely show there is a transsystemic possibility to the different ways of addressing the same matter brought before it for a legal response. Through this process, I believe the pattern for a conversation between disparate legal knowledges can be set down in a manner that is useful for Tsilhqot'in people and legal scholars working in this field of law.

Knowing and understanding that these laws exist within a well-reasoned logic is sufficient to allow effective engagement across legal orders, which brings me back to the question, *how* can the Tsilhqot'in government govern water given the highly colonial context within which the Nation finds itself? My response: *strategically*. Leaving the internal functioning of the legal order to the people, I argue that the Tsilhqot'in legal order sanctions the deployment of strategic tactics to achieve effective governance over water in the interface with outside legal orders and governments. Dividing the internally-*lived* from the externally-*deployed* may seem artificial and contrived to some. Well, frankly it is. Yet, not without justification.

The instant British and Canadian rule imposed a political-legal system, particularly through the *Indian Act,* for electing chiefs and councils onto Indigenous societies, the imposition created a veritable dichotomy in social, political, legal, and economic knowledge and processes, one Indigenous and one which is foreign.[12] The authority delegated through the *Indian Act* also recognized certain limited jurisdiction without consideration for existing systems of law and government, creating the external interface and splitting processes and knowledge from the internal to the external.[13] Does this colonial imposition justify continuing a multi-layer effect? In short, yes. As with most Indigenous communities and their governments across Canada, Tsilhqot'in have laboured to work among the multiple legal regimes within which they find themselves entangled. One response emerged in the formation of the Tsilhqot'in National Government (TNG) in "1989 to meet the needs and represent the Tŝilhqot'in Nation and Tŝilhqot'in communities of Tl'etinqox, ʔEsdilagh, Yunesît'in, Tŝi Deldel, Tl'esqox and Xeni Gwet'in in their drive to re-establish a strong political government structure".[14] The national entity under the TNG was created and deployed to unify the six communities, all of which are recognized bands under the *Indian Act* under a national political body, drawing upon the unified collective that existed at and prior to the arrival of Europeans.[15]

Tsilhqot'in people have been working their way through the imposed political-legal regimes for over a hundred years. They have become proficient at working with, within, and against layers of inter-Indigenous (i.e. Secwepemc, Carrier, Nuxalk, Heiltsuk) and Canadian legal orders. Therefore, to suggest a new path, a different path, would be akin to rejecting the

[12] (RSC, 1985, c I-5). [*Indian Act*]
[13] Particularly section 81.
[14] Tŝilhqot'in National Government, *Our National Government*, online: http://www.tsilhqotin.ca/.
[15] See the discussion in Chapter 5 on a nationhood. The BC Supreme Court struggled to find a national political body in the evidence, despite there being evidence to support such a finding. I argue that the ample evidence of the use of 'runners' to carry messages between communities provided the intelligence necessary to respond to threats as a nation rather than by one community in isolation.

past and the lessons gained only to start anew. Not only would this be cumbersome, it would be inefficient. The legal order has existed and adapted to changes facing Tsilhqot'in society since its origins. Their tradition can and does provide responses to today's problems facing the Nation. These responses are often reported in the news media, as Indigenous groups who stand up against oppressive liberal regimes tend to make the news.[16]

The multiple legal layers are too deeply entrenched to oust, leaving the existing reality with which to work: the internal logic, the external (for simplification I will focus on the common law) logic, and a spectrum in between.[17] The spectrum offers a range of possibilities based on circumstances. For example, matters within communities, such as resolving disputes between two families over use of a fishing site, may be addressed by the application of the internal law logic, without resorting to translating concepts for interaction with other legal systems such as municipal (e.g. by-laws), provincial (e.g. property or family laws), or federal laws (e.g. criminal justice).[18] There are also many instances where Tsilhqot'in people must engage in Canadian law methods to provide a clear articulation of their expectations, such as drafting legislation to manage wildlife.[19] By no means does the Tsilhqot'in strategic use of

[16] In addition to the Chilcotin war and the Aboriginal title litigation, some of the more recent challenges include Taseko's attempt to build the Prosperity Mine, and the ban on moose hunting in the territory. See for example, Monica Lamb-Yorksi, "Tsilhqot'in move to ban non-native moose hunting", *The Williams Lake Tribune* (12 July 2018), online: https://www.wltribune.com/news/tsilhqotin-move-to-ban-non-native-moose-hunting/.

[17] I prefer to understand the relationship of the internal and external as providing a spectrum for its range of possibilities a spectrum suggests, rather than two paths (Indigenous and western) and a middle path of "a merged indigenous and settler lifeway" which only leads to death, as Mills describes *supra* note 8 at 20.

[18] The potential resolution to this type of problem through seeking consent is discussed elsewhere in this dissertation. The following dispute resolution process was recorded in a Justice Inquiry conducted by a BC appointed Justice Commission. "When a wrongful incident occurred in a village, the elders, the participants in the incident and their families, and all the village population that was available and interested, would meet in a session to reach a resolution. At such a meeting, the degree of involvement and the reasons for the incident were discussed, with everyone even remotely affected having a right of audience. A conclusion was reached by consensus and sanctions were imposed by the elders that were enforced by the whole population of the village if necessary. The purpose of the process was to resolve the discord in the community." Cariboo-Chilcotin Justice Inquiry, *Report on the Cariboo-Chilcotin Justice Inquiry*, (Victoria: Ministry of Attorney General Communications and Education Branch, 1993) at 13.

[19] *Tsilhqot'in Nation Nulh Ghah Dechen Ts'edilhtan* ("Tsilhqot'in Nation Wildlife Law") is an example of the outward expression of Tsilhqot'in law using strategic means of legislative drafting. Another example is presenting

common law methods and instruments absolve obligations outsiders bear to learn Tsilhqot'in laws and related processes.[20] The principle of reciprocity requires obligations on both parties to achieve balance in a relationship.[21] As mentioned previously, Tsilhqot'in continue to fulfil their obligation in their relationship with the state by understanding Canadian law and its implications on Tsilhqot'in lives.[22]

Canada's history of intransigence against Indigenous political, legal, social, and economic ways of being makes for slow progress on fulfilling reciprocal obligations. Therefore, strategic deployment of laws and governance becomes necessary to avoid remaining institutionally inert when it comes to inter-governmental relations with a foreign population. Besides, employing common law tools is not as untraditional as it may seem. The Tsilhqot'in legal order supports strategic tactical deployment for the benefit of the people, as will be described in detail in Chapter 5 on governance. As for now, suffice it to say that the choice belongs to the people. I am merely offering a possibility for continuing in today's complicated world in a manner that resonates with how people understand their world.

The responses in this dissertation spill over to cover a couple other questions I have been asked in the past. The first being: once the internal laws are knowable and understandable to others, how can the community use them in a practical manner?[23] The second question is: how

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their law to Canadian courts to protect right and title to land (*Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700). *Tsilhqot'in Nation Nulh Ghah Dechen Ts'edilhtan* enacted 16 July 2019, and came into force 23 August 2019. online: http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/TsilhqotinNationNGDT-WildlifeLaw%20(2).pdf

[20] As the quote at the beginning of this chapter indicates, Tsilhqot'in laws apply "to all Tsilhqot'in and whoever goes into Tsilhqot'in land."

[21] A key principle in the Tsilhqot'in legal order, reciprocity is discussed in detail in subsequent chapters.

[22] One example of this understanding is recorded in the *Report of the Cariboo-Chilcotin Justice Inquiry*, which contains experiences of Tsilhqot'in people with the Canadian criminal justice system, its imposition on Tsilhqot'in people, and their knowledge of the same. See *supra* note 18. A recent example of Tsilhqot'in knowledge of western law is the Nations drafting and enacting their wildlife law, *Nulh Ghah Dechen Ts'edilhtan*, using Canadian legislative drafting to pass a new law in a western format, *supra* note 19.

[23] A Secwepemc person asked this question in 2012, which has been echoed by different people across communities and nations in various ways since them.

can we as lawyers give tangible effect to the internal laws of the people when working for Indigenous clients rather than relegating those concepts to the preamble and then continuing on with the *white folk's way* of drafting law?[24] I believe my dissertation is more responsive to the first question than the second. Although I argue that drafting laws is an effective tool which may be used in contemporary governance, the specifics of how to translate and incorporate Indigenous laws from an oral-based legal record to pen-and-paper legislation is a task for another day, as it goes beyond the scope of this dissertation.

c. to this Work

This dissertation pertains to the use and access of surface water throughout the Tsilhqot'in *nen* using Tsilhqot'in law. Ultimately, utilizing laws relating to water enhances the practice of contemporary governance. The reasons I have chosen water as the subject matter of Tsilhqot'in law research are twofold: 1) water forms a constitutional basis for Tsilhqot'in existence, featuring prominently in their worldview, as the pathway that facilitates uptake of the land into the flesh and blood and identity of the people; and 2) to push back against British Columbia's historical resistance to acknowledge Indigenous rights to water.[25] More generally, this research allows me to reciprocate the knowledge and generosity that has been shared with me over the

[24] Lawyer Murray Browne once asked me how lawyers could effectively incorporate Indigenous laws into drafting for clients. He explained that his current practice involves writing the two or three laws that the client shares with him in the preamble before going on the do "the white folk's thing" in drafting. Personal communication, 20 November 2017, during an Indigenous Laws presentation for Woodward and Company.

[25] Richard Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: Canadian Institute of Resources Law, 1986) at 43-45; Kenichi Matsui, *Native Peoples and Water Rights: Irrigation, Dams and the Law in Western Canada* (Montreal: McGill-Queen's University Press, 2009) at 48; Claudia Notzke, *Aboriginal Peoples and Natural Resources in Canada*, (North York: Captus Press, 1994) at 14; Merrell-Ann Phare, *Denying the Source: The Crisis of First Nations Water Rights* (Vancouver: Rocky Mountain Books, 2009) at 12. British Columbia's resistance to acknowledging any shared ownership of water led to surface water being absent from the Tsilhqot'in declaration of Aboriginal title at Canadian law *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, "With respect to those areas designated by the trial judge that are not privately owned or submerged lands, the Tsilhqot'in ask this Court to restore the trial judge's finding, affirm their title to the area he designated" at para 9. [*Tsilhqot'in* SCC]

years working with Tsilhqot'in people, thus fulfilling a legal obligation I accepted when first entering a research relationship with the people in 2012.

Fulfilling a legal obligation through research offers an example of practicing Tsilhqot'in law. Theoretical musings and analysis are hollow if the legal principles learned through the process of research remain abstract descriptions recorded in documentary form. In other words, describing law in writing only takes the researcher so far, to concepts and thoughts about what might be their understanding of the group's legal order. Researchers begin to more robustly understand a group's laws when we begin to perform laws through our activities throughout the research process, such as how we engage with people, observe protocols around dialogue, and respond to various forms of authority, which may include people, animals, and land. As with other Indigenous legal orders, Tsilhqot'in law is lived, and as such, actively practiced through outward expression in a person's lived activities. Therefore, this dissertation reaches beyond the description, articulation, analysis, and suggested implementation of Tsilhqot'in laws. It also embodies an exercise in multiple ways of knowing through a combination of narration, excerpts of judicial transcripts, and academic legal analysis. Whether the sun travels across the sky, or the earth turns under a fixed sky is largely a matter of perspective depending on where a person stands. Depicting the teachings of law in multiple ways offers a multipronged approach to perceiving how the laws interact on different cognitive and philosophical levels.

The work in this dissertation reflects my perspective from where I stand. Its existence is a tangible expression of laws in practice through principles such as reciprocity, respectful engagement, storytelling, and sharing. The Raven narrative at the beginning of each chapter is intended to exemplify the practice of storytelling by engaging with one of Tsilhqot'in's most powerful characters – trickster, teacher, Elder. My interactions with Raven are provided with the

utmost respect for this incorrigible ancestor. Yet engaging practice by example is merely one fringe effect of the core purpose of this dissertation, which is to show how the Tsilhqot'in legal order is a source of modern governance for water management. This aspiration is at the margins of current research into Indigenous legal orders (which I introduce in the next chapter).

More broadly, the resulting work has the potential to reach beyond the Tsilhqot'in legal order and may serve as motivation for other Indigenous groups who seek to rely on their own legal orders to inform the manner in which modern governments choose to govern their lands, waters, and people. To be clear, this work does not, nor do I claim to, constitute a definitive or authoritative manual on implementing legal orders in modern governance. On the contrary, I offer possibilities for consideration through detailed analysis and reasoning of the knowledge I have gained through research and conversations with Tsilhqot'in Elders and other community members over the years. This work comprises my part of the exchange with Tsilhqot'in people for their time, patience, and generosity. The following offers a map of where the work leads.

In Chapter 2, I engage with the scholarship on Indigenous laws and the methodological approaches to researching Indigenous laws and legal orders.[26] I begin the chapter with a brief literature review of the existing scholarship on Indigenous laws, wherein I situate my work in this dissertation. Beyond the literature review, I move into the methodological approach I develop for my research, which has as its foundation the adapted case brief analysis. My focus in this section is to grapple with some of my concerns over doing this work generally, that being working with Indigenous legal orders without a grounding in the language and only a rudimentary conceptual understanding of the worldview. Generally speaking, I struggle with the

[26] By this I mean laws are the specific norms and rules embedded within a legal order. For additional discussions see for example, Val Napoleon, "Thinking About Indigenous Legal Orders" (2007) Research Paper for the National Centre for First Nations Governance, online: http://www.fngovernance.org/ncfng_research/val_napoleon.pdf; and Jeremy Webber, "The Grammar of Customary Law" (2009) 54 McGill LJ 581.

thought of translating concepts and languages across worldviews to try and gain an understanding of Indigenous legal orders from my own common law training and the lens thus created. In the process of extrapolating my methodology, I face my own insecurities about working in another group's legal order, while striving to continue to expand the basis of my own training in this area through the common law case-brief method of identifying legal principles in oral stories of Indigenous peoples.[27] While embracing the case-brief method as my entry point into both common law and Indigenous laws, I use it to launch into a more holistic approach to understanding Indigenous law-ways based on the teachings of Elders.[28]

The methodological approach I apply in my work is centred on understanding the teachings as I was meant to understand them, rather than suggesting my understanding creates some kind of universal knowledge about the law. Tsilhqot'in methodologies of teaching and learning do not operate to create unitary definitions. Teachings that assert a singular strict definition or explanation would arguably stifle the creativity which provides flexibility to allow

[27] As a doctoral student, I believe I have an obligation to strive to produce new knowledge and create new ways of doing research, however small, and not to simply rely upon the work of those who have gone before.

[28] I am drawn to the term law-ways from the work of KN Llewellyn and E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press, 1941) at 15. Law-ways presents law as an outwardly expressed set of knowledge and practices which are embodied in the social individual, rather than a *thing* in itself, divorced from the lived experience of people. Although we know that all people experience law in daily life, the concept of law-as-entity is embedded in legal institutions in Canada, such as legislatures, courtrooms, and police stations (to name a few). There is an abundance of scholarly work about law's representation. Some important work has come from feminist legal theory. Two relevant areas are in law as aesthetic, and law as performance. Law's aesthetic, for example, discusses how law is represented in images, such as the body, or artistic form, and through what people imagine law to be, as in what constitutes a family. For more on this, see for example Alison Young, *Judging the Image: Art, Value, Law* (New York: Routledge, 2004). The concept of law as aesthetic aligns with Indigenous law's embeddedness in stories, artistic expressions such as carvings, masks, blankets, and tattooing, which convey various meanings about a group's legal order and an individual's place in it. Judith Butler has written extensively on law as performance through gender. See for example, Judith Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory" (1988) 40:4 *Theatre Journal* 519-531. Butler's theorizing about gender's relationship with the law resonates with Indigenous law's performative aesthetic particularly when she identifies gender as a cultural construction rather than a natural fact. Law is also a construction rising from the social, political, economic foundations of human organization separating people from their purely biological, natural existence. In this manner, people perform the rules of social organization through the ways in which they interact in social relationships. In other words, people conduct themselves by living their law-ways, performed with agency in daily life, rather than living as reactive subjects of an external legal system that is imposed upon them by others (at least until the rise of colonialism).

law to adapt to changing times and circumstances. Tsilhqot'in law is dynamic. The subjectivity in teaching and learning means I can only speak to my learning, and compare it with how people have responded to problems on the ground. I argue Tsilhqot'in methodologies operate within the individual to provide a grounded knowledge base for how to live in community, which is why Elders rarely provide direct answers to problems. Instead, they tend to offer a narrative about a different, yet perhaps similar problem, which allows the learner to formulate a personalized solution based on the individual and their present situation (I offer an example of this subjective teaching elsewhere in this dissertation when Elder Gilbert Solomon spoke with me about not rolling rocks down mountainsides). To ascertain relative accuracy in my understanding, triangulating knowledge from multiple sources such as teachings from Elders (interviews), living with stories (oral tradition), ceremony and practice on the land, in conjunction with how a nation responds to problems offers validation. Outsiders are expected to learn and know the laws of other nations, otherwise compliance with the legal order could not be expected. From my chapter on methodology, then, I move into a discussion of the Tsilhqot'in legal order in general.

Chapter 3 begins with a discussion of law, generally, beginning with a brief analysis of the word *law* to ground *dechen ts'edilhtan* in the Tsilhqot'in worldview. This chapter is largely on a theory of Tsilhqot'in law, rooted in *dechen ts'edilhtan* (laws of the ancestors). I consider how living law is embodied in the lived experiences of people and lived through daily existence.[29] Imagining a way of being and living law then provides a path toward the Tsilhqot'in world of relationships and the application of the lived laws to govern them. Once Tsilhqot'in existence is seen as a set of relationships with humans and non-human partners, the visibility of

[29] Chuma Himonga and Fatimata Diallo uses the term "living customary law" in South Africa, which they use to mean the law which is "regulating the day-to-day lives of people on the ground," in "Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law" (2017) 20 PER/PELJ, online: https://journals.assaf.org.za/per/article/view/3267, at 6.

law's application to the world around, not just humans, becomes clearer. Laws that once seemingly only applied between humans, such as laws addressing harm, have more fluidity and also apply to the land, fish, animals, birds, and water. The legal order is not compartmentalized into categories that apply to a variety of subjects areas of law necessarily, but is a coherent overlapping whole.

The reason for understanding law as fully integrated and integral to a way of being explains why it can be difficult to understand, or even see, a field of law parsed out from the entire complex body of law without distorting meaning. Just to give a simplified example to illustrate, I turn to the idea of *water law*. I cannot say for certain that there is such a concept as water law in Tsilhqot'in law. That determination depends on a range of factors I discuss in this dissertation. To understand *dechen ts'edilhtan* as it applies to water, a person must understand, *inter alia*, how families organize and administer their fishing, hunting, and farming sites, the obligations for individuals, families, and communities to share, prohibitions against waste and disturbances, obligations to ancestors and future generations, and relationships to animals and non-sentient entities. A feasible approach to working through one specific subject area of law is to be continuously in contemplation of the larger functioning whole, which helps to minimize distortions. However, analyzing and writing about the minutia while also writing about functionality within the whole is an insurmountable task, as I have learned through my research and writing.

In this chapter, I also take the opportunity to address an observation I made on the absence of rights in the Tsilhqot'in worldview. As an alternative to rights discourse, I discuss interconnectedness of all things, which establishes the ontological perspective of belonging.[30] A

[30] There is an abundance of work on rights discourse with which I choose not to engage for the purpose of brevity. This is not a paper about Tsilhqot'in rights. However, I want to present my observation, as it shifts thinking about

person does not appear to have a personal right to belong, or a right not to be interfered with in their belonging to a group, rather, they belong because they are part of the whole. The whole will continue without the individual, but the individual ceases to exist without the whole, lending to the idea of a holistic methodology. Once the concept of holism, which I refer to as the holistic doctrine as a way of knowing and being, is rendered, the legal order begins to make better sense.

People are not simply property owners of all that is around them (although some may see it that way). They are comprised of, constituted by, all that is around them. That is, people are the land through the uptake of everything that exists on the land. The main connective tissue facilitating this uptake is water. In the Tsilhqot'in worldview, people cannot be separated from the land, which is part of their flesh and blood, and their identity as a people.[31] This composition is renewed daily through the consumption of food from the land (all requiring water to exist), and drinking, bathing in, and praying to water. Water forms a fundamental core of the people, and their laws emerged to honour and protect those inextricably interconnected relationships, bringing us to the next chapter, on *tu* (water).

Chapter 4 offers a closer look at how law functions in relation to *tu*. I begin by investigating the logic behind how *dechen ts'edilhtan* may apply to water. Coherence between water and people create a connection for causation when water is violated under Tsilhqot'in law, in a similar fashion as when a person is harmed. Decisions that lead to disturbances,

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law from expectations people have because those expectations are recognized and exist at law as legal rights, to understanding a person's expectations because they belong to the land, a family, a community, a nation. For one discussion on a critiques of rights discourse, see John Borrows, "Unextinguished: Rights and the Indian Act" (2016) 67 UNBLJ 3. According to the SCC, Aboriginal rights crystalize at the intersection of pre-contact Indigenous practice and the common law (*Van der Peet, supra* note 11 at para 49), which suggests that a right as defined in Canadian jurisprudence did not exists prior to the arrival of Europeans. This is accurate largely because Canadian courts have not successfully understood pre-contact Indigenous laws or worldviews, as is evident in *Van der Peet*, where Lamer CJC did not discuss either from the Stó:lō perspective despite holding that perspective as necessary for rights adjudication.

[31] This concept was clearly articulated at a recent Tsilhqot'in workshop, where a young Tsilhqot'in woman, Rebecca Solomon, sang a song she wrote, which included the lyrics, "the river is in my veins". Old School at Tl'esqox, 20 January 2020.

contamination, or diversion of water does more than impact the water in isolation from its surrounding environment. These activities produce a visceral effect through the pathways of holistic interconnection with water and land that reach to the core of human beings, explaining the lack of clear distinction between human and non-human categories of law.

Much of this chapter involves a detailed analysis on laws that involve water. Primarily centred in protection of the family and community, *dechen ts'edilhtan* serves to remind people that water should not be wasted, unnecessarily disturbed, or fouled. These laws are assessed to reveal the reasoning underpinning their existence. They are closely situated within principles that relate to respect, reciprocity, and protection of future generations. The principles underpinning laws relating to water connect to a basic reasoning that derives from a long history of resilience and survival in, at certain times, a harsh environment. In short, ensuring security and viability of water, and all the species through which water flows, ensures the continued existence of Tsilhqot'in people through generations of descendants. Therefore, respect, reciprocity, and protection apply directly to water, principles which address the expected quality, quantity, and flows of water in conditions that allow it to serve the needs of the people in an interconnected world. Logically, when these laws begin to break down, the viability and thus the longevity of the people are threatened, invoking the abrupt and occasionally violent responses the Nation has displayed throughout its history in relation to outsiders.

In Chapter 5, I bring the threads of the dissertation together to inform possible avenues for contemporary water governance. This chapter considers historic governance through decision makers, adjudication, enforcement, and the concept of a national identity before turning to possibilities for contemporary governance. I do not make definitive propositions stating what the Nation must or should do. Rather, I spend some time arguing how the legal order has always

supported strategic engagement if it serves to benefit the people and their continued survival as Tsilhqot'in. Strategic engagement arises in two distinct ways. The first is through borrowing laws from other nations, which implies that the TNG is operating within its legal order to borrow tools from the outside to engage Canadian law and politics provided it benefits the people. The second is through infiltrating the outsider to restore peace and protect families, communities, and the nation. TNG is familiar with these practices, as the nation entered the Canadian legal system and used common law tools to protect their relationship to the *nen* in its title litigation.

I argue that strategic engagement is a response to the colonial gun-to-the-head, forcing a particular relationship on the Crown's terms.[32] First Nations may try to ignore the Crown's asserted authority to their lands, but eventually they must engage, whether at negotiating tables or in a courtroom (there appear to be few other options). The tools available are inevitably western in origin, as courts and politicians are not competent in understanding Indigenous worldviews.[33] These tools have been imposed on First Nations through the historical relationship with the Crown, notably with the *Indian Act*. Although continued engagement with Canadian governments using western manner and form political-legal practices may invite continued violence, until the Crown fully rises to its obligations to learn the laws and perspectives of

[32] In my MA thesis, I argued First Nations have three options regarding the Crown's imposition on Indigenous lands: 1) ignore them as long as possible (until the chainsaws show up); 2) go to court in an effort toward self-preservation; 3) negotiate the extinguishment of Aboriginal rights in the name of certainty. See Alan Hanna, *Crown—First Nations Relationships: A Comparative Analysis of the Tsawwassen Final Agreement and Tsilhqot'in v British Columbia* (MA Thesis, University of Victoria Department of Anthropology, 2011) [unpublished] at 2, 73. I use the Crown, Canada, Province of British Columbia, and state interchangeably throughout.

[33] Grammond J held, "Indigenous decision-makers are obviously in a better position than non-Indigenous courts to understand Indigenous legal traditions.[…] They may be able to take judicial notice of facts that are obvious and indisputable to the members of that particular community or nation, which this Court may be unaware of. Indeed, for many Indigenous peoples, a person is best placed to make a decision if that person has close knowledge of the situation at issue," *Pastion v Dene Tha' First Nation* 2018 FC 648 at para 22 [footnotes omitted]. The lack of knowledge and inability to understand Indigenous worldviews and the legalities they produces underpins this incompetence. The distinct pathways and need to understand both is one of Mills' main arguments sets out in his "*Three Paths Prophecy Petroform*," *supra* note 8 at 13, 14. See also Lance Finch CJ, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice," in *Indigenous Legal Orders and the Common Law: Paper 2.1*. Continuing Legal Education Society of British Columbia, November, 2012.

Indigenous peoples, strategy will play an important role in protecting Indigenous knowledge while forwarding interests for the benefit of the people.

Lastly in this chapter, I make a few recommendations for how this research may be applied for achieving governance by considering how contemporary legislation may be drafted (western tools) to reflect and be responsive to the Tsilhqot'in legal order. I also discuss the potential avenues of authority to enter into a shared decision-making jurisdiction with the Province of BC (the Province or simply BC) regarding water in the *nen*. These pieces are merely suggestions, lacking depth, but sufficient to convey conceptual strategies. They are not intensive, as the Tsilhqot'in people are going to continue to choose their paths cautiously and strategically as they have always done. My goal is to show some possibilities for the path they are already on regarding their relationship with the Crown. My goal is to suggest how *dechen ts'edilhtan* may inform contemporary governance regarding water.

From here, I am compelled to begin with a proper introduction of the outsider as researcher, which locates me in the context of a research relationship with Tsilhqot'in people.[34] As an outsider to the Tsilhqot'in Nation, I have an additional responsibility to explain how I am situated in this work and for what purposes I am engaged in it.

d. to myself: *Nenqayni* and *Midugh*

I am Blackfoot, Scottish and French, meaning I am both *nenqayni* (First Nations) and *midugh* (white person).[35] As such, I am an outsider to the Tsilhqot'in Nation (*ets'en nenqayni*). I

[34] Introducing the individual is generally applied many Indigenous legal practice in the traditions with which I am somewhat familiar, which would include Tsilhqot'in, Coast Salish, Secwepemc, and Dene.
[35] Although these are the official translations of *midugh* and *nenqayni*, there are possible broader interpretations, In 2012, I asked whether Ts'il?os disliked only "white men" as stated in the story "Tatlow" (in Terry Glavin and the People of Nemiah Valley, *Nemiah The Unconquered Country* (Vancouver: New Star, 1992) at 28). The response was that Ts'il?os did not like people who were not Tsilhqot'in, suggesting that before white men arrived, *midugh* may have been applied more generally to non-Tsilhqot'in and *nenqayni* (which translates more directly to 'people of

do not speak for Tsilhqot'in people. I acknowledge that the knowledge used in creating this dissertation belongs to Tsilhqot'in people. My analysis and interpretation are my own, which I provide in combination with interviews and documentary research. I have been granted consent to work on this project from the people I have interviewed, and the TNG through various research agreements with the University of Victoria (UVic), some of which is dated, representing early efforts of engaging with Tsilhqot'in law.[36]

In addition to these formal research agreements and informed consent authorizations, one Elder gave me explicit permission to work on Tsilhqot'in law. When I asked Elder Marie Dick if I could have her permission to work on Tsilhqot'in laws, she explained, *of course, after all, how will other people know what our laws are if nobody talks about them*?[37] Despite my own insecurity about whether I should be doing this work, I believe that refusing to do so would be disrespectful to the Tsilhqot'in Elders who shared their knowledge, time, and patience to work with me.[38] Doing this work allows me to honour them. To that end, this dissertation is descriptive as well as analytical. The description is meant to honour Marie's wishes that people are able to *know* something of Tsilhqot'in law, of which understanding is function of that knowledge.[39] Describing the law allows a lens for knowing, as the rigour of analysis leads to comprehension, which in turn leads to recognition and respect, and hopefully to adherence.

My relationship with the Tsilhqot'in Nation is multifaceted – professional, academic, and familial. As a lawyer for the firm that represented the Nation in their Aboriginal title litigation, I

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the earth') to Tsilhqot'in, all others being foreigners or outsiders, or *midugh*. Due to the possible multiple interpretations, I will use the terms outsiders when referring to people who are not descendants of Tsilhqot'in people.

[36] Namely the Accessing Justice and Reconciliation Project in 2012, and the Water Laws Project of 2017-19.

[37] Personal communication, July 10, 2012 at Tl'etinqox.

[38] I acknowledge Val Napoleon for pointing this out to me. Personal communication, 2016.

[39] I am also honouring my roots in anthropological, ethnographic research through the descriptive aspect of my writing.

have had access to the legal minds behind 20-plus years of legal research and the associated court transcripts. I am also a scholar who has worked with Tsilhqot'in Elders and other community members since 2012, when I researched Tsilhqot'in laws regarding intra- and inter-societal harm in the Accessing Justice and Reconciliation Project.[40]

In the summer of 2012, I travelled to the communities to discuss with Elders their legal order as it applied to harm. More recently, I spent time in the summer of 2017 in the Nemiah Valley supervising two law students interviewing Xeni Gwet'in Elders on their internally located laws relating to water.[41] I also spent the summer of 2018 on the Sugar Cane reserve at Williams Lake working on the water laws reports that were produced for the project. I am fortunate to be part of a First Nations community in Williams Lake, providing me with a central location for working with the Tsilhqot'in communities. This leads to the third facet of my relationship with Tsilhqot'in people.

My relationship with Tsilhqot'in people is established through family. My wife is northern Secwepemc. Two of her cousins are Tsilhqot'in through their father. Two other cousins are married into Tsilhqot'in families. There is a long history of intermarriage between Tsilhqot'in and their Secwepemc neighbours.[42] Although not immediately related to Tsilhqot'in and not Tsilhqot'in myself, my connection through family places me in a position where I have obligations under the legal order while remaining an outsider. For example, I am bound to

[40] This project was a partnership between several First Nations across Canada, including the Tsilhqot'in National Government representing their six Tsilhqot'in communities of Tl'etinqox, Tŝi Deldel, Tl'esqox, Yunesît'in, Xeni Gwet'in, and ʔEsdilagh, and the University of Victoria Faculty of Law, the Indigenous Bar Association and the Truth and Reconciliation Commission of Canada, funded by the Ontario Law Foundation. For further details see http://www.indigenousbar.ca/indigenouslaw/wpcontent/uploads/2012/12/cree_summ.

[41] The Water Laws Project is a partnership between the Environmental Law Centre and Indigenous Law Research Unit of the University of Victoria Faculty of Law and three partnering First Nations in BC, one of which was the Tsilhqot'in Nation.

[42] See for example, James Teit, "The Shuswap," *The Jesup North Pacific Expedition*. *Memoirs of the American Museum of Natural History vol 4, pt 7* (Leiden: EJ Brill, 1909) 443 at 763.

protect family, which I interpret in the context of this research to mean the work cannot bring harm to family relations specifically or to Tsilhqot'in people generally. My relationships give rise to a double obligation, one legal and one academic. The legal obligation is as mentioned above, the obligation to family within the legal order. The academic responsibility is an ethical duty to do no harm to research partners. I understand the academic responsibility of doing no harm as the inverse obligation of protecting people. Under the first responsibility, the research cannot cut and create wounds. Under the second, the research should serve the interests of the researcher partner by serving to shield against potential harm from others. This dual obligation creates a limitation in research when potentially harmful information is uncovered and when producing knowledge that can help protect people.

My Research Obligations: Do No Harm/Protect People

A researcher faces a conundrum when working with others with whom we are connected. Should we withhold potentially harmful information in the name of objectivity? Should we stop research if it appears that it may weaken positions (political, legal, economic) or make people vulnerable to attack? My answer is yes. My obligations to protect the people and do no harm supersedes a claim to objectivity, although, objectivity is not necessarily lost when research results that may harm individuals or breach their privacy are not released to the public. Having touched on this topic, in my experience, I find that often a deeper analysis providing context and specificity regarding particular circumstances can reveal a nuanced or logical explanation for potentially harmful information. Examples of this are rife in litigation records, when lawyers are permitted to re-examine their witnesses after cross-examination by opposing counsel.

During cross-examination, a witness for the Tsilhqot'in in their title litigation acknowledged that a non-Tsilhqot'in family would regularly harvest in Tsilhqot'in territory.[43] Without further inquiry, this evidence appeared to weigh against territorial exclusivity (a key prong in proving Aboriginal title).[44] Under redirect, the witness clarified that this family had gained access to the territory though marriage with a Tsilhqot'in person and the community had consented to their harvesting in the territory, showing that Tsilhqot'in people authorized access to their territory through a specific legal institution.

In my work as a researcher with backgrounds in common law and anthropology, I have found that incompetent or insufficient inquiry increases the risk of producing harmful information. The potential harm imposed on people ranges from the individual (e.g. memories of residential schools or other trauma), to the family (e.g. family politics), to the nation (e.g. misinterpretation that may weigh against a legal claim). My ethical obligation as a researcher is redoubled by my legal obligation to protect the people. I believe this work will serve to protect Tsilhqot'in people, as it grapples with contemporary issues of law and governance. In so doing, I start from the assumption that the Nation, internal conflicts acknowledged, share a common objective of protecting the people for present and future generations, however the collective decides that objective is best served (i.e. through environmental preservation, economic development through resource development, or a balanced combination of these). Based on the assumption, this work will make suggestions that should support Tsilhqot'in peoples' enduring

[43] Personal communication with Gary Campo, counsel for Tsilhqot'in, 2 May 2018.
[44] The test for title being "(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive," *R v Delgamuukw* [1997] 3 SCR 1010 at para 143 [*Delgamuukw*], as affirmed in *Tsilhqot'in* SCC at para 26.

and tireless resistance against the imposition of colonialism that has usurped ownership and authority of their water (and lands) from the beginning of the relationship.

Note on Terminology

The use of English to describe Indigenous ways of thinking and being is cumbersome, as is discussed in the methodology chapter. Here, I set out a few definitions for the words I choose. First, I use First Nation to describe the neo-political organizations that represent Indigenous groups who identify as such. These include *Indian Act* bands and their memberships, and groups who identify as collectives and function under a government outside of the *Indian Act*, such as modern treaty nations. I use the terms *Indigenous communities* to describe collectives of people who live together and who define themselves as they understand their identity in the world. These may therefore include First Nations if that is how the community identifies itself.

The six Tsilhqot'in communities comprising the Nation are also bands according to the *Indian Act*; however, the communities of people living together prior to the imposition of the *Indian Act* in 1876 were likely much more fluid than today. Anthropologist Robert Lane, who visited the Tsilhqot'in Nation on several occasions in the late 1940s and early 1950s, referred to the community collectives as bands (as they were), noting mobility between the communities:

> The Chilcotin had various subdivisions. The band was a loosely associated group of families who wintered in the vicinity of a certain lake or group of lakes. The band was usually named for the lake with which it was most intimately associated. There was a degree of mobility between neighbouring bands.[45]

[45] Robert Lane, *Cultural Relations of the Chilcotin Indians of West Central British Columbia*, (PhD Dissertation, University of Washington, Department of Anthropology, 1953) [unpublished] at 166. [*Cultural Relations*]

Undoubtedly, the reserve system created sedentary geographic locations for the communities. Despite this, people still move freely between communities provided they have some connection to people in the other community.[46]

I have deliberately chosen to avoid using *tradition*, as it tends to evoke notions of the past and rigidity. Although these descriptions of tradition are largely inaccurate, as Katherine Bartlett explains, tradition is a component in the process of change. The role tradition plays in change, according to Bartlett, "depends entirely on particular aspects of the narrative, not the least of which who is telling the story and why it is being told."[47] My concern is that tradition carries baggage that will only serve to distract from the real work on Tsilhqot'in law in this dissertation. Therefore, I prefer to use the term *order* instead, which I believe provides a more accurate depiction of the body of law derived from the Tsilhqot'in worldview.[48] I use the terms Crown, colonial government, and state interchangeably to represent either federal or provincial levels of government according to the specific context. The Crown is a reference to Canada's monarchist underpinnings in England as used in Canadian jurisprudence. I will occasionally use *western* to refer to non-Indigenous theories and ideologies which find their origins in northern Europe. Finally, I discuss *law* and *jurisdiction* elsewhere in this dissertation.

[46] *Ibid*.
[47] Katherine Bartlett. 'Tradition, Change and the Idea of Progress in Feminist Legal Thought' (1995) Wisconsin L Rev 303 at 328.
[48] I use the word in the same manner in which Napoleon describes, "law that is embedded in social, political, economic, and spiritual institutions" in "Thinking About Indigenous Legal Orders" *supra* note 26 at 2.

Datsan's Methodology

My chair leaned back, I am at my desk pulling my hair out trying to write on methodology in some kind of comprehensive manner that perhaps even I will be able to decipher. I let out a sigh and lean forward to grab another handful of fresh blueberries when, with a flutter and a swoosh, Raven appears in the open window and drops down on my desk, scattering papers in his wake. "Hey, Old One. Come back have you?" He scans the room, surely looking for the cat, clucking his satisfaction when he spots Simon laying on the bookshelf at the other end of the room, pretending to pay Raven no mind. Raven crow-hops along the edge of the desk, inspecting its contents, when he spies the few remaining berries at the bottom of the bowl and lets out a guttural squawk. I assume they're a little too close to me for his liking, so I slide the bowl toward him with one hand, while furtively slipping my new pencil under the edge of my notebook with the other.

Raven gobbles down the berries as I watch in quiet amusement. "Care to help me write out this chapter?" I ask in jest. Raven looks at me, then at my computer, and gobbles down the last berry. He thrusts his beak to the bottom of the bowl, pecking at it as if there might be another blueberry hiding in there. Then, to my surprise, he hops up on the edge of the bowl and starts kicking at it with his foot. Kicking and stomping. Then turning his head to look at the bottom before hopping to the other side, kicking and kicking at it, growing more frustrated with each swipe. "Hey, easy now. You're going to hurt yourself," I said, reaching out to take the bowl out from under him. He jumped back, perching on the back of a chair as I took the bowl to the fridge to get some more berries. As I returned with the berries, he was hopping across my keyboard in anticipation. I set the bowl down, "All you had to do was

ask," and noticed my screen, hoping, for an instant, that he was somehow miraculously able to write down some of his ancient wisdom to help me with my current problem. No such luck. Just a row of ttttttqqqqqqqrrrrrr.

Raven gobbled up the berries in blissful delight as I watched. When he finished, he reached deep into his feathers and pulled out the broken lower half of my pencil that he had taken in his last visit and dropped it on the table before screeching at Simon, who was now cautiously attentive across the room, and lit out through the window. "Nice to see you again, Datsan," I said as he ascended out of sight. Turning my attention back to my screen, I reached into the bowl to see if he had left any berries and stuck my hand in a pile of warm dung. "Ugh, the thanks I get," I muttered. Wiping my hand, I looked at the gibberish on the screen, then at the broken pencil. I wondered if, by some strange chance, Raven was trying to tell me something. After a while, my thoughts still swirling, maybe he was trying to answer me. Imitating my actions on the keyboard. Giving back the writing half of my pen. Kicking at the bowl of berries which caused me to refill it by going to the fridge, as though using, in Raven's eyes, some kind of magic, rather than going to a blueberry bush. Imitation, magic, and a bowl full of dung, possibly his attempt to refill the bowl and not leave it empty for me – his way of trying to do what I did. Perhaps methodology comes from within, in a process of learning by first imitating others?[49]

[49] See *Raven Imitates His Hosts* in Livingston Farrand, "Traditions of the Chilcotin Indians" (1900) 4:1 Memoirs of the American Museum of Natural History (New York) at 18, online: http://digitallibrary.amnh.org/handle/2246/39.

Q: Now, Chief William, I have in hand a copy of Exhibit #8, which is the version of Lhin Desch'osh which your counsel put in evidence back in September. Where in Lhin Desch'osh can I find the laws of the Tsilhqot'in that relate to the use and occupation of land? Because I can't find them and I'm sure it's because I don't know what I'm looking for.

A: […] when you talk about law of the land, the legends, that's what I mean when we learn these different stories, these different legends. It all has a meaning behind it and that it teaches us to be a Tsilhqot'in and how to treat one another, how to treat the wildlife, how to treat the land. […] elders always told me that these legends and these stories are meant to teach you the law of the land, how you treat people, how you treat the wildlife, how you treat the water, the land.

- Chief Roger William, trial testimony[50]

Chapter 2: Methodology

Introduction

In the expanding field of Indigenous research methodologies, the utility and shortcomings of various theories, methods, and practices are often assessed and debated as a means of improving research from Indigenous perspectives.[51] Academic research, generally, is rooted in western philosophical thinking underpinned by the scientific method, making much of academic research foreign to Indigenous ways of knowing.[52] A solid foundation is being established for the

[50] Trial transcript, 17 February 2004 (day 82) vol 35 at 5867, 5869.
[51] By improving Indigenous research, I am referring to the changes that make research within Indigenous knowledge bases more inclusive and familiar to local communities.
[52] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 2006) at 29. Smith argues, "having been immersed in the Western academy which claims theory as thoroughly Western, which has constructed all the rules by which the indigenous world has been theorized, indigenous voices have been overwhelmingly silenced. The act, let alone the art and science, of theorizing our own existence and realities is not something which many indigenous people assume is possible." I suggest this is because the "writing,

expansion of Indigenous research methodologies that extensively investigate the many nuances of the subject area.[53] I can only hope to add to this growing area of knowledge by focusing on the methodological approach to Indigenous legal research applied in my own work on Indigenous laws.

Beyond the normative lenses of western research methodologies, conceptual Indigenous research is rooted in Indigenous worldviews (i.e. ontologies, cosmologies, and epistemologies).[54] The apparent dichotomy of western and Indigenous research creates a conundrum of sorts. If research is a function of western academia requiring the abstraction of ideas to be written down in rigid permanence, then how can methodology of any sort be inherent in societies that have distinct forms of learning about the world which embody unwritten methods of transmitting knowledge and ideas?[55]

As Shawn Wilson ponders in his chapter, "Can Ceremony Include a Literature Review?", as Indigenous scholars may employ western research practices, including the lit review, to "communicate with dominant system academics."[56] In other words, employing western practices

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history and theory," about which Smith is discussing, are foreign conceptual categories that are not easily mapped onto the lived experiential knowledges that Indigenous people hold.

[53] See for example Smith, *ibid*; Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto, University of Toronto Press, 2009,); and Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Winnipeg: Fernwood, 2008).

[54] Aaron Mills refers to lifeworlds as "ECO-systems," "unique epistemological-cosmological-ontological systems," that shape a way in which the world is understood. Mills, *supra* note 8 at 24.

[55] Marie Battiste and James (Sa'ke'j) Youngblood Henderson argue that oral transmission of Indigenous knowledge allows transmission across spiritual realms. They argue that this effect of transmission across the spirit world would be destroyed with the loss of Indigenous languages. I argue that destruction of the ability to transmit knowledge across sacred realms also occurs when we rely solely on writing to capture knowledge. "Indigenous peoples view their languages as forms of spiritual identity. Indigenous languages are thus sacred to Indigenous peoples. They provide the deep cognitive bonds that affect all aspects of Indigenous life. Through their shared language, Indigenous people create a shared belief in how the world works and what constitutes proper action. Sharing these common ideals creates the collective cognitive experience of Indigenous societies, which is understood as Indigenous knowledge. Without Indigenous languages, the lessons and the knowledge are lost. […] The complementary modes of knowing and caring about the sensory and the spiritual realms inform the essence of Indigenous knowledge. This way of knowing has been continually transmitted in the oral tradition from the spirits to the elders and from the elders to the youth through spiritual teachings," *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich, 2000) at 49 [footnotes omitted].

[56] Shawn Wilson, *Research is Ceremony*, *supra* note 53 at 44.

may be a strategic means to meet the standards of academic rigour (review, verification, validation). A more culturally appropriate response to western practices applied to Indigenous research is to say that "Indigenous research *is* a life changing ceremony."[57] Although this may be helpful, I am somewhat unsatisfied at the thought of using colonial tools to carve out legitimate spaces in a predominantly western institution and calling it Indigenous methodology.

Somehow, writing down words in the English language and calling it an Indigenous research methodology makes me uncomfortable, yet the alternatives are few. Part of me wants to try to refute John Borrows' assertion that keeping traditions frozen in the past does not allow for effective modern expression.[58] However, this is not what I am suggesting (that non-literate practice would somehow imply authenticity – whatever that is). Rather, I suggest many Indigenous research methodologies continue to be practices that are not related to western academic methods. For example, an Indigenous person who creates a narrative to reflect their teachings and shares it with others is practicing an Indigenous methodology.[59] Additionally, the performance of a ceremony is a form of Indigenous methodology.[60] Any manner in which Indigenous peoples transmit knowledge using innate forms and forums that do not derive in the

[57] *Ibid* at 61 (emphasis in original).
[58] John Borrows, *Canada's Indigenous Constitution* (Toronto: Toronto University Press, 2010) at 8. [Borrows, *CIC*] What I mean here is that Indigenous legal practices continue in many ways as they always have, which does not require recognition at Canadian law (see Minnawaanagogiizhigook Dawnis Kennedy, "Reconciliation without Respect? Section 35 and Indigenous Legal Orders, in *Indigenous Legal Traditions* (Vancouver, UBC Press, 2007) at 96). Indeed, Borrows makes this very argument in Recovering Canada, where he states "the chances of Canadian law accepting Indigenous legal principles would be substantially weakened if First Nations did not continue to practice their own laws within their own systems," *Recovering Canada*, *supra* note 10 at 27. The point I am making is that being anchored in the past is not a detriment to the validity of Indigenous laws. Many aspects of Indigenous legal practices from the past continue today because of their organic composition. They are timeless, resilient, and meaningful in the present because they are fluid and flexible (*ibid*). They are not frozen in the past in the sense they are rigid and anachronistic, but precisely the opposite. Their deep temporal roots make them useful in the present because they are flexible and Indigenous-centric.
[59] See Robert YELḰÁTTE Clifford, "Listening to Law" (2016) 33:1 Windsor YB Access Just 47; Devi Dee Mucina, "Story as Research Methodology" (2011) 7:1 Alt J; and Darcy Lindberg, *kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming Gendered Protocols in Cree Ceremonies through Cree Law* (LLM Thesis, University of Victoria Faculty of Law, 2017) [unpublished] at 1.
[60] As are other performances such as songs and dances which are also used to convey knowledge. See for example Darcy Lindberg's explanation of a Cree pipe ceremony, *Ibid* at 4.

western scholarship of European universities is a deployment of Indigenous research methodologies. I am not suggesting a commitment to avoid using western research practices (I am using one now writing this dissertation). I merely choose to do so transparently to avoid confusion.

When Indigenous scholars employ western practices to achieve whatever our goals (to communicate with dominant academics, to reach a wider audience inside and outside the community, or to carve out space), we should be mindful of Gordon Christie's caution to look critically at how mainstream ideas intersect with "the particular insights and objectives that might be put forth from an Indigenous perspective."[61] The concern Christie expresses is, from my perspective, a logical one. The potential exists for western research paradigms to convert Indigenous knowledge into concepts that resemble and even reinforce western ideologies about the world, although this may occur whenever knowledge crosses conceptual boundaries. As Cree scholar Margaret Kovach explains, "the problem is [conceptual frameworks] inherently centre Western epistemology, thus manufacturing and reproducing Western epistemology as a normative standard within research," which subverts Indigenous knowledge into something that reinforces discourses about the dominant society.[62] Oftentimes, discourses of the dominant society blindly seek to reinforce colonial empire, keeping power to the centre by holding Indigenous knowledge (and the assertions about self-determination and jurisdiction over land that derive from them) either to the margins or subsumed within the dominant discourse.[63]

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[61] Here Christie is discussing the use of mainstream legal theories to develop Indigenous legal theories. I analogize theory with methodology, Christie's caution applies evenly. Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin Richardson, Shin Imai and Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart, 2009) 195 at 196.
[62] Kovach, *supra* note 53 at 41.
[63] Gordon Christie, "Culture, Self-Determination and Colonialism" (2007) 6:1 Indigenous LJ 13 at 16, 17. See also generally, Glen Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) and specifically at 25.

I begin this chapter with a brief literature review to establish where my work fits into the existing body of scholarship. Moreover, I employ this chapter to allow me to address concerns related to using the common law lens to access Indigenous laws which I employ in my work. These concerns are not directly related to any specific method, as they stem generally from the problem of trying to understand a legal order across disparate languages, concepts, and worldviews. More directly, my concerns include how law is translated conceptually across legal orders, the role of language in research, the role and responsibilities of the researcher, and to some extent on validity. I will address each of these in turn throughout the chapter beginning with a discussion on the use of oral stories as a source of legal research. I then consider the use of common law research methods to perform Indigenous research, and discuss specifically the case brief analysis method applied to oral traditions. Using a common law method for studying Indigenous laws raises obvious concerns, two of which I bring to the forefront: the artificial parsing of areas of law into recognized common law categories, and a potentially overly narrow analysis of law. I will also address the more general problem, relevant to any method of analysis, of translation and interpretation of language and worldview.

Ultimately, working within an Indigenous legal order with fluency in a group's language and worldview is ideal. However, that scenario is sadly relatively rare. What can a person do when they do not have either of those competencies – ignore the legal order altogether or forge ahead with the tools and knowledge available?[64] I suggest that the answer to this conundrum is self-evident. I advocate for the latter, as willful silence bolsters the status quo, making less optimal methods of engagement, such as working from outside a language group, worldview,

[64] Hadley Friedland discusses this dilemma at length in her dissertation, arguing that "legal scholars must […] find legitimate ways to work with the non-ideal [resources] to advance an important practical task in the present" in *Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada* (PhD Dissertation for the University of Alberta Faculty of Law, 2016) [unpublished] at 25-27.

and community, when applied respectfully, useful tools for gaining access to what may otherwise remain esoteric knowledge. This challenge is not new, as the scholarship in Indigenous laws, within which I locate my own work, shows.

a. **A Brief Literature Review**

There has been a wealth of research on Indigenous laws and legal orders over the years. I have written about some of the anthropologists of the early 20th century who studied the laws of so-called *primitive* peoples.[65] After these early works, the voices appear to fall silent for several decades until the study of Indigenous legal orders is taken up again more recently by American scholars such as Raymond Austin, Christine Zuni Cruz, Matthew Fletcher, and Justin Richland in an American resurgence.[66] These scholars were primarily dealing with bringing Indigenous law into American Tribal Courts. Around this time, Canadian legal scholars were also starting to identify and unpack laws of Indigenous peoples, such as John Borrows and Val Napoleon.[67]

Launching from these foundations in Indigenous law research, I situate my work within the scholarship that has emerged within the last few years. Much of this more recent scholarship directly engages with Indigenous laws, such as that of Danika Littlechild, Sarah Morales, Hadley Friedland, Darcy Lindberg, Johnny Mack, Aaron Mills, Sylvia McAdam, and Andrée Boisselle. Although these are key scholars whose work I find my own closely associated with for their

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[65] Alan Hanna, "Reconciliation through Relationality in Indigenous Legal Orders" (2019) 56:3 Alta L Rev at 15.
[66] Raymond Austin, *Navajo Courts and Navajo Common Law* (Minneapolis: University of Minnesota Press, 2009); Christine Zuni Cruz, "Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law" (2001) 1 Tribal LJ, online: http://lawschool.unm.edu/tlj/volumes/vol1/zuni_cruz/index.html; Mathew Fletcher, "Rethinking Customary Law in Tribal Court Jurisprudence" (Occasional Paper delivered at Michigan State University College of Law, Indigenous Law and Policy Centre Occasional Paper Series, 2006), online: https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1155&context=facpubs; Justin Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (Chicago: University of Chicago Press, 2008).
[67] Borrows, *Recovering Canada*, *supra* note 10; Napoleon, *Ayook*, *supra* note 10.

engagement with and articulation of the laws of Indigenous societies, I am careful not to exclude other important works that are not necessarily recognized (or labeled) as dealing directly with Indigenous laws, as I discuss below.

Indigenous legal research has become its own category of research, where academics explicitly engage with the laws of Indigenous groups. This work was also performed within categories that were not explicitly identified as dealing with Indigenous law, although that is often precisely the subject matter. I can identify at least three areas of Indigenous laws research: the first is what was already mentioned, Indigenous law as *law*,[68] the second is Indigenous law as common law,[69] and the third is Indigenous law as culture.[70] I have resisted engaging too much with other scholars, as their work involves Indigenous groups who are not Tsilhqot'in, and often, methodologies will follow the practices of the relevant Indigenous group.[71] That said, I am drawn to the work of Linda Smith on Tsilhqot'in language and spirituality, in addition to Robert Lane's work in his dissertation on Tsilhqot'in cultural relations, and David Dinwoodie's published dissertation on Tsilhqot'in language, none of which are explicitly about law, but nevertheless contain information about law because of the overlapping manner of the

[68]Val Napoleon and Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal orders Through Stories" (2016) 61:4 McGill LJ, 725 at 739

[69] For example, Patricia Monture-Angus discusses Indigenous autonomy and self-determination, arguably an aspect of inherent governance arising from the laws of ancestors, from within Canadian jurisprudence, *Journeying Forward: Dreaming First Nations Independence* (Winnipeg: Fernwood 1999). Another example generally is Borrows, *CIC*, *supra* note 58.

[70] Examples of this can be found in contemporary anthropology dealing with Canadian jurisprudence, such as Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Vancouver: Talon Books, 1998); Bruce Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (UBC Press, 2012). Other examples emerge from Indigenous people writing about their ways, without explicitly calling certain practices law, such as Chief John Snow, *These Mountains are our Sacred Places: The Story of the Stoney People* (Toronto: Samuel Stevens, 1977).

[71] Danika Littlechild explains in her LLM thesis that she is "deploying a Cree methodology in this work. As such, I am engaging in Cree knowledge as a body of ideas and practices," in *Transformation and Re-Formation: First Nations and Water in Canada* (LLM Thesis, University of Victoria Faculty of Law, 2014) [unpublished] at 20. I find that it would be difficult to engage in a group's legal order while resisting the influence on how the knowledge shapes the methodology. The two – knowledge of process and practice and methodology – seem inextricably linked.

worldview.[72] I engage with these scholars throughout the course of this dissertation, and therefore will limit my engagement here to the current scholarship on Indigenous law mentioned above.

To situate my own work, I reiterate my aim in this dissertation of providing a deep analysis of Tsilhqot'in laws of the ancestors as they pertain to access to and use of surface water with a view to strategic engagement with the imposing outside world in contemporary times. The first set of texts relating to my agenda are Masters' theses.[73] Upon reviewing these materials for helpful insights to provide direction for my own work, I searched first for the articulation of Indigenous laws, and second for their methodological approach. These theses introduce Indigenous laws to various degrees. They introduce a few concepts in a declarative manner. For example, Johnny Mack's *Thickening Totems and Thinning Imperialism* offers some insight into *Heshook-hish tsalwalk*, a Nuu-chah-nulth concept relating to the "interconnectedness of the universe" and finding balance in people's interwoven relationships.[74] Mack explains balance in relationships as being central to Nuu-chah-nulth life, which is often brought about by the concept of respect, or *Eesok*.[75] Mack deploys these foundational Nuu-chah-nulth normative concepts as a means of critical academic self-reflection within his work. Val Napoleon unpacks the critique Mack identifies, expanding the responsibility Indigenous academics have to act toward a personal ethics "in light of the power dynamics around us" to include a broader "collective-

[72] Linda Smith, *Súwh-t?'éghèdúdính*: the *Tsìnlhqút'ín Nímính* Spiritual Path (MA Thesis, University of Victoria, Department of Linguistics, 2004) [unpublished]; Robert Lane *Cultural Relations of the Chilcotin Indians of West Central British Columbia*, (PhD Dissertation, University of Washington, Department of Anthropology, 1953) [unpublished]; David Dinwoodie, *Reserve Memories: The Power of the Past in a Chilcotin Community* (University of Nebraska Press, 2002)
[73] Some of the scholars, namely Johnny Mack and Darcy Lindberg are in the process of writing their dissertations. At the time of this writing, those are not yet available.
[74] Johnny Mack, *Thickening Totems and Thinning Imperialism* (LLM Thesis, University of Victoria Faculty of Law 2009 [unpublished] at 19.
[75] *Ibid* at 20.

political" level.[76] One relevant aspect of this academic self-critique is its grounding in Mack's Toquaht legal order through his internal knowledge, meaning other Indigenous scholars who apply this critique must do so from their own legal landscape, which is often, for many scholars, myself included, a patchwork of Indigenous and Canadian legal perspectives. Beyond the discussion of these concepts, Mack's focus is predominantly on imperialism's oppressive imperative exercised through the *Maa-nulth Final Agreement* to which his First Nation was a signatory. Much of Mack's thesis is on the struggle with and against imperialism, with Nuu-chah-nulth law as the springboard for his resistance to and critique of the reach of imperialism through modern treaties. The other two LLM theses follow a similar vein, in that Indigenous laws provide a subtle undercurrent to more the visible discussion of engagement with outside forces.

Darcy Lindberg's *kihcitwâw kîkway meskocipayiwin (sacred changes)* is a work rising out of a deeply internalized understanding of Cree law. Lindberg reaches into Cree law to sketch out a procedural frame for understanding gendered aspects of Cree ceremony.[77] Seeking out his actual articulation of some examples of Cree law, Lindberg mentions the relationship of the northern lights as a source of certain rules, such as "Don't whistle at the northern lights," and "Don't call your ancestors down too soon".[78] These normative rules come with some analysis, which is more demonstrative than it is part of his core thesis. However, Lindberg consistently touches on narratives to identify Cree legal principles to inform his engagement with ceremonial practice and its relationship with gender. His thesis is exemplary for providing a balanced framework for engaging with contemporary and historic topics without losing sight of Cree law's

[76] Napoleon, *Ayook*, supra note 10 at 313.
[77] Darcy Lindberg, *supra* note 59.
[78] *Ibid* at 74-75.

guiding underpinnings. One area which is lacking is an engagement with Cree community members to provide contextual variation to Lindberg's analysis of Cree law. This shortcoming is likely explained given the limitation in scope of an LLM thesis, and does not detract from Lindberg's voice because of his own internal knowledge and thinking in Cree law. Another LLM thesis which is particularly relevant to my work is Danika Littlechild's *Transformation and Re-Formation: First Nations and Water in Canada.*[79]

Littlechild aspires to bring Cree law into conversation with Canadian law as it pertains to water. I was keen to review this conversation at the intersection of Cree and Canadian legal orders, which never clearly materializes in the thesis. Littlechild explains how her thesis will "articulate how recognition of Indigenous legal traditions as a transformative capacity to secure better water management and governance".[80] As I read on, I realized she was addressing recognition within the Canadian legal system, which does not, for the sake of her thesis, require a deep engagement with Cree law. At one point, Littlechild mentions the role of the beaver in the "regulation and management of the natural environment," in identifying Cree law through interactions with the earth. The discussion ends prior to a lengthy engagement with the law in this regard. Much of Littlechild's paper, as with Mack's, culminates in a discussion about colonial law as it pertains to the subject matter (water). In trying to understand why the switch from aspirational thinking about Cree law and the actual engagement with Canadian law, I realized the inevitability of these discourses to wind up in such a place. For Littlechild, a Cree lawyer working from a Canadian legal foundation (as her knowledge of Cree law was admittedly limited at the time of her writing),[81] she is working to create space for a more equitable

[79] Littlechild, *supra* note 71.
[80] *Ibid* at 9.
[81] *Ibid* at 20.

conversation than currently takes place, and which she knows is possible. Regardless of the depth of knowledge of an Indigenous legal order, Indigenous academics and lawyers alike are faced with the intransigence of Canada's legal and political machinery, and find ourselves being drawn back into those conversations. Littlechild's thesis reveals a grim truth. Working with (within or from without) the Canadian legal system is inevitable, and Indigenous laws are aspirational, in that they provide hope for invoking positive change in the machinery.

What was beneficial in reading these theses was seeing the internalized knowledge these scholars brought to their work. Internalized knowledge brings to bear insights and understandings that outsiders to the legal orders would not themselves carry. That said, an unstated burden for Indigenous scholars is the ability to anchor their knowledge in other, external sources to provide verification of the knowledge. This is where other community members contribute to Indigenous-based research, as without reflection from others, knowledge about laws and lifeworld remain internally subjective. Being subjective is not fatal to Indigenous scholarship on our own legal systems. As I discuss further into this methodology chapter, the subjective canvas (each individual learner) is an important feature of transmitting Indigenous laws by ensuring a means of introducing individual creativity, and thus maintaining a fluid, dynamic order which can readily respond to changing times. In works as brief as LLM theses, internal knowledge is present and identifiable, but is left relatively unpacked. Likely the embodiment of internal knowledge is what creates obligations for Indigenous academics, as Mack identified in his critical academic self-reflection.

In the practice of critical academic reflection, I note several correlations between my work and the work of these other knowledgeable academics. I will focus my discussion on three of those correlations as I move into to dissertations in this field of knowledge. The first is the

concept of holism as a methodological approach. The second is the concept of interconnectedness as a primary feature that appears across many Indigenous worldviews. The third is how our work is grounded in the colonial context of Canada. It seems that at one stage or another, the scholarship engaging with and articulating Indigenous laws inevitably intersects on these three facets of Indigenous legal research. I want to be clear that I address these aspects of the research as they arise within the Tsilhqot'in context, and in so doing, I acknowledge that others have also grappled with the same concepts.

The first two concepts, holism and interconnectedness, will be discussed together as the state or condition of the latter gives meaning to the concept of the former. As such, holism serves to underpin an Indigenous research methodology arising in Littlechild's thesis, when she acknowledges holism as a basis for her Cree methodology, and understands the Cree "knowledge system from a holistic perspective."[82] Holism conveys the idea that Indigenous law, and its associated worldview, are best understood in their entire overlapping complexity, as to parse out pieces for analysis may risk skewing the meaning in the isolated pieces. As Littlechild explains, the body of Cree knowledge "is an interconnected, interwoven body of knowledge encompassing culture, spirituality, the environment, community, family, and the individual".[83] Holism is a thread running through much (if not all) of Indigenous laws scholarship. For example, Sarah Morales invokes holism as "relational-connectedness," which she explains is the "bedrock" of her Coast Salish worldview "based upon our relationships to our ancestors, the people and the land".[84] Additionally, Andrée Boisselle's research in Stó:lō law encounters holism through one

[82] Littlechild, *ibid* at 20.
[83] *Ibid*.
[84] Sarah Morales, *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal order* (PhD Dissertation, University of Victoria Faculty of Law, 2014) online: https://dspace.library.uvic.ca/bitstream/handle/1828/6106/Morales_Sarah_PhD_2015.pdf?sequence=6&isAllowed=y, [unpublished] at 48.

of her key participants, who "recounts formulations of Stó:lō experience that exemplify a particular relationship to 'everything' that forms part of their territory".[85] Holism and interconnectivity are relevant relational aspects of Indigenous worldviews, and by extension laws, as the concept of everything being connected informs the pathway through which law flows from the humans to non-humans (birds, fish, animals) and the land, ecosystems and spirit worlds. As Morales contends, these relationships with everything and everyone around entail obligations for the maintenance and health of the relationships, which forms the basis for *snuw'uyulh* (a state of being).[86] I engage with holism as methodological concept and interconnectivity as an organizing principle in Tsilhqot'in worldview in this and the next chapter to set out a means for understanding internalized Tsilhqot'in law as it applies to water.

In addition to holism and interconnectivity, another theme that runs through the current Canadian scholarship on Indigenous legal orders is the imposition of colonialism. Academics wisely approach the contextual background within which these Indigenous legal orders find themselves impacted in some manner or another by colonialism. Whether the discussion is of the colonization of the Cowichan Valley or colonial oppression of Stó:lō society and the resulting impacts, there is salience in this part of the discussion for at least two reasons.[87] First, the historical account of a society is relevant in how it has shaped the present state of the society. Nobody is immune. The Tsilhqot'in history with colonialism is part of who they are today, largely by how they have responded and resisted its imposition. The history is real and provides context for how Indigenous law is lived today, which then informs how it may be used in an outward expression in relation to the surrounding colonial world. The second is, as Napoleon

[85] Andrée Boisselle, *Law's Hidden Canvas Teasing Out the Threads of Coast Salish Legal Sensibility* (PhD Dissertation, University of Victoria Faculty of Law, 2017) at 91.
[86] Morales, *supra* note 84 at 56.
[87] Morales, *supra* note 84 at 154; Boisselle, *supra* note 85 at 34.

cautiously pointed out in her dissertation on the Gitxsan legal order and the relationship with power through the *Delgamuukw* litigation, social change should not go unexamined.[88] As I read (and re-read) her work, I identify with the agency in deploying colonial tools to resist, or carve out new spaces, within the colonial world.[89] This act has the capacity to shift power, particularly when a group's Indigenous legal order rises to the challenge of the contemporary society in a changed world, and becomes "useful" in today's world.[90]

My interest in the relationship between the power dynamics of Canadian and Indigenous legal orders brings me to Aaron Mill's dissertation, although for a slightly different reason. Mills offers a thorough discussion on the incommensurability of different legal orders, and the impossibility that they can understand one another from within their respective worldviews. This relates to my interest in power dynamics, as it raises the question, if two disparate legal orders are not translatable, then doesn't Canada simply walk away with the prize? In other words, if Canada holds the balance of power, why should Canadian legal and political institutions bother trying to understand Indigenous rooted legal orders at all?

In his dissertation, Mills uses a metaphor for disparate worldviews (Indigenous and non-Indigenous Euro-Canadian) of two paths, with a middle path of "a merged indigenous and settler lifeway" which only leads to death.[91] Mills is arguing that if both paths are walked, settler supremacy will dominate and Indigenous people will be subsumed into the hegemony of the settler liberal worldview (hence my earlier question). I agree with the risk of being subsumed, which I address more fully in Chapter 5, as a live threat that must be acknowledged before

[88] Napoleon, *Ayook*, supra note 10 at 333.
[89] *Ibid* at 236.
[90] *Ibid*.
[91] Mills, *supra* note 8 at 20.

working with the articulation of Indigenous laws. I also acknowledge a distinction in the substance: Mills uses paths in reference to different ways of knowing and being (rooted Indigenous worldviews/western liberal worldview), whereas I am discussing possibilities for the strategic use of western practices in law and governance for purposes that serve to empower Indigenous communities, which is not, at least superficially, the same as living in someone else's worldview (although I acknowledge the possibility that full integration with common law tools may eventually distort an Indigenous worldview toward giving it a liberal blush). However, my perspective, my path, leads to another possibility than Mills' three path approach. I believe there is a jurisprudence developing which gives rise to a new branch of Indigenous-Canadian law, one which is not fully both Indigenous and common law, and yet is also neither.

Analogous to the Métis genesis in Canada, from the intermingling of disparate worlds, disparate worldviews can give birth to a new people. I believe this is the Canada, to which Canadians (at least perhaps superficially) aspire. This is not a new concept. Borrows and Asch have written about the aspirational Canadian political-legal order that is embodied in the *Constitution Act, 1982*.[92] Mills would likely argue that despite the aspiration, little has changed in the power dynamic for the reasons he argues in his dissertation, which I take up subsequently in this chapter. Suffice it to say, I tend to be optimistic about the potential for change, evidence of which has begun to shine through at least 150 years of almost imperceptible change, but change none-the-less.[93] Without hope, why make the effort? I am shameless, if not foolish, to

[92] Borrows, *CIC*, *supra* note 58 generally; Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Vancouver, UBC Press, 1984).
[93] Through decisions such as *R v White and Bob* (1964) 52 WWR 193 BCCA, and *Calder v British Columbia* [1973] SCR 313, courts in British Columbia recognized that Aboriginal and treaty rights existed and (potentially) had not been extinguished.

hope that my work stands to contribute to ongoing change in the lineage of the authors and thinkers discussed in this brief review.

There is room for multiple voices and differences of opinion, which is one aspect of law mirroring social collectives. I respect Mills' arguments for the naked reality he exposes to other academics who dare to venture into this field, and challenges me to make better efforts of working through those challenges. A test to which, I hope, this dissertation responds. The works mentioned above, and some of which I engage more thoroughly below, weigh in on the relationships various First Nations have with the colonial-liberal-entrenched governments of Canada. They shed light on how relatively new academics such as myself might weave the discussions and analyses of law through the crowded corridors of colonial power. In acknowledgement and respect to this growing field of scholarship, I contribute to the identification and development of additional paths of knowledge and understanding beginning at the place of worldview. Through a worldview, law emerges.[94] Although there are multiple resources for gaining insight, one logical place to begin learning about a different worldview is through a people's oral tradition.[95]

b. Stories as Research Resource

A people's stories offer a reasonable means of beginning to learn how they understand themselves in the world. Many legal scholars agree that a people's stories contain knowledge of the group's legal thinking.[96] This statement applies to Tsilhqot'in people. Despite the Crown's

[94] Robert YELḰÁTTE Clifford, "WSÁNEĆ Legal Theory and the Fuel Spill at SELEKTEL (Goldstream River), (2016) 61:4 McGill LJ 755 at 760.
[95] Friedland, *supra* note 64 lists several legal resources in her dissertation, including "Elders, families, clans," and "stories, songs, and practices" to name a few at 21.
[96] For example, see Friedland, *ibid* at 22 citing Napoleon, *Ayook*, *supra* note 10 at 71; generally, John Borrows, *Drawing Out Law: A Spirit's Guide* (University of Toronto Press, 2012); and Fletcher, *supra* note 66 at 90.

cross examination at the beginning of this chapter, Justice Vickers found on the evidence that Tsilhqot'in stories contained law:

> Each [legend] carries with it an underlying message or moral that is intended to instruct and inform Tsilhqot'in people in the way they are to lead their lives. They set out the rules of conduct, a value system passed from generation to generation.[97]

In other words, Tsilhqot'in witnesses proved at Canadian law that stories are a valid resource containing information about their legal order, despite its being couched as a "value system." This evidence was acknowledged earlier in the 1950s when anthropologist Robert Lane worked with Tsilhqot'in people on research regarding their cultural relations with neighboring nations. Lane explained that

> The stories themselves seldom had morals, but were told to children for the moral effect. Young people were warned not to be greedy as was Raven or they would suffer his misfortunes; or to be kind and generous to the unfortunate or those in trouble as were many characters (often orphans), and they would reap rewards and supernatural aid.[98]

Lane's anthropological training in identifying cultural meaning led him to identify stories as parables, having moral effect. Stated another way, the moral effects in the stories were legal norms or rules that children would grow up embodying. Lane is identifying a process of intergenerational education to act according to Tsilhqot'in law. In Lane's description, law is inculcated into the minds of the youth, who grow up with the foundational teachings of the stories. Stories intermixed with other sources of legal teachings, such as language, ceremony, and spirituality, application in concrete experiences, gave the full expression of Tsilhqot'in law. The legends (as the court referred to them) are stories of the *?eggsidam* (ancestors), which carry foundations of law produced in a pre-contact time, devoid of European influence, underscoring

[97] Vickers J distinguished legends from stories, stories being "recordings of actual events in an historical period of time." *Tsilhqot'in* BCSC at para 434. I do not make the same distinction, and refer to legends (i.e. legends of the *?esggidam* or ancestors) as stories, all forming the oral tradition.
[98] Lane, *Cultural Relations*, *supra* note 45 at 53.

the conundrum of studying Indigenous law from a European-based worldview in a language foreign to the source.

The challenge of using European academic methodologies to investigate Indigenous societies is well documented, largely for the reason stated in this chapter, which is the tendency to force Indigenous concepts into western categories, distorting concepts to make them recognizable to western law.[99] The categories used in analytical frameworks are constructions identifiable to common law lawyers. This in itself is not a terrible thing, as showing how an Indigenous group's actions, decisions, patterns of conduct, and processes are law that may be reconcilable with the common law turns the discussion in courtrooms and negotiating tables from culture, beliefs, and values to one of laws and legality.[100] Discussions of law rather than culture changes the tone, giving matters the force of law, which helps shift some power in favour of Indigenous people. If the project is to identify law solely for the purpose of recognition in Canadian common law legal circles, then western methodologies are well suited to the work. However, if the project is to learn Indigenous laws in their own contexts, then the concern over translation into common law categories is sustained.

Researchers should bear in mind that stories comprising an oral tradition are from a particular time, which may (and often do) have little direct recognizable relevance in today's modern global societies. James (Sa'ke'j) Henderson argues "these stories reveal what is taken as custom or law is a prejudice of the generation and the place, often in conflict with older teachings."[101] In other words, the stories capture a sense of how things were in a particular social

[99] See generally, Smith, *supra* note 52; Kovach, *supra* note53; and Wilson, *supra* note 53.
[100] The SCC's decision in *Van der Peet*, *supra* note 11, produced the integral to distinctive culture test, hinging the proof of an Aboriginal right on whether the right was rooted in the cultural practices of a people. The word culture is mentioned 180 times in the decision, but is not defined.
[101] James (Sákéj) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, 2006) at 159.

epoch, embodying the "relationship between jurisprudence and culture" in a particular temporal setting.[102] The analyses researchers bring to bear on publicly available stories recorded in the past, then, are a snapshot of a specific circumstance from a society in a specific time period, which merely offers a "feeling"[103] or "flavour" of a group's law-ways of the past.[104] To complicate matters, the stories themselves and their applications are not static.

Different storytellers tell the same stories in different ways. For example, Elder Marie Dick shared the story of the *Blind Man who was cured by the Loon* with gender roles reversed, telling it as the woman who was blind, abandoned in the woods by her husband.[105] Capturing one story for publication freezes one version, while typically several other versions exist capable of "dynamic transformation" to remain relevant for people in changing times.[106] The translation of one recording also freezes meaning, creating the potential for misinterpretation into the future, which is a potential hazard for people through time.[107] As such, the results of analyses of old oral traditions should be used bearing these nuances in mind. When applied to inform modern processes, translations from past to present understanding, researchers should, as best as possible, contemplate the socio-legal and political ways of both.

As recording research in drafted form reflects permanence, care should be taken to present an Indigenous legal principle from an oral tradition as one that reflects a particular circumstance in a particular time. This principle may change according to changes in both of

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[102] *Ibid*.
[103] Henderson argues that stories are performances, which allows the fluid transmission of ideas in any time period: "Like the structure of First Nations languages, the oral tradition responds to the dynamic transformation of the Earth Lodge. This energetic method transmits Indigenous humanities and its knowledge of the flux to the new generations. This [oral] tradition is not about a fixed or recorded body of stories retained from the First Nations 'past'." Henderson, *ibid*.
[104] Llewellyn and Hoebel, *supra* note 28 at 19.
[105] Interview of Marie Dick at Tl'etinqox (10 July 2012) at 7.
[106] Henderson, supra note 101 at 159.
[107] This exemplifies Borrows' point on not freezing traditions in the past more eloquently than my earlier comment on the same (see footnote 58). The Indigenous Law Research Unit at the University of Victoria (ILRU) deals with this by noting multiple versions for subsequent analysis.

those variables, which is equally evident for the common law as it is for Tsilhqot'in law. An analysis is a snapshot of one instance. A story offers many possible responses which change with even minor variances in the circumstances. An Elder will selectively choose a story (or stories) to share at a given moment that provides a frame of reasoning for problem-solving an issue that may take several days, weeks or even months to process.[108] The oral tradition is dynamic and "stories provide a sense of clarity yet arbitrariness" that serves to engage the recipient's reasoning process within their worldview.[109] The flexibility of the oral tradition to address a range of problems, rather than a specific problem, (compared with the fixity of published stories printed in ink) challenges notions of consistency, certainty, and predictability.[110] Therefore, utilising analytical results of publicly available stories for guiding the generation of contemporary Indigenous laws rather than implementing them on the face of the results is prudent.

Casting legal principles from stories as definitive expressions of Indigenous laws for contemporary purposes directly risks entrenching the past, which would be anachronistic and largely unhelpful in meeting the needs of contemporary Indigenous societies. When Ubuntu scholar Devi Dee Mucina writes about using stories as a resource for research, he discusses the purpose of stories and the practice of storytelling as a methodological approach requiring "dynamic engagement" rather than a specific method of interpretation.[111] As I read Mucina's paper, I was searching for his method of interpretation, but soon realized that his approach

[108] Henderson, supra note 101 at 158.
[109] Henderson, supra note 101 at 161.
[110] For one argument that uses this flexibility against Indigenous peoples, see Alexander von Gernet, "What My Elders Taught Me: Oral Traditions as Evidence in Aboriginal Litigation" in *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision*, Owen Lippert ed (Vancouver: Fraser Institute, 2000) 103, online: https://www.fraserinstitute.org/sites/default/files/NassValley-what-my-elders-taught-me.pdf.
[111] Mucina, *supra* note 59 at 8.

emphasises storytelling as a practice that allows flexibility of meaning for each listener.[112] He was not presenting a particular method from which I was hoping to gain insight. Instead, his teaching is more profound and liberating. The invigoration of Indigenous legal orders is dependent on the continuation and strengthening of its practices, such as storytelling and the creation of new stories, to continue embedding "knowledge and learning" of the present societies.[113] For Mucina, the practice of storytelling is what reinvigorates Indigenous laws as much as (or more than) interpreting the meaning in stories.

The method of analysis I employ in this work, with its translation and interpretation of languages and concepts, offers limited insight into the Tsilhqot'in legal order. The benefit of its application is the functional example it offers (i.e. identification of principles and processes in stories) which reinforces an argument for the continuation of traditional legal practices as one means of keeping the past active and dynamic into the present. Throughout the research, I have strived to identify how historic practices may continue as a foundation for contemporary legal institutions underpinning Tsilhqot'in society and its government. Language and storytelling are two of those institutions, which are key to becoming more proficient in a legal methodology rooted in the legal order being studied. However, having to start from a point of common law-oriented academic practices, a few concerns and cautions must be clearly articulated before I can proceed to analysis with any degree of comfort and confidence.

c. Indigenous Research – Common Law Method

In the performance of research, I strive to tailor and utilize an Indigenous research methodology. When considering this, I see two main components. First, *who* is the researcher?

[112] *Ibid.*
[113] *Ibid* at 6.

And second, *how* is research performed? The matter of *who*, addresses the researcher as possessing a particular Indigenous worldview that embodies relationships to others and to the land.[114] As the researcher, I must practice humility in accepting the worldview I am studying, and which informs my analysis, may be unsettling, as the foundation of how I understand the world may shift somewhat with unfamiliar concepts. As an Indigenous researcher, I embedded myself, as much as possible, in the concepts of how Tsilhqot'in community understands itself in the world.[115] However, I am not so concerned with this aspect, as it goes to the integrity of my own knowledge, which I will address as a response to my concerns with my method of inquiry. The second component is worthy of intensive reflection. I will provide an analysis on *how* I learned to draw knowledge from stories based on a particular common law research method known as the "law-case method" of analysis.[116] The rigour of analysis allows me to arrive at my own conclusion about how I situate my work with Tsilhqot'in law. I believe this effort constitutes a fresh engagement with the use of common law methodologies for Indigenous based research; I owe to myself, Tsilhqot'in people, and other academics to grapple with concerns amounting to appropriation, knowledge production, and ongoing processes of colonialism.

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[114] In this regard, *land* refers to everything and everyone connected to the land (water, trees, plants, rocks, people, animals, fish, etc.). Elizabeth Carlson, provides a concise definition of Indigenous research methodologies citing Linda Tuhiwai Smith, Shawn Wilson, and Margaret Kovach as her sources, in "Anti-colonial Methodologies and Practices for Settler Colonial Studies" (2016) Settler Colonial Studies, online at http://dx.doi.org/10.1080/2201473X.2016.1241213 at 3, where she writes "they explain that Indigenous methodologies emphasize Indigenous worldviews, ontologies, and epistemologies. Indigenous methodologies embody reciprocity, land and place, balance and holism, self-determination, knowledge as collective and relational, relational accountability, social locatedness, connection, honouring Indigenous- and place-based protocols and norms, and decolonization."

[115] This understanding is a necessity according to Mills, "Indigenous peoples have distinct ways of thinking about persons, freedom, belonging, community, constitutionalism and legal process—all of which one must have at least begun to learn about before she can begin to learn about an indigenous people's system of law," *supra* note 8 at 8. Accordingly, there are complications for Indigenous researchers, which Sarah Morales grapples with in a great discussion of "insider/outsider" research, *supra* note 84 starting at 59. I am also mindful of the anthropological scholarship on participant observation popularized in the works of Bronislaw Malinowski, EE Evans Prichard, Margaret Mead, and Franz Boas, to name a few in a large group.

[116] Napoleon, *Ayook*, *supra* note 10 at 28.

There are other challenges of conducting research into Indigenous legal orders which I am not particularly interested in revisiting, as there is scholarship that has already taken up those efforts.[117] The known challenges range from whether Indigenous people had and have *law* (now generally accepted as resolved) to whether Indigenous laws can be intelligible to people from other, particularly western, legal orders.[118] Although the challenges I address apply broadly to research across disparate worldviews generally, I engage with the specific details of the law-case method of analysis involving matters of translation, language, concepts, researcher positionality, and validity. In response to Christie's insight that a responsible way forward is to first pull back and consider the nature of the task at hand, I consider the temporal history of the law-case method of analysis.[119] Turning to the origins of this method when it was first applied to Indigenous stories shows a trajectory of research from the past to the present. This trajectory allows me to suggest a possible path into the future for the ongoing development of this method by extending its reach to a wider area of legal matters such as use of and access to natural relations such as water.

[117] Friedland, *supra* note 64, has aptly grappled with many of the challenges by bringing into conversation with one another the work of other leading scholars on Indigenous laws including John Borrows, Val Napoleon, and Matthew Fletcher, at 19-49. For discussion raising and grappling with the many challenges of working with Indigenous legal orders in addition to Friedland, see also generally Borrows, *Heroes*, *supra* note 10; Christie, *supra* note 63; Fletcher, "Rethinking Customary Law" *supra* note 66; Austin, *Navajo Courts*, *supra* note 66; and Richland, *Arguing with Tradition: supra* note 66.

[118] Ibid at 12-13. Borrows, *CIC*, *supra* note 58 at 138. Mills generally, *supra* note 8.

[119] Christie argues that before scholars go too far down the path of carving out space for Indigenous legal orders in the dominant Canadian landscape, we should first consider the assumptions that necessarily inhere to create the starting point as such. These assumptions include the legitimacy of colonial authority and its location as the centre of power. Christie, *supra* note 63 at 15.

d. Law Case Method of Analysis

Early use of the adapted case brief method can be traced to legal realist scholarship of the first half of the 20th century in the United States.[120] Jurist K.N. Llewellyn and anthropologist E. Adamson Hoebel applied the "modern treatment of cases at law" to Cheyenne stories about conflict to unpack what they could identify as law or the "law-ways" of Cheyenne society.[121] Their case law method was influential in Val Napoleon's seminal study of Gitxsan law, where she applied a multi-case analysis to draft a theory of the Gitxsan legal order.[122] Llewellyn and Hoebel applied a three point analysis to their research, which involved 1) identifying the ideal behaviour that establishes norms (rules), 2) how those norms are actually applied by people in Cheyenne society (practice), and 3) when there is a breach of the norm, what is the response (resolution).[123] Their analysis was confined to the study of what they called "trouble-cases", as these cases (stories) involving conflict between people "makes, breaks, twists, or flatly establishes a rule, an institution, an authority [… and] are thus the safest main road into the discovery of law."[124] There were criticisms of their work, some of which Napoleon addressed in her dissertation that I will not repeat here.[125] My discussion turns generally on the pitfalls which inhere in applying a common law technique in my work of identifying Tsilhqot'in law.

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[120] Friedland and Napoleon both acknowledge the earlier origins of this method by Christopher Langdell at Harvard over a century ago. Friedland, *supra* note 64 at 55; Napoleon, *Ayook*, *supra* note 10 at footnote 47.
[121] Llewellyn and Hoebel, *supra* note 28 at ix, 15.
[122] Napoleon, *Ayook*, *supra* note 10 at 28. To distinguish the work, Llewellyn and Hoebel limited their study to "trouble cases" and a developed a "theory of investigation" to explain a research framework; whereas, Napoleon's research extended to include Gitxsan legal reasoning behind the law, which she used to develop a theory of Gitxsan law. See Napoleon, *Ayook*, *supra* note 10 at 29-31.
[123] Llewellyn and Hoebel, *supra* note 28 at 20-21. Cited in *ibid* at 28.
[124] *Ibid* at 29.
[125] Napoleon, *Ayook*, *supra* note 10 at 29-31. I focus narrowly on the technical aspect of the case brief method alone, as it is the part of the overall methodology of looking for law in stories that raises some concern for discussion. There are several pieces to the overall case brief methodology developed by Napoleon and Hadley Friedland, such as the development of a framework, which serves to address many of the concerns. My point is to discuss the technical concerns to ensure they are out in the open for debate and to show how I deal with them in my research.

e. A Brief Introduction of the Adapted Case Brief Method

There is more than one way to conduct research into Indigenous laws and their overarching legal orders.[126] The method I employ is a legal analysis of the Tsilhqot'in oral tradition (legends and other stories) to identify legal principles and processes.[127] The method is a variation of the "adapted method of legal analysis" also referred to as the "adapted case brief method" that I learned from Hadley Friedland and Val Napoleon as a student researcher in the Accessing Justice and Reconciliation Project.[128] There is much to be said for the adapted case-brief method as part of a framework that organizes legal principles, rules, expectations and responsibilities into similar groupings based on analyses of several stories and in conjunction with in-community interviews. This methodology as a whole allowed me to begin recognizing Indigenous laws in the embedded context of oral histories, which I was then able to begin to identify in the conduct and behaviour of people. I do not reject this approach, as it is the foundation of my skillset for working with and within the Tsilhqot'in legal order. Rather than

[126] For example, Aaron Mills teaches Anishinaabe constitutionalism based on immersion in and deliberations about oral traditions to understand the lifeworld of Anishinaabe people as he explains in his paper, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LG 847. Borrows discusses teaching law on the land by observing and interacting with the natural surroundings within a particular worldview in "Outsider Education: Indigenous Law and Land-Based Learning" (2106) 33 Windsor YB Access Just. See also, Sarah Morales approach to law through understanding how it is practiced, *supra* note 84 at 208. See also, Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ, online: https://jps.library.utoronto.ca/index.php/ilj/article/view/27628; and Darcy Lindberg, "Drawing upon the Wealth of Indigenous Laws in the Yukon" (2020) The Northern Review 179.

[127] Vickers J distinguished oral traditions (legends) and oral histories (stories about people's activities). See Lorraine Weir, "'Oral Tradition' as Legal Fiction: The Challenge of Dechen Ts'edilhtan in *Tsilhqot'in Nation v. British Columbia*" (2016) 29 Int J Semiot Law 159 at 160. I do not make this distinction and use the terms oral traditions to encompass both legends and stories of human events.

[128] Hadley Friedland and Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal orders (2015-2016) 1:1 Lakehead LJ at 23. Also described in her dissertation, Friedland, *supra* note 64 at 62 and 75. See also Accessing Justice and Reconciliation Project: Revitalizing Indigenous Laws (2014), online: http://indigenousbar.ca/indigenouslaw/wp---content/uploads/2013/04/iba_ajr_final_report.pdf. The adapted case brief method is the method adopted and applied by the Indigenous Laws Research Unit at the University of Victoria, which is commonly referred to as the ILRU Method.

unpacking the whole case brief methodology, I choose to focus my discussion on the adapted case brief method as a tool for identifying legal principles, rules, and processes.

Roughly stated, the adapted case brief method involves applying a first-year law template for analysing court decisions to Indigenous oral stories and legends to "identify a problem and a decision or resolution to that problem."[129] The template sets out steps to identify a resolution of some problem consisting of the following:

- identify an issue (human problem) that the analysis will serve to resolve,
- determine the facts from the story relevant to the stated issue,
- identify the decision made in the story that resolves the issue,
- identify the reasons (given and implied) behind the decision.[130]

Ideas, statements, actions or concepts that are beyond the researcher's epistemological grasp are "bracketed" and set aside from the analysis.[131] The results of several of these case brief analyses of stories are then gathered into categories under a framework, which may include "legal processes," "legal responses and resolutions," "legal obligations," and "legal rights".[132] My research method stems preliminarily from this technique. However, taking a page out of Littlechild's methodology mentioned above, I now approach stories holistically, offering a range of possible responses without applying the adapted case brief template. Used carelessly by untrained, unfamiliar or over-ambitious researchers, this method has the potential to filter out Indigenous knowledge and shape the contours of the responses into forms that resemble common

[129] Friedland and Napoleon, *ibid*.
[130] *Ibid* at 23.
[131] *Ibid*.
[132] Friedland, *supra* note 64 at 76.

law categories. From here, I articulate the most common critiques of this method which will take me to holism as a logical next step in the progression in the practice of considering law in stories.

f. Critique of a Common Law Method for Identifying Indigenous Laws

The main criticism of the use of any case law method is that it is a technique of, generally speaking, western state law applied to Indigenous knowledge. Llewellyn and Hoebel were not blind to the potential for western law to influence outcomes. For instance, they identified the possibility that a framework for investigation "may dictate what one sees and makes use of, and may dictate also a general frame into which the data may be squeezed," to make it fit into recognizable categories.[133] Their insightful response acknowledges that western legal tools are designed to address legal problems "given to it [i.e. western legal tools] for solution" rather than posing or framing the problems according to the western legal system's own institutional design, effectively essentializing the law into a recognizable construct.[134] Yet, this response does not

[133] Llewellyn and Hoebel, *supra* note 28 at 39. McLachlin CJC cautioned the court on the same concern when considering concepts from Indigenous knowledge, "the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts." *Tsilhqot'in* SCC at para 32.

[134] Llewellyn and Hoebel, *supra* note 28 at 42. Friedland and Napoleon address this concern by crafting a well-thought out research question to bring to the stories to provide specificity and scope, *supra* note 128 at 20. To expand this dialogue more broadly, Stó:lō feminist Lee Maracle suggests the potential for a more insidious reading of Indigenous law from western trained minds with an agenda to justify colonial imposition: "To accept a European interpretation of our old ways is foolhardy. Politics arises from law […] European law legalizes our oppression. […] I expect that Europeans cannot define our societies with any accuracy or draw connections between our society and their own. Further, I hardly expect them to be able to look at our laws and see the traditions, values and body politic that arise out of our legal system. I expect them to interpret history so as to justify their genocide against us in the name of humanity and civilization." In *I am Woman: A Native Perspective on Sociology and Feminism* (Toronto, Press Gang, 1996) at 39. Recognizing Maracle is coming from more of a political platform than a legal one, as she is not trained in the common law, I agree this potential exists, and there may be unscrupulous people who would attempt to spin interpretations to create a particular slant on the knowledge, making transparency and triangulation of knowledges all the more important. To be clear, Maracle is offering this insight in the context of arguing that Indigenous leadership may adopt these practices to serve their own personal interests. In the very least, Maracle offers a cautionary tale to academics working in the area of interpreting Indigenous legal orders.

address how to avoid shaping results.[135]

Llewellyn and Hoebel did not let their concern impede their work, likely because they could not see another way through the daunting problem of understanding entirely different ontological and epistemological perspectives about the world. They relied on the universality of the technical operation of law such as correctness and incorrectness as a means of peeking into Cheyenne legal consciousness:

> The obstacle [in the study of Indigenous law] is the acceptance of the realm of Law as being of a different order; for if of a different order, then it sets its own premises and becomes impenetrable on any premises except its own. But the only thing about technical Law which is different in the sense of incomparable is that it has a technical field of discourse, one of legal correctness and incorrectness—discussion of which can of course be based only on premises of doctrinal Law itself.[136]

Llewellyn and Hoebel go on to say that law's technical elements can be accepted as a "batch of tools to get jobs done in a culture," which forms part of a theory that serves to validate the method from one legal order being applied across legal orders.[137] This argument suggests that different legal orders will have, at the core, mechanisms that, although different in appearance or concept, can function to serve the same ends.[138] Some current scholarship, which I discuss next, raises this point as being the central problem with conducting legal analyses through a European-ground legal lens on Indigenous legal orders.

Anishinaabe scholar Aaron Mills argues that different worldviews with unrelated historical, ontological and epistemological origins create entirely different concepts of legalities.

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[135] I do not suggest that Tsilhqot'in law is somehow pure before research, only that accurate understanding and interpretation (likely for insiders as well as outsiders) is potentially variable. The degree of variability depends on many factors which are being discussed in this chapter, such as knowledge of language and worldview.
[136] Llewellyn and Hoebel, *supra* note 28 at 41-42.
[137] *Ibid* at 42.
[138] See Jeremy Webber's argument for a parallel justice system, along which this line of reasoning follows, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in Canada, *Report of the Royal Commission on Aboriginal Peoples: Aboriginal Peoples and the Justice System* (Ottawa: Supply and Services Canada, 1993) 133.

The logic systems underpinning these differences ostensibly determines whether rational coherence across legal orders is possible, making problematic the translation of legal concepts across them. As Mills explains,

> if constitutionalism is the logic and structure of how members of a people belong to one another, then translation is a coherent expectation if and only if legality pluralism obtains between the distinct constitutional orders. If, rather, the circumstance is one of legality difference, than [sic] the respective constitutional orders are not *only* different, but are different *in kind* and the prospect of constitutional translation is incoherent. One may be able to translate distinct *content* across common logics, but translating across distinct logics just makes no sense: a logic is by definition the thing through which sense is made.[139]

The distinction Mills identifies is between western liberal legality, with liberalism as it defining structure, and Indigenous rooted legality arising from the roots of a people's origins through creation stories, which anchor their legal order.[140] These distinctions, according to Mills, are so great, that reasoning across them becomes a futile exercise, as the differing logic systems that inhere in each one prevent cross-comprehension. He argues that to understand Indigenous legal orders, people from liberal consciousness will need to learn Indigenous worldviews, otherwise, assimilation and continued colonial violence remains inevitable. Although I do not disagree with Mills' reasoning, I am more inclined to believe there is room for comprehension across disparate logic analytics and the worldviews from which they abound.[141]

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[139] Mills, *supra* note 8 at 28 [emphasis in original].

[140] *Ibid* at 41. The discourse on liberalism in Canada and western liberalism in general is broad, and goes beyond the scope of this dissertation, Mills engages with this larger discussion, whereas I cite Mills as an example of one distinction made in the difficulty of translation across worldviews. See also, Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 for a discussion on liberalism and law at 72-82.

[141] Indeed, Robert Clifford suggests that *beginning* down the path to understanding Indigenous laws does not necessarily require full comprehension of the worldview, although comprehension is relative: "A comprehensive knowledge of W̲SÁNEĆ cosmology is not necessary in order to begin constructing an understanding of the legal order, but we need an open mind to the effect cosmology may have on conceptions of proper relationships—whether it is with each other, the Earth, ancestors, or otherwise. This understanding is integral because law is, fundamentally, about relationships." Clifford, *supra* note 94 at 768. For a reasoned approach to reconciliation across rather than from within one legal order, see Nichols, *A Reconciliation without Recollection? supra* note 11.

I point to Claude Lévi-Strauss' seminal work on kinship to support my claim. Kinship is the institution through which people create rules about marriage across humanity's disparate societies to avoid incest, a universal social taboo.[142] Lévi-Strauss' work in kinship structure directly relates to legal orders, as kinship is a legal institution. His work shows that although the systems will differ (some are extensively elaborate), as the social organizations and normative orders certainly differ, human beings share common concepts despite those difference.[143] If we cannot find frames of common reference to identify across different worldviews, then there can be no hope of commensurability or even conversation.[144] This is precisely Mills' point, arguing that finding frames of reference requires learning other worldviews.

Common understandings about ourselves and the world around make possible the ability to recognize consistencies across human societies.[145] Finding consistencies offers space to have discussions about mutual commensurability, which in turn may open avenues for learning about Indigenous legalities. Alternatively, WSÁNEĆ legal scholar Robert YELḰÁTTE Clifford suggests a preliminary approach to thinking about Indigenous laws that does not require

[142] Claude Lévi-Strauss, *The Elementary Structures of Kinship* (Boston: Beacon Press, 1969).
[143] Lévi-Srauss is engaging in a theoretical discussion between nature and culture as being determinative of responses to a universal taboo, "The *fact of being a rule*, completely independent of its modalities, is indeed the very essence of the incest prohibition. If nature leaves marriage to chance and the arbitrary, it is impossible for culture not to introduce some sort of order where there is none. The prime role of culture is to ensure the group's existence as a group, and consequently, in this domain as in all others, to replace chance by organization. The prohibition of incest is a certain form, and even highly varied forms, of intervention. But it is intervention over and above anything else; even more exactly, it is *the* intervention," *ibid* at 32 [emphasis in original]. Culture, a social feature of all human societies, takes the arbitrary out of leaving matters to nature, and provides an intervention that may take many shapes and forms throughout different groups, which is shown in the balance of his book.
[144] In *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) Michael Asch argues this point of commensurability in the context of honouring Canada's treaty promises with First Nations, "Indigenous peoples are using principles other than those derived from contemporary Western political thought to determine our status on their lands. Furthermore, they make it clear that these are principles they have honoured for a long time. [examples omitted] To implement our treaties in good faith means that we need to learn how these principles apply to our situation, and that means we need to learn what they are. To do so, we clearly need some guidance," at 117, 118. In other words, non-Indigenous Canadians, non-Tsilhqot'in Canadians can learn to understand the cross-epistemological thinking and reasoning, with some guidance.
[145] The project of comparative research across non-western societies was taken up by British social anthropologists of the early 20th century, beginning largely with Bronislaw Malinowski. See Adam Kuper, *Anthropology and Anthropologists: The Modern British School* (London, UK: Routledge, 1983 at 3.

comprehensive knowledge of its underlying worldview.[146] Clifford's approach invites engagement on the basis of relationship, which implies comprehension of the legal order will be relative to developing an understanding of the worldview. As the relationship is guided by the laws of the people, relationships impart knowledge of the laws and worldview merely through a person's participation.[147]

In short, multiple points of entry into Indigenous legal orders invites the engagement that Mills identifies as relevant for avoiding a dead end for Indigenous peoples who enlighten implicitly liberal Canadians on Indigenous legalities without requiring some comprehension of the rooted worldview. Differences are important, and one legality is not to be assimilated into another without continuing the violence imparted on Indigenous peoples. Respecting differences while recognizing humanity's commonalities will be key to teaching and learning another's worldview, which, as Clifford wisely instructs, will be through relationships.

The problem with recognizing that differing systems of law are not necessarily inconsistent in their overall function of managing peoples' behaviour and creating rules for acceptable conduct is the risk of universalizing knowledge about distinct groups of people. For example, we may accept that most people will punish someone who harms another within their group for no apparent reason (or a socially unacceptable one). This is a universal statement generalizing law. It may be true. What we cannot know is what defines harm, how harmful conduct if perceived, what defines punishment or consequence, what constitutes justification or a

[146] "A comprehensive knowledge of WSÁNEĆ cosmology is not necessary in order to begin constructing an understanding of the legal order, but we need an open mind to the effect cosmology may have on conceptions of proper relationships—whether it is with each other, the Earth, ancestors, or otherwise. This understanding is integral because law is, fundamentally, about relationships," Clifford, supra note 94 at 768.
[147] For another discussion on relationships between political groups as providing an invitation to learn, see Alan Hanna, "Reconciliation through Relationality in Indigenous Legal Orders" (2019) 56:3 Alberta L Rev 817 at 828-831.

defence, and what possibilities exist for providing a resolution.[148] Analysis by a person trained in the Canadian common law or civil law is shaped by that person's knowledge and understanding of those categories. Yet, the analysis may be far from reality if the person does not have some grounding in the tradition of analysis, as Llewellyn and Hoebel identified, a legal order "sets its own premises and becomes impenetrable on any premises except its own".[149] Therefore, the departure point into a legal order may be to accept some of the universal argument, all things being alike, which we know are often not alike. The following example about interpreting Tsilhqot'in law should provide some context.

Legal historian Hamar Foster's expert report to Tsilhqot'in legal counsel in the Tsilhqot'in Aboriginal title litigation provides evidence of how people who passed into Tsilhqot'in territory "had to obtain guides and give presents" to secure "safe passage".[150] Foster asserts that these payments were a toll or rent:

> The Tsilhqot'in obviously knew their territory, and others appear to have known at least one of its boundaries. To be safe, one had to be accompanied by Tsilhqot'in, paying what in effect was a "toll" to enter and "rent" if you wanted to stay and settle down.[151]

Foster's interpretation of giving something in exchange for safe entry into the territory as being a payment of a toll or rent is reasonable on two grounds. First, this interpretation is given for a specific purpose of providing evidence in a Canadian court of law. The evidence had to align with common law conceptions of property and exclusivity for the Court to understand the

[148] According to Gerald Postema, "law-determining custom" is deeply socially oriented, among other things, by "not only acting as *rules for* members of some community and evident in their conduct, but also acting recognizably as *rules of* the community, and not merely accidentally overlapping rules that individuals adopt just for their own part." Gerald Postema, "Custom, Normative Practice, and the Law" (2012) 62:707 Duke LJ at 722.
[149] Llewellyn and Hoebel, *supra* note 28 at 41.
[150] Foster is citing from "Robert Homfray's expedition in 1861, when he gave 'all the beads and trinkets we had left' to 'the same Indians who [later] killed' Waddington's men." Hamar Foster, *Tsilhqot'in Law: A Report Prepared for Woodward and Company* (2005) [unpublished, on file with the author] at 21.
[151] *Ibid* at 23.

activity as evidence of Tsilhqot'in laws about control of the land on a territorial basis.[152] Second, Foster's interpretation may simply be accurate from a Tsilhqot'in perspective. However, an interpretation from the Tsilhqot'in legal perspective offers at least one alternate response to these activities.

Based on knowledge I have gained working with Tsilhqot'in Elders and stories, I suggest that Foster's account may be better understood as a practice of gift exchange to secure a balanced relationship with the newcomers.[153] The gifts non-Tsilhqot'in offer to Tsilhqot'in people (e.g. food, beads) are not necessarily considered commodities used to purchase a grant of access or licence (e.g. rent or toll). The act of gifting and the physical gift itself represents an interest in establishing a relationship. Gifting is a mechanism of forming and maintaining relationships in many Indigenous legal orders.[154] In accepting the gift, Tsilhqot'in were willing to exchange access to their land for a limited time.[155] This exchange of one gift for another is based in the principle of reciprocity in the Tsilhqot'in worldview, examples of which are traced to their origin

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[152] As opposed to "definite tracts of land to be used on a regular basis," *Tsilhqot'in* BCSC at para 609. Vickers J ruled on this argument presented by the federal and provincial Crown, holding "What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a "postage stamp" approach to title, cannot be allowed to pervade and inhibit genuine negotiations. A tract of land is not just a hunting blind or a favourite fishing hole. Individual sites such as hunting blinds and fishing holes are but a part of the land that has provided "cultural security and continuity" to Tsilhqot'in people for better than two centuries," at para (1376).

[153] I gratefully acknowledge Michael Asch's insight on Marcel Mauss' seminal work *The Gift: Forms and Functions of Exchange in Archaic Societies*, translated by Ian Cunnison (New York: WW Norton & Company, 1967). See Asch, *supra* note 144 at 167-169. Aaron Mills also writes on the meaning of gifts in his dissertation flowing from the Creator, through and between people and the earth, which he calls "giftways". Mills, *supra* note 8 at 74 and generally throughout his work. See also James Tully, "Reconciliation Here on Earth" in Michael Asch, John Borrows, and James Tully, eds *Resurgence and Reconciliation: Indigenous – Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 83 at 87-89. John Borrows organizes his book, *Laws Indigenous Ethics* around the gifts of the seven grandmother teachings, zaagi'idiwin (love), debwewin (truth), zoongide'ewin (bravery), dabaadendizowin (humility), nibwaakaawin (wisdom), gwayakwaadiziwin (honesty), and manaaji'idiwin (respect), in his opening narrative "Niizhwaaswi-Miigiwewinan (Seven Gifts): Nookomis's Constitution" (Toronto: University of Toronto Press, 2019) at 5-14.

[154] *Ibid*. See also, Hanna, *supra* note 147 at 837.

[155] Elder Marion William of Xeni Gwet'in explained "Gain access to the territory? Back in the day there was a lot of trading, they made a lot of relationships in the trading areas. […] Trading resources and what not was always huge within our people back then. So a lot of trading could have been taken in place in sharing. Like sharing mutual agreement relationships with each other. Good understanding of sharing the land." Interview of Marion William in Xeni Gwet'in (5 July 2017) at 9, 12.

story, *Lendix'tcux*.[156] Of course Tsilhqot'in would expect these gifts if a person wanted entry into the territory, as there would be no basis for exchanging access to their land without the initial gift and its concomitant invitation to enter a relationship.

A relationship based on one party taking something that is neither offered nor given is set to fail. The consequence of taking from the Tsilhqot'in, such as access to their land, without gaining entry through their legal order was severe.[157] In a western political-legal theorist perspective coloured by a free market economy and the Lochean definition of property,[158] the Indigenous practice of exchanging gifts (act of relationship, exchanging nominal "beads and trinkets" for limited access to land) is interpreted as a *payment* of *rent*.[159] Both are legal practices arising from disparate legal orders, but they are conceived of quite differently.

A risk of misinterpretation exists when a researcher from a common law background attempts to relate concepts rooted within an Indigenous legal order without a competent understanding of the relevant worldview and how it frames its disparate legal interactions.[160] This is true, of course, unless the stated purpose of the research is to articulate Indigenous laws and translate them into analogous common law concepts. I am not suggesting Foster's interpretation was incorrect, or that it was somehow contrived to mislead Canadian courts. On

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[156] Alan Hanna, "Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective" (2015) 45:3 Ottawa L Rev 365 at 378. In general, reciprocity is applied to maintain relationships between people and animals such that animals feed people in exchange for people ensuring the animals' existence. This is an exchange of life for life.

[157] Often death. Foster, *supra* note 150 at 22.

[158] For a critique on Locke's theory of property, namely that Locke was showing how people carved out personal rights from a framework of collectivity claims to the commons, see generally, James Tully, *A Discourse on Property: John Locke and his Adversaries* (New York: Cambridge University Press, 1980).

[159] See Foster, *supra* note 150.

[160] Even with competent understandings of a group's law, there will always be disagreement about interpretation within one's own legal order. Law is social and dynamic, and concuss is not required. According to Napoleon, law "operates against the necessary and ongoing backdrop of disagreement in human society," in "Did I Break It? Recording Indigenous (Customary) Law," presented at a symposium held at the Faculty of Law, University of Cape Town in May 2018 [publication forthcoming] at 20, citing Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall LJ 167 at 169.

the contrary, Foster's interpretation is an accurate translation into the common law categories of property and immigration (by managing access to their territory) using the tools available within that regime (toll, rent, licence). However, the internal understanding of the law may lead to a different interpretation than the translated version, which is a necessary strategic practice, particularly in contemporary times. Translation achieves intelligibility of Indigenous concepts for common law legal scholars and practitioners.[161]

g. Interpretation of Concepts

The example above offers a cautionary tale to researchers, as it has the propensity to narrow a field of inquiry to a specific set of details. The narrowing effect is the intended purpose of the adapted case brief method, as it serves to provide a "small slice" of an Indigenous legal order making it more accessible for people wanting to learn.[162] However, researchers should be aware of the downside to narrowing analysis to a particular question or set of facts in relation to Indigenous stories, as Henderson identifies:

> These stories have multi-levels of understanding depending on ceremonial contexts and do not conform to the imagined Eurocentric classification of them or to the categories of myth, legend, or fiction. Like Aboriginal rights, the stories are *sui generis*. Implicate in nature, they cannot be easily fragmented into discrete units of Eurocentric knowledge without seriously impairing their meaning.[163]

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[161] See Borrows, *CIC*, *supra* note 58 at 139 on the reframing of some Indigenous laws to make them intelligible.
[162] Napoleon, *Ayook*, *supra* note 10 at 95. Napoleon's reason for taking a "small slice" approach to Indigenous legal orders is because tackling the entirety of a legal order is simply too extensive, and therefore impossible, to manage in one project. In other words, legal research in small slices limits scope to manageable research goals and helps reduce the likelihood of accessing knowledge in which a researcher may have no prior training required to allow proper comprehension. I acknowledge that my description here is not an analogous depiction of the "small slice" analogy, which narrows analysis to one area of law rather than considering the entire field of a people's law. A small slice approach carries more than just a case brief analysis. It includes an overarching research question, a framework, community primer (background research) and engagement (interviews), transparency, and community validation. I use the terminology for the purpose of elaborating a potential pitfall in creating an overly narrow approach for studying law that may limit other possible interpretations.
[163] Henderson, *supra* note 101 at 158.

The application of a case brief template which asks a question of an Indigenous story potentially limits information in the story to the relevant facts pertaining to the issue, operating as a lens that filters out other elements of the story. As Henderson describes, this impairs a story's meaning. Friedland and Napoleon address this concern by bringing a research question to multiple stories for analysis.[164] The more stories, the better the analysis. Granted, the case brief method works well in providing an example of a response to a problem embedded within Indigenous stories as a "starting point" for research into a legal order.[165] Extending that analysis across many stories enriches the results by creating a range of responses to an analogous issue. However, it may still obscure other possibilities that lay deeper within an Indigenous group's legal order, simply because the questions are framed in a particular manner with a focus on typically one behaviour or action. The depth of analysis may be limited until more research is conducted into the same legal order through subsequent projects. To demonstrate the potential to skew, I offer the following Tsilhqot'in example of an adapted case brief analysis dealing with a matter relating to harm.

The Tsilhqot'in story of *The Blind Man who was cured by the Loon*, gives an account of a blind man who goes hunting with his wife.[166] The blind man's wife helps him by aiming his arrow when he shoots. One day they shoot a caribou, but his wife tells him he missed. After a brief exchange over whether he actually missed, she runs off and leaves him in the forest. Eventually, the man hears a loon's call and makes his way to the lake where the loon is swimming. He asks the loon if she would help him regain his sight in exchange for a necklace of shells, to which the loon agrees. The loon instructs the man to go into the water and dunk his

[164] Friedland and Napoleon, *supra* note 128 at 22.
[165] Friedland, *supra* note 64 at 63, 65.
[166] Farrand, *supra* note 49 at 35-36.

head. After submerging his head twice, the man's sight returns "as good as ever". The man places his shell necklace around the loon's neck, which she wears to this day. When he steps out of the water, he re-traces his tracks back to where he had shot the caribou, which was left there, and eventually back to his camp. When he arrives at their camp, "he killed his wife, and burnt her and the caribou up together."[167]

At first blush, considering a main research question relating to how people address harms between and among people, a researcher's adapted case brief analysis (as my first run at this did many years ago) may focus on the act of leaving a blind spouse alone in the woods.[168] The issue may go something as follows: *What is the proper response when person in a position of trust abandons and betrays the person who relies on them?*[169] The facts would be limited to addressing this issue, which could include:

- the person in a position of trust was a spouse;
- the woman lied about the kill and left her blind husband alone in the forest;
- the man heard a loon and found his way to the loon;
- the man had his sight restored;
- the man traced his steps back to his camp; and
- the man killed his wife

The decision-maker identified in the analysis is the blind man, as he decided to kill his wife. Arguably, reasoning would suggest this was a response to being abandoned by her. The reasons for this decision are cited as: he took responsibility for his circumstance of being left alone in the

[167] *Ibid* at 36.
[168] Analysis begins with an overarching "specific research question" to begin to narrow the research focus. Friedland and Napoleon, *supra* note 128 at 20.
[169] This was the issue I identified in my first attempt at providing a case brief of this story as a second-year law student just beginning to learn how to apply the adapted case brief method.

forest, found a way to heal his vision, and followed his trail back to camp where he killed his wife and burned her body. The principle that may flow from this analysis is that, in the past, the most extreme but valid consequence for a woman who betrayed and abandoned her (vulnerable?) husband is death at his hands and his discretion. The problem with this analysis is that it is too narrow, obscuring a range of other possibilities.[170] Therefore, the analysis, if erroneously mistaken as a literal translation, is misleading for the unprepared, untrained lawyer, which may be potentially dangerous for their client, for example, if the information is adduced as evidence in litigation. One of the missing pieces of this analysis are the other legal relationships in the story, with the caribou, the loon, the forest, and the lake, which get stripped out in a western resource-focussed lens as inanimate props in the background scenery.[171]

Digging deeper into additional elements left out of the small slice analysis requires a shift in the issue. The overarching research question can remain the same (i.e. how do people respond to interrelation harms?), but a slight shift in the issue changes the analysis.

- Issue: *What is the proper response to being stranded alone in the forest?*
- Facts:
    - blind man is left alone in the forest;
    - man hears loon in the distance;
    - makes his way to the lake where the loon is located;
    - asks for help from loon;

[170] This is an example of the danger of using a single story, which in itself is insufficient to provide an accurate depiction of a legal rule. See Chimamanda Adichie, "The Danger of a Single Story," TED video (filmed July 2009, posted October 2009), online: https://www.ted.com/talks/chimamanda_ngozi_adichie_the_danger_of_a_single_story?language=en.

[171] Claudia Notzke writes, "It needs to be acknowledged that many aboriginal people, particularly the elders, are uncomfortable with the term "resource management", not only because there is no equivalent term in aboriginal languages, but also because it implies a sense of superiority over nature and a sense of apartness from it," recognizing a different perspective about the environment, in *Aboriginal Peoples and Natural Resources in Canada*, *supra* note 25 at 2.

    - agrees to give his necklace in exchange for an attempt to regain his sight;
    - follows the loon's instructions;
    - recover's his sight; and
    - fulfils his obligation to the loon with the necklace.
- Decision: blind man decides to address his circumstance by seeking help from another.
- Reasons:
    - he followed Loon's instructions to heal himself (stated in the story); so he could survive his predicament and take care of himself after being abandoned (unstated, inferred).

This analysis addresses the man's responsibilities to himself, and his obligations to his natural surroundings, which are potentially harmful if he could not safely navigate his way. This begins to become visible when fully applying a reasoned analysis through the ILRU framework requiring a multiple issue analysis. We can begin to see that by framing the issue differently, the man had to use his other senses to seek a path to a resolution for his own circumstance. He did this by listening to the forest and hearing the loon's call. This led him to the lake, where he was able to ask for help. The loon offered the man to enter a reciprocal relationship through an exchange of gifts. The resulting relationship leads to enduring obligations they have to each other, to keep the loon in good health, to help the man (people) when they need it. Otherwise, if people cannot ensure the health of the loon, the loon would no longer be able to help the people in times of need. One Elder explained that where loons are, the water is always clean (the clean water contributing to healing, as logically, dirty water would cause more harm than good).[172] In

[172] "Wherever you see loon you'll see that water is real clean." Interview of William Billyboy at Tl'etinqox, (10 July 2012) at 9. These interviews were part of the Accessing Justice and Reconciliation Project. For more information, see *Accessing Justice and Reconciliation Project: Revitalizing Indigenous Laws*, online: https://www.indigenousbar.ca/indigenouslaw/.

this discussion, the man has an obligation to listen to his surroundings (the natural environment) and maintain healthy relationships with the land (and everything connected to it including non-human beings such as the loon) to be able to make his way and continue to live. This is law related to the land carried down from Tsilhqot'in ancestors.[173]

The second analysis provides a response that gets into establishing and maintaining helpful relationships.[174] This latter interpretation is more aligned with what Elders stated in interviews on the subject of interrelational harms. In discussions about this story, Elders did not acknowledge that killing his wife was a proper response to being abandoned.[175] Elder Marie Dick explained that she understood the story with the gender roles reversed – that the man abandoned his wife in the woods, but she did not kill him in the end.[176] The term "killing" does not necessarily translate into the ending of a biological life.[177] It has many other possible definitions, including ending life as the person knows it, which supports the version that the man and wife separated for a while, suggesting he or she "killed" the marriage. Although gendered violence occurred, the potential for a re-writing of the narratives to present a more paternalist view exists when these stories were recorded by European white males (often theologians) such as Livingston Farrand.[178] Instead of elaborating on the killing, or the gendered aspect of it, the

[173] "That's what our people used to a long time ago, if they want to be good warrior, a good hunter, they can't just sleep all day and be hunter. They are told things, the law is for people how they're gonna provide for their family. This is what our people carried because in them days you can't go to the store. A store is out there. […] That's what our ancestors carried. That was the law of the land. It's the way we did things." Interview of Thomas Billyboy at ?Esdilagh, (31 July 2012) at 10.

[174] Mills refers to these relationships as communities of mutual aid, where "the positive formulation of mutual aid is *gift-gratitude-reciprocity*" and the negative formulation is "need-responsibility-reciprocity." In these formulations, interdependence is established and maintained through a principle of reciprocity, which applies equally to human and non-human relationships, as Mills explains, "the frequently dramatic difference in power between humans and non-human persons is to be accounted for through the logic of their entanglement in relations of *mutual aid*." Mills, supra note 8 at 43, 100, 103.

[175] Interview of Marie Dick and William Billyboy at Tl'etinqox, (10 July 2012) at 7.

[176] Interview of Marie Dick at Tl'etinqox, (10 July 2012) at 7.

[177] For more on this, see Lane, *Cultural Relations, supra* note 45 at 56, discussed elsewhere in this chapter.

[178] One example of gendered violence is in the story *The Two Sisters and the Stars*, in Farrand, *supra* note 49 at 31, where two sisters are pursued by an old man carrying a sack of women's breasts. The women set a trap and are able

Elders focussed on the relationship with the loon, and when pressed, explained that the husband and wife split up, and eventually reunited after suffering through the absence of one another. Their interpretation of the story included separation and reconciliation, thus reinforcing the concept of maintaining relationships described in the second analysis. In hindsight, the most responsible interpretation to take away from the first analysis is that responsibility to care for a vulnerable individual is a big responsibility, as indicated by the severity of the story's outcome (some manner of killing). There is also a strong message about being responsible for oneself.

As applied to this story, a common law approach may miss these principles governing relationality in a Tsilhqot'in worldview (obligations connected to establishing and maintaining relationships) in favour of finding analogy in the common law (punishment for a perceived offence). I am not discrediting the adapted case brief method here, particularly as it leads to a framework for thinking about the social legal context. I am looking at common law-oriented research itself as a means of entry into a way of thinking about the fundamental principles of Tsilhqot'in law. To be more explicit, a researcher trained in the common law must work hard not to understand Tsilhqot'in legal principles in common law boxes considering the knowledge is flowing through a lens that has the potential to filter the world in a particular manner.[179] The same common law method is applied in both analyses, which may lead to different outcomes based on different starting points. Therefore, the responsibility is upon the researcher to ensure they approach stories from a position of competence, or risk misinterpretation. I merely suggest that as a result of this brief comparative exercise, now that I have developed some depth of

to kill the man, ending the pursuit. Although this story says the man came from the stars, analogous to being from somewhere else, the story of the *Girl Who was Turned into a Rock* is about a young woman who has began her menstrual cycle having to leave the village and live by the river with her grandmother. She hides from a man who follows her to assault her, and she is turned into a rock in her crouched position. Rosalie Johnny, in Terry Glavin and the People of Nemiah, *supra* note 35 at 31.

[179] Gordon Christie has raised this argument in terms of how Indigenous legal researchers should approach non-Indigenous theorists and their theories with caution, *supra* note 61 at 213.

knowledge in the Tsilhqot'in worldview, I can depart from a rigid application of the adapted case brief method and begin to implement a more holistic socio-legal analysis of stories that is less likely to obscure larger interconnected realities contained in stories. With that in mind, my analysis will also be limited through the translation of language itself, having to use English to work in a Tsilhqot'in language-based worldview and legal order.

Turning to stories as a source of law is fraught with potential pitfalls, which offers a platform for debate among scholars. These pitfalls are a result of a lack of resources available to a researcher, particularly one who comes from outside of a legal order with limited, or no, knowledge of the local language.[180] As Friedland identifies, the most available resources, those which are publicly available and written in English, are the "least ideal" for Indigenous laws research.[181] However, Friedland wisely suggests these least ideal resources may be the only ones available to researchers who have no cultural or community connection.[182] Use of these resources is bootstrapped by reliance on analyzing multiple stories, bringing results to bear on community members who are immersed in the community's cultural knowledge, and citing researcher transparency in the analysis.[183] Although this is an effective way of making use of problematic resources, I am compelled to grapple with language as a serious impediment to analysis, particularly as it contributes to the layering of problems of which researchers must remain aware.[184]

[180] This is equally so for people from within a legal order who is not fluent in their mother tongue
[181] Friedland, *supra* note 64 at 50.
[182] Friedland, *supra* note 64 at 26-27.
[183] *Ibid* at 60, 80-81. Friedland cites Napoleon's earlier work of using multiple cases in combination with interviews, *ibid* at 48.
[184] Friedland cites lack of accessibility and multiple possible interpretations as reasons justifying avoiding reliance on a local language as a resource for law, *ibid* at 38-39. Transparency may offer some comfort in interpretation using the least ideal resources, including those recorded only in English. See *ibid* at 67.

h. Language Translation[185]

The potential for misinterpretation is great when working within stories recorded in English.[186] In Indigenous based research, a story is translated from a home language to English, which is then written down, fixing it as an eternal moment in time.[187] Often misinterpretation may occur simply because there are no words in English to capture concepts in an Indigenous worldview, as Chief John Snow explained:

> When I speak to whitemen of Iktûmni [a great medicine man] I find I run into one of the great problems of dealing with another social group: language. Different cultures produce different values systems, which in turn produce diverse vocabularies. Sometimes I find it almost impossible to translate certain Stoney words into English and keep the true meaning or give the correct connotation.[188]

An example of Chief Snow's comment can be found in the same story of the Blind Man and the Loon, and the concept of killing in the sentence "he killed his wife…". Quite simply, one English word can apply loosely to connote a range of meanings. Robert Lane's work with the Tsilhqot'in in the 1950s described how using the word *murder* may encompass multiple concepts:

> Murder also may have been more talked about than committed. Often it was done magically, and death from what we would consider natural cause might be counted as murder. In hunting, there were many hazards such as snowslides, falls, and attacks by animals. The tendency was to count any disappearance, where it could not be proved otherwise, as murder.[189]

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[185] Translating language is closely related to translating culture. Lorraine Weir offers an engaged critique of translation in the courts, where she argues how "hermeneutic criteria and practices, including 'oral tradition,' reproduce their own culturally encoded forms of 'meaning' rather than interpretation of Tsilhqot'in narratives rooted in Tsilhqot'in knowledge systems, culture, language and history," which illuminates a key problem with reducing oral tradition to evidence in litigation, *supra* note 127 at 178.

[186] My point in this brief segment is to acknowledge a few key concerns in translation as a means of remaining vigilant to my own self-awareness in the research process in an effort to remain transparent about the knowledge I am presenting.

[187] For an anthropological discourse on translation of culture, see Clifford Geertz, *Local Knowledge: Further Essays In Interpretive Anthropology* (New York: Basic Books, 1985). For a study on translation of Tsilhqot'in language, see Smith, *supra* note 72; and Dinwoodie, *supra* note 72. For an educational approach to linguistic translation and analysis, see Ana Rojo, Step by Step: A Course in Contrastive Linguistics and Translation (Bern, CH: Peter Lang, 2009).

[188] Chief John Snow, *These Mountains are our Sacred Places*, *supra* note 70 at 9.

[189] Lane, *Cultural Relations*, *supra* note 45 at 56.

Murder carries a specific meaning in Canadian law under the *Criminal Code*.[190] The use of the term kill would likely be interchangeable with murder to an informant, as both would convey the general meaning of the loss or disappearance of a person. The killing of a person in a story does not necessarily mean the person physically died, as they may have left the community, or their spirit may have been killed, or they may have lost their ability to be an effective hunter, effectively killing their status.[191] The challenge of explaining concepts that have broad meaning from one language to another, particularly when the informant or their interpreter is not fluent in the other language, creates room for inadequate interpretation or even misinterpretation. Despite this problem, working on understanding and articulating laws in English, from English translations of oral traditions in an Indigenous language is unavoidable.

Although learning Indigenous law in the language in which it originates is preferred,[192] most Indigenous law scholars are not fluent in an Indigenous language.[193] Indigenous languages contain "standards and practices" of the relevant legal orders,[194] which means there is a risk of losing knowledge of a people's laws if the language disappears.[195] A sad reality is that

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[190] *Criminal Code* (R.S.C., 1985, c. C-46), section 229 Culpable homicide is murder (a) where the person who causes the death of a human being (i) means to cause his death, or (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not….

[191] An analysis quickly becomes complicated, as the killing of the blind man's wife was followed with a statement that he "burnt her and the caribou up together." Research would then be followed to discover what possibilities are meant by "burnt". It may be as simple as the literal translation conveyed in the story: he killed her and burnt her body. This literal translation does not seem to accord with Tsilhqot'in legal order, as I was told Tsilhqot'in people do not kill other Tsilhqot'in people (see Interview of Patricia Guichon in Williams Lake (23 July 2012): "they were not supposed to kill their own tribe. This rules that the chief has set for us was there even way before the religion came in, it was already there because we weren't allowed to kill." (translated by Angelina) at 17). Further, the principle of using everything that a person takes would prevent the burning of the caribou, suggesting that the statement "burnt her and the caribou up together" does not align with a literal meaning. There is likely a problem with the translation. This is an example of the depth of analysis that has to be invested in working out one statement in a story.

[192] Napoleon, *Thinking About Indigenous Legal Orders*, *supra* note 26 at 2.

[193] Borrows, *Heroes*, *supra* note 10 at 809.

[194] See for example, Sarah Morales speaking specifically about Hul'qumi'num in her dissertation, *supra* note 84 at 17. I argue that the notion of law inhering in language also applies in the Tsilhqot'in legal order.

[195] Borrows, *Heroes*, *supra* note 10 at 810.

colonialism's pervasiveness has entrenched English as a dominant language widely spoken throughout Canada, making it a logical platform for the education and deliberation of different legal orders by a broad range of people from community members to students and lawyers.[196]

Although English creates an efficient means of studying Indigenous legal orders, efforts to learn a related Indigenous language should accompany learning the laws.[197] In many situations, using translators reinforces the barrier to language and a reliable translation of concepts. English professor Lorraine Weir describes the process of using translators for witness testimonies given at the Tsilhqot'in trial as hurried and problematic, as real-time translations made accuracy questionable when "word choices in English are influenced by the terms used by counsel, particularly when equivalents do not exist in the" Tsilhqot'in language.[198] Sitting down with Elders for research interviews offers more time to explore meaning and allow translators time to wrestle with word choice; however, this does little to alleviate the problem of equivalency of words or concepts, particularly when some concepts only have meaning in one worldview and not the other.[199] The barriers to translating concepts across worldviews is compounded by the problem of translating words across disparate languages.

Accepting the inextricable connection of language and law, a community's or nation's invigoration of their legal order should include strengthening language-learning internally. As with other epistemological and ontological understandings within a worldview, loss of knowledge of various aspects of a legal order will follow language loss. Combined with the other concerns over applying a common law method to identify Indigenous legal principles, working

[196] *Ibid* at 809.
[197] *Ibid*.
[198] Weir, *supra* note 127 at 181.
[199] I remember sitting in different interviews where Elders started speaking in Tsilhqot'in "high" language, which is an old form of the languages. Local translators struggled to interpret meanings into English, citing a lack of English words to convey the various meanings.

in English takes a researcher another step farther from understanding a tradition in its own context. Yet failing to study and engage because of the problems associated with working from another language would likely result in maintaining the status quo – the continued silence and denial of the laws of Indigenous peoples. The use of English as the research standard for studying an Indigenous legal order adds another element to the researcher's responsibility to make time and space for translators while making best efforts to learn the language and being clear when concepts and words do not align, leaving room for misinterpretation.

i. Moving Beyond the Adapted Case Brief Method: The Holistic Approach

In addition to the limitations of the adapted case brief method identified in this chapter, the most significant problem I face is the study of water as a subject of Tsilhqot'in law. The case brief method considers the relationships of the characters in the stories, their problems created in interactions and behaviours toward one another, and how the characters resolved those problems. The adapted case brief method is less effective when the subject matter is water. Water is not an active character (in the way outsiders would understand agency) in the public stories used for analysis, meaning characters are not making decisions that directly address water or access and use of water. The law-case method is designed to identify decisions about conflict, or trouble. Water is not directly identified as the cause of trouble in the Tsilhqot'in stories I studied for this project. Yet, water is explicitly identified in roughly half of these stories.

Recognizing water as inextricably connected to everything in the Tsilhqot'in world and balanced through the maintenance of enduring relationships (discussed in detail in the following chapter), water begins to assume a more active role than the stories reveal. Although we begin to understand water as more interconnected, allowing for some level of analysis through

relationality, the method of analysis has to be holistic to allow for broader analytical interpretation.

Rather than identifying an issue, a decision-maker, and a resolution in a case brief method of analysis, I approach stories as more nuanced and flexible to gain insight into the principles applied in relation to people's needs and relationships pertaining to water. Any categories I identify in this project are not neatly distinct and separable. On the contrary, they overlap, interconnect, and interrelate. Categories are imposed as a means of organizing concepts for comprehension and discussion.[200] For example, the category of *needs* allows me to understand how a particular relationship with water works based on expectations people have of water. Two needs expected of the law I identify include 1) understanding what qualities people implicitly expect from others to ensure a sense of well-being through predictability, and 2) what responsibilities people adopt toward others in relation to the access and use of water. I also consider the effects on people and their relationship with one another and water if those expectations are not met. These are simply a few examples of organizing concepts into frames of thinking to render a holistic method for identifying legal principles in stories. Another method I apply for drawing on knowledge embedded in stories includes the use of analogy, where the story represents some message which may be insightful when applied to a different context.[201]

The application of story as analogy should be exercised with caution, as it has the potential for loose interpretations that may mischaracterize or misinterpret meaning.[202] For

[200] See Friedland and Napoleon on synthesis and analytical frameworks, where they wisely point out that "specific principles, practices, and aspirations within Indigenous legal traditions do not stand alone but are all interconnected aspects of a comprehensive whole," *Gathering the Threads*, *supra* note 128 at 27.
[201] By analogy, I do not mean analogy in the context of comparing similar common law decisions, rather I mean looking to relational patterns in cognitive reasoning to map out a range of possibilities. See for example, Dedre Gentner, Keith Holyoak, and Boicho Kokinov, *The Analogical Mind: Perspectives from Cognitive Science* (Cambridge, MA: MIT press, 2001).
[202] For more on the limits of analogizing in the common law, see John Farrar, "Reasoning by Analogy in the Law" (1997) 9:2 Bod LR 149.

example, literal interpretation applied as analogy could have devastating effects. In one recording of the Dene story about the first person on earth, there is a sentence that states the Creator made "different kinds of beasts and land-animals," and "all kinds of birds after which he gave the woman and her offspring full power to kill, eat, *and never spare*".[203] This last part may easily be interpreted as meaning the woman could kill indiscriminately without limit, the analogy of which could mean descendants of this woman (Dene people, from whom Tsilhqot'in people descend) could take from the land with reckless abandon. This mischaracterization is created by taking a literal interpretation and using it as an analogy for contemporary conduct, which is incorrect, as a closer analysis reveals. The last part of the sentence states, "for that he had commanded them to multiply for her use in abundance".[204] The researcher should realize that the ability to multiply in abundance necessarily precludes killing to the exhaustion of the species, suggesting a limit to the term *never spare*. A deeper engagement with additional Dene stories shows there are limits set to avoid wiping out a species. This knowledge allows the researcher to provide a more informed analysis of the interpretation to inform the analogy, which is *never spare* refers to never going without rather than never sparing an animal. Once this interpretation is realized, then never going without means people are obligated to ensure that animals must be able to multiply in abundance. The analogy to be drawn is that the Dene right to hunt and fish necessarily requires the ability to manage species populations by managing their habitat to ensure 1) they can multiply in abundance, such that 2) Dene people never go without the food the Creator gifted to them. Analogy requires proper interpretation well-grounded in the whole scope of the oral tradition and

[203] Samuel Hearne, *A Journey from Prince of Wales's Fort in Hudson's Bay to the Northern Ocean in the Years 1769, 1770, 1771, and 1772* (London: Strahan and Cadell, 1795) online: https://www.electriccanadian.com/makers/journeyfromprinc00hearuoft.pdf at 341. [Emphasis added]
[204] *Ibid.*

supported by the group's traditional knowledge and practice. This amounts to a holistic approach to research.

A holistic method invites engagement with several referents within a story. This approach aligns with engaging stories in a Tsilhqot'in-informed methodology (storytelling) as a recipient can gain the knowledge they require on their terms as it pertains to the circumstances of their life at the time, which may offer multiple teachings as time and circumstance change. Elder Ervin Charleyboy explained this method of listening to what the stories say to the person receiving them:

> A legend is stories that the old people told at night-time. And these legends usually have a meaning behind it, and if you listen closely and just think about it, then these legends were telling you something, telling you how to live, live by these rules. They [the Elders] leave that [meaning in stories] to you to figure out. At least that's how I viewed it as a young person. I didn't think too much about it until I got older, and then I started thinking, these legends have meaning, you know. If you use common sense and think about it, then that's really – that's how you're supposed to live.[205]

The extent to which holistic analysis may be applied is only limited by the worldview and legal orders of Tsilhqot'in people themselves, and the knowledge, learning, and abilities of the listener-researcher, which becomes clearer throughout this dissertation. The accuracy of legal analysis remains at issue. Holistic analysis of stories combined with in-community conversations allows for a reasonable attempt at articulating what I perceive to be legal principles and processes. I personally conducted all interviews in the 2012 research, which varied by location. In 2017, I participated in all interviews with UVic JD students Darcy Alexis and Joelle Karras, which were all conducted in Xeni Gwet'in. I excluded myself from the 5 July 2017 evening interview of Marion William, Eileen William, and Susie Lulua, who were interviewed by Darcy Alexis and Joelle Karras only, to facilitate an all women gendered approach to the conversation

[205] Ervin Charleyboy, trial transcripts, vol 82 at 14262, lines 11-16, 21-27.

about water. In an effort to verify accuracy in all the research, I turn to historical records and media publications to overlay Tsilhqot'in responses to conflict, tension, or threats, onto the legal analysis for verification.

j. Verification

A group's publicly displayed response to various interactions or events provides embedded information that may reflect legal reasoning and should connect to legal analysis. This approach to research is generally referred to as triangulation of data, which involves the use of three different sources of data to provide depth and accuracy.[206] Research from only two sources may lead to myopic distortions, particularly researcher bias in the context of studying Indigenous laws of a group of people with whom the researcher is not a member. Assessing research results against actual group activities while not under the research spotlight adds another dimension to analysis. To offer a simple example, many Tsilhqot'in stories contain a principle of a community's expectation of safety, or protection,[207] which aligns with Elder interviews.[208] These two sources speak clearly about the principle of protection, but for the sake of verification, the historical account of the 1864 war against European invaders who were entering the territory to build a road from the coast to the goldfields through Tsilhqot'in *nen* shows the principle being applied on the ground. The introduction of smallpox on a genocidal scale and blatant disregard for Tsilhqot'in law triggered the killing of 14 invaders and forcible removal of all white people

[206] Much of data collection methodology comes from the health care field. The following excerpt offers a brief description of data triangulation, "Method triangulation involves the use of multiple methods of data collection about the same phenomenon. This type of triangulation, frequently used in qualitative studies, may include interviews, observation, and field notes." Nancy Carter, Denise Bryant-Lukosius, Alba DiCenso, Jennifer Blythe, Alan Neville, "The Use of Triangulation in Qualitative Research" (2014) 41:5 Oncol Nurs Forum 545 at 545.
[207] For example, *Lendix'tcux*; *Raven and Tūtq*; *Fisher and Marten*, in Farrand, *supra* note 49 at 7, 15, 41 respectively.
[208] Interview of Marie Dick at Tl'etinqox (10 July 2012) at 1; Interview of Thomas Billyboy at ?Esdilagh (31 July 2012) at 12.

from Tsilhqot'in lands.[209] The actions of Tsilhqot'in Chiefs in 1864 is the physical manifestation of the principle of community protection, which confirms a legal analysis that reaches a similar conclusion.[210] Verification of research results by searching published events is a capstone for my methodological approach to law analysis.[211] The methodology I employ in my research, is based on a re-organization of Matthew Fletcher's five sources for finding customary law.

In his paper, "Rethinking Customary Law in Tribal Court Jurisprudence," Fletcher sketches a template setting out five sources for accessing what he refers to as customary law.[212] Fletcher's five sources are: 1) parties to litigation; 2) tribal court judges with inherent knowledge; 3) secondary source literature; 4) community members; 5) written sources from community members.[213] In my research, I simplify this template to include: 1) oral tradition (publicly available or internal); 2) community knowledge (interviews, written sources, ceremonies and other events); 3) extraneous sources (court decisions, news media, historical record, academic resources). These three main categories contains a sufficient scope of information and knowledge to triangulate research data into a legal order.

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[209] See Terry Glavin and the People of the Nemiah Valley, *supra* note 35 at 84-85, 95-97; and generally Foster, *supra* note 150.

[210] "One of the paramount considerations underlying responses and resolutions to harm in the Tsilhqot'in legal tradition is maintaining individual and community safety." Tsilhqot'in Nation, Jessica Asch, and Alan Hanna *Accessing Justice and Reconciliation: Tsilhqot'in Legal Traditions* (2012) [unpublished - on file with the authors] at 26, 37.

[211] I offer another example of the application of data triangulation in Hanna, *supra* note 156 at 390.

[212] I do not agree with Fletcher's reference to Indigenous laws as 'customary', which has the tendency to diminish the robustness of Indigenous law vis-à-vis state law. To me, customary law is an amalgamation of British interpretation of Indigenous laws and the common law for use in colonies where Britain imposed indirect rule. For example, Adria Lawrence argues how traditional laws were selectively permitted or outlawed depending on whether they supported colonial authorities and their ruling power. She shows suggests customary law comprised the favourable local laws according to the colonizers, "Customary law codified some practices and omitted others; colonial rulers likewise tolerated some customs, but outlawed others, as the eventual abolition of slavery suggests. The argument here suggests that indirect rule would tend to permit elements of tradition that were useful for maintaining autocratic control." In other words customary law was created, as opposed to organically based legal orders. Adria Lawrence, "Colonial Approaches to Governance in the Periphery: Direct and Indirect Rule in French Algeria," a paper prepared for *Colonial Encounters and Divergent Development Trajectories in the Mediterranean*, Harvard University December 1, 2016 at 24. See also, Himonga and Diallo, *supra* note 29.

[213] Fletcher, *supra* note 96 at 89-91.

Conclusion: *Raven Imitates His Hosts*

> One day Raven was hungry and went to a neighboring camp to ask for food. The camp belonged to Yēēnaxon; and Yēēnaxon 's wife took a basket and went outside, saying she would fill it with berries. In a few minutes she came back, and the basket was filled with berries. This she had done by magic. She brought them into the house and gave them to Raven, who was much pleased, and said he would take them to his house and return the basket.
>
> Raven came home, and, having left the berries inside, took the basket out and said, " I wish this basket were full of berries!" but there appeared only a handful of poor dried berries in the basket, and these he ate. The next time he tried to fill the basket by wishing, he made a slip of the tongue, and, instead of saying " I wish this basket were full of berries!" said,- " I wish this basket were full of dung! " and it became full of dung to the top. And the woman was very angry and beat Raven, and, after washing out the basket, went back to her house.
>
> Another time, when Raven was hungry, he went to Nū'sīlxā'tsī's house and asked for food; and Nū'sīlxā'tsī, taking a dish and a small stone, tapped his foot with the stone, and salmon-eggs fell out until the dish was filled. Raven ate as much as he wished, and then said to Nū'sīlxā'tsī, "I will take the rest home with me, and you may come and bring back the dish." When they came to his house, Raven tried to do the same thing, and tapped his foot with a stone, but only one egg fell out. Then he grew angry, and hammered his foot until he nearly wore the bone away, but no more eggs came; so Nū'sīlxā'tsī took his dish and went home.[214]

In many ways, I relate to Raven in this story. Several Tsilhqot'in Elders have shared with me the fruits of their knowledge that nourishes their ways of being, insights into many of their oral teachings. I now have an obligation to return the bowl. In an effort to reciprocate, I do not want to return an empty bowl. I want to return a bowl full of berries or salmon eggs that will continue to help nourish their ways in the present day. Doing so will require a certain magic, a re-listening to the stories in a manner that can be of use toward serving Tsilhqot'in people's interests today.

[214] Farrand, *supra* note 49 at 18.

The lenses available through which I understand the stories will contribute to the determination of whether I return berries or dung.

At first glance, Raven appears to be disrespecting his hosts by trying to imitate their magic, and inadvertently filling the bowl with dung. This was my understanding for a long time, that the story represents a lack of respect, for which Raven injured his foot as a consequence. Applying a holistic analysis, the story now conveys a different understanding. Imitation is not necessarily disrespectful. It is how children learn in communities. They watch and learn by imitating what their parents are doing. It is a means of teaching and learning. Often, the first attempts do not return favourable results. That is part of the learning process. Sometimes a learner even gets hurt in the process, as Raven injured his foot.

Some Dene Elders have taught me that deeper learning comes through imitation, watching and trying to repeat what is being learned.[215] My perseverance in learning and reproducing Tsilhqot'in law for contemporary applications will cause internal strife, as I grapple with concepts that do and will remain beyond my complete grasp. As a result, perhaps my engagement with Tsilhqot'in legal knowledge reproduced in this academic format of written dissertation will go back to the people appearing as though I have returned the bowl full of dung, or perhaps, with salmon eggs.

[215] A Dene community member in Wrigley, NWT, once told me that children did not ask a bunch of questions. To learn, they would watch, listen and do what their parents would do. This was a method of transmitting knowledge intergenerationally that resonates with the story of *Raven Imitates his Hosts*.

A Journey Up High

With a flick of his feather-tips, Raven grants me some of his attendant power for transitioning form and I find myself high above the landscape on a new journey. He is taking me north, to his home in the interior, as I seemed to have forgotten he is not a Coast Salish Raven, but an Interior Athabascan Datsan. The view from that height gives me a new perspective. The large municipalities and cities of the southern coast scar the land like the remnants of a pox-infected survivor. Even as we pass over the coastal range and begin across the high grassy meadows and valleys of the interior plateau, highways and feeder roads, logging roads and power lines criss-cross the quiet expanse creating an image of mother earth heavily bound and constrained in the shackles of western progress and development. I wonder where he is taking me. Hopefully to some serene place free from the destruction and ominous sense of despair of our decaying modernity.

We reach the limits of the town of Williams Lake and descend into the landfill site. Raven alights on the bars of a barrier where people toss their garbage for removal and allocation to the ever expanding mound of the rotting remains of human prosperity. He lurches his big, heavy body down into a fresh pile of refuse and pulls out something ripe for eating. It has been a long flight. I have sat here at this site many times before, having pulled up to the transfer station in my old pickup, belching out exhaust from gas likely stripped from the sacred black tar sands of Dene lands in northern Alberta, potentially the deep ancestral lands of Tsilhqot'in people themselves. It's the same fuel that feeds the hounds of progress that strain on their tethers at the edge of one of the last bastions of pristine wilderness that is the Xeni valley, nipping and snarling, waiting to be unleashed to devour

the old growth stands of trees and dig pits in the ground to pull feverishly at the intestines of mother earth while snorting greed and envy from their smokestacks. I watch the congress of Ravens, thinking about how these noble intelligent spiritual guides have been reduced to scavenging off the remains of the affluence that has been built on the resources pulled from Secwepemc and Tsilhqot'in lands that stretch in all four directions from here.

But Raven doesn't seem phased by this corruption and waste, as he playfully tosses a McDonald's wrapper in the air to get at whatever prize lies beneath it. He and his cousins screech and play in the tumbling filth, seemingly oblivious to sadness of the scene. Suddenly, it strikes me, as he tugs angrily at something. It looks like a maggot-infested salmon head with the spine still attached. Raven stops for an instant and peers at me. Is that…? I am sure I could read something in his eye! A tear? No—frustration, despair even. Then it all made sense. This is all waste that needn't be. Raven is trying to clean up the waste prohibited under Tsilhqot'in law. But it's futile. Without help from others, without a sense of community, Raven is on the losing end of an endless battle.

With the rotten salmon carcass in his beak, Raven alights and off we go again. I kept waiting for him to eat what was left of the rotting fish and drop the bones, but he didn't do either. We swooped down the steep bank on the far side of the landfill and up along the treetops climbing out of Williams Lake to the west. Over the hills and across the top of a plateau, we soon dropped down to the Fraser River winding its way through the land. Just above the water, Raven dropped his prize into the water. Ah, I remember Gilbert's teaching—the bones must be returned to the water.

?Eguh jid dechen ts'edilhtan. ?Eguh jid gughiz?an nenduh nench'ed. Newenench'ed ?eguh jid gughiz?an.

This is the way our law is. This is how I know it on this land. This is how I know it on our land.

- *Thomas Billyboy, trial testimony*[216]

Chapter 3: *Dechen Ts'edilhtan*

1. Introduction

This chapter is about law. More specifically, in this chapter, I contemplate disparate legal orders and how they may interact.[217] The main purpose of my work is to rely on the Tsilhqot'in legal order to inform contemporary governance relating to water. My approach begins by briefly considering the Tsilhqot'in legal order in the context of the Canadian legal order to identify some distinctions and similarities, through which I discuss the challenges Indigenous and non-Indigenous people are dealing with when thinking and working across legal orders. Identifying distinctions provides insight and direction on determining which aspects of a legal order speaks to peoples' ability to make decisions about how to approach a different legal order, and whether

[216] Trial transcript, volume 90, 2 June 2005 (day 238) at 15633. Dinah Lulua assisted with the translation on 30 July 2019.

[217] To distinguish between legal orders, orders, and systems, I rely on, with some modification, Val Napoleon's definitions in Napoleon, *Thinking About Indigenous Legal Orders*, *supra* note 26 at 2. Napoleon distinguishes a legal system from a legal order by using "'legal system' to describe state-centred legal systems in which law is managed by legal professionals in legal institutions that are separate from other social and political institutions." Whereas, she uses "the term 'legal order' to describe law that is embedded in social, political, economic, and spiritual institutions." The stated reason for this distinction is to "avoid imposing western legal ideas onto Indigenous societies." Avoiding imposing state-centric concepts onto Indigenous societies is a live issue (as discussed at length in the previous chapter); however, I believe state-centric law's pervasiveness does not allow for its separation from other social and political institutions. As such, Indigenous peoples too have legal systems that are also "managed" by specific people and legal institutions, although they are not easily recognizable to people with western worldview and trained in western law. Having said this, I acknowledge Napoleon's efforts to discourage assimilating legal ideas and structures while writing to a largely western law audience. On the avoidance of assimilation, her discussion on centralized and decentralized legal systems is compelling, at 5. I use "legal system" to identify the legal actors, institutions, and procedures of a society (i.e. the legal operations), which is distinguishable from a "legal order" which I use to identify the "social, political, economic, and spiritual" milieu, or worldview, from within which the legal system exists (i.e. the legal context). Citing Napoleon, "I also use the term 'Indigenous legal orders' when referring to Indigenous legal protocols and laws. Of course, it is preferable to use Indigenous peoples' own language when referring to law and legal concepts," at 2.

any engagement with it would risk harming it.[218] Identifying distinctions also addresses the manner in which people could work across legal orders, and whether there are tools within one's own tradition that provide for working transsystemically. Acknowledging that theories are already available for this discussion, such as legal pluralism, I choose to work from within the Tsilhqot'in legal order to identify tools it offers for engaging with the legal systems of other peoples.[219]

Counter to differences, similarities help reduce the perceived gap between disparate legal orders, particularly when one is Indigenous and the other is Euro-Canadian. Similarities may be identified across a range of legal concepts and institutions. For example, in Canadian law, people immediately think of judges, lawyers, and police. In different Indigenous legal orders these roles are represented through decision makers (e.g. Elder(s), heads of families, or respected leaders), knowledge-keepers (e.g. Elders, medicine people, people with specialized training), and enforcement (e.g. heads of families, people assigned the task of maintaining order).[220] These two systems are different in many ways including official offices, titles, training, and worldviews, but

[218] Val Napoleon discussed a presentation Dale Turner gave regarding a person's knowledge of their own legal order. A person who is comfortably knowledgeable about their own laws and who see the scaffolding of another legal order on the landscape will not fear that other order. Rather, they will be able to make some sense of the reasoning from the position of their own. Whereas, a person who is not comfortably situated in their knowledge of their own legal order will fear and resist the appearance of another's legal order sighted on the horizon (personal communication, 18 September 2019). To me, this reflects the fears many Canadians have when hearing about Indigenous legal orders, as the sight of another legal order affirms their own misconceptions about Canadian law, which threatens the false sense of security anchored in the ignorance of their own system. See also, Napoleon, "Did I Break it?" *supra* note 160.

[219] Scholarship on legal pluralism theory for the co-existence of multiple legal orders is well established. Although pluralism offers rich discussions on how different legal orders may co-exist, I forego engaging in this scholarship as it goes beyond the scope of this paper. For existing discussions, see for example, Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) 19 J Leg Pluralism; Johnny Mack, "Chapter Three: Toward a Liberated Legal Pluralism" in *Thickening Totems*, *supra* note 74; Pooja Parmar, *Indigeneity and Legal Pluralism in India: Claims, Histories, Meanings*, (Ney York: Cambridge University Press, 2015); Nicole Roughan, *Authorities : Conflicts, Cooperation, and Transnational Legal Theory*, (Oxford, UK: Oxford University Press, 2013); Perry Shawana, "Legal Processes, Pluralism in Canadian Jurisprudence, and the Governance of Carrier Medicine Knowledge," in *Indigenous Legal Orders*, Law Commission of Canada, eds, (Vancouver: UBC Press, 2007) 114; Jeremy Webber, "Legal Pluralism and Human Agency" (2006) Osgood Hall LJ, 167.

[220] People assigned the task of keeping order or carrying out other related tasks are referred to as "Watchmen" in the Tsilhqot'in legal order. Interview of William Billyboy at Tl'etinqox (10 July 2012) at 14.

they often serve somewhat analogous functions. Recognizing similarities does not suggest the Tsilhqot'in legal system is the same as, or similar enough to, the Canadian legal system to make integration seamless. However, recognizing some general analogies in function serves to resist the temptation for people trained in Canadian law to brush aside efforts to understand Indigenous legal orders and their functioning systems citing a lack of accessibility or intelligibility.[221] In other words, Indigenous and European-based legal orders are different, but not so different that Indigenous legal orders are, or should be, incommensurable with the common law. This alone provides sufficient impetus for continuing to push available methodologies in ways that facilitate conversations across legal orders.

In this chapter, I provide a rough sketch of state and Indigenous legal orders to show how various aspects of two disparate legal orders lead to the identification of a gap in peoples' ability to fully comprehend the other. Identifying the gap permits me to consider the skills required to move toward competence in another society's legal order by understanding how Tsilhqot'in laws function in relation to, or in isolation of, other disparate legal orders. Relationships embracing multiple legal orders requires respecting differences in conception, practice, and application of laws. Once I have established a sketch of Tsilhqot'in law, I offer a basic theory for how the Tsilhqot'in worldview (particularly principles of interconnectedness, respect, and reciprocity) allows law in stories to be applied to water through organizing principles of relationality.[222] In sum, this chapter renders an image of the Tsilhqot'in legal order in preparation for the next chapter, which will provide specific insight into Tsilhqot'in law as it applies to water by

[221] See Borrows on intelligibility and accessibility in, *CIC*, *supra* note 58 at 138-149.
[222] Respect and relationality are not essentialized concepts here. Respect is discussed throughout this dissertation, and comprises differing viewpoints, from how to act, to acknowledging the spirit. Likewise, relationships involving humans are not always ideal. Human interactions can be violent and destructive. See for example, Emily Snyder, Val Napoleon, and John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593.

engaging directly with the oral tradition. Once this is achieved, I turn to the task of articulating the traditional laws in relation to water from my perspective, followed by a sketch of how those laws inform a model of contemporary governance pertaining to water. To get there, I begin with a few words on the concept of law itself.

a. Law: A Word with a Lot of Baggage

Working across legal orders, I find a discussion on trying to describe what it is we are talking about to be a helpful starting point. This allows participants to start from a common point of reference. Legal (and British social) anthropologist Max Gluckman once gave a compelling reason why law's conceptual content was a valuable basis for discussion:

> To understand what "law" was, is, and is becoming, one has to understand what "law" did and does; and to understand what "law" did and does, one has to understand what "law" was, is, and is becoming. […] One cannot even record what law does without recording what law is.[223]

Gluckman was responding to an earlier argument suggesting the content of law was rather ambiguous and thus its analysis a "fruitless" pursuit vis-à-vis the study of law's purpose.[224] Engaged in a discourse about how to gain an understanding of non-state legal orders, Gluckman agreed with Llewellyn and Hoebel's belief that the study of law is problematic unless the context, or social "background", within which a group's law exists is also understood.[225] In other words, law's functionality and a descriptive depiction are interconnected and embedded within a worldview. Accepting the fusion of these means accepting that what constitutes law, Gluckman's starting point, is likely going to be very different for people from disparate legal orders. When conducting in-community interviews with Elders, following the process of the Indigenous Law

[223] Max Gluckman, "Limitations of the Case-Method in the Study of Tribal Law‖" (1972-1973) 7 Law & Soc'y Rev 611 at 616.
[224] Ibid at 613.
[225] *Ibid* at 615.

Research Unit, I often begin with the question, *what do you think of when you hear the word 'law'?*

When I ask what law means to people, the responses are inevitably varied. Most commonly, Elders (Tsilhqot'in, Secwepemc, and Dene) have answered the question indirectly by saying they don't have law.[226] This response indicates they are making a distinction between different conceptions of what law is. When an Elder hears they word *law*, they have a centralist concept of law (discussed below), associated with police, courts, provincial and federal governments, and often, injustice, oppression, violence, and fear. After distancing themselves from *law*, which they interpret to mean state law, the same Elders will then begin long discussions about the rules, norms, and processes by which people abide when going out on a hunt, fishing, gathering, resolving disputes with others, and so forth. There are distinctions between what different people recognize and identify as law.

Law is an English word. It comes with baggage. Law carries centuries of history of the political, social, and economic upheavals across time of English people in another part of the world. The word *law* is not Indigenous, creating challenges to finding common ground for concepts from disparate groups who have entirely different languages, histories, lands, and worldviews. In Tsilhqot'in, *dechen ts'edilhtan* (laws of the ancestors) roughly translates in English to *here is the stick*. This is law according to a Tsilhqot'in worldview (discussed more fully in the next section). Looking at those differences is helpful for identifying conceptual gaps between epistemological and ontological knowledge bases. The scope of literature on trying to define the common law is immense, and largely unnecessary here beyond providing a rather

[226] Napoleon works through Indigenous people's reluctance to identify their laws as law right from the beginning of her paper, when she mention's one of her Cree student's comments that "Just because something has 'always been done that way' does not make it law," *supra* note 26 at 1.

elementary description. I invoke a centralist conception of the common law conveyed by Elders. The centralist definition is based on responses I get from lawyers when discussing Indigenous law, who suggest that while ideal and promising, lawyers are stuck in the real world where judges and politicians are firmly entrenched in the security of state law:

> Law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. […] In the legal centralist conception, law is an exclusive, systematic and unified hierarchical ordering of normative propositions […] It is the factual power of the state which is the keystone of an otherwise normative system, which affords the empirical condition for the actual existence of 'law'.[227]

A centralist definition such as this does not accurately capture all the nuances of state law, which transcends political and judicial authority, permeating the exigencies of people's daily social lives.[228] Rather, the centralist definition emphasizes Canada's centralized composition with professional practitioners and state run institutions. The rigid, oppressive hierarchy of centralized state law is the law many First Nations experience when discussing matters of Aboriginal rights and title, governance, and jurisdiction affecting their daily lives in a decentralized society, a place where law resides in the people.[229]

Before attending to the challenge of presenting an alternate perspective of law, one which is based on the regulation of human behaviour through deeply internalized knowledge and processes, I need to explain a few underlying concepts from within the Tsilhqot'in worldview. Without some comprehension of how Tsilhqot'in people may see themselves in the world and their connection to it, the ability to grasp their interpretation of what we call *law* will be near impossible. To get to that explanation, I begin by setting out the distinction between a holistic view of the collective self in the world and a liberal-rights view of the individual in the world.

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[227] John Griffiths, "What is Legal Pluralism: (1986) 24:1 Journal of Legal Pluralism and Unofficial Law at 3.
[228] See Webber on informal normativity, *supra* note 219 at 177, 178.
[229] Napoleon, *Thinking About Indigenous Legal Orders*, *supra* note 26 at 3.

b. Holism in Context

The concept of holism tries to acknowledge interconnectedness within a worldview where land constitutes people and their collective identities. The names for many First Nations provide a hint about their connection to land (when I say connection to land, it is not a superficial relationship, but an integral one of composition). For example, the word *dene* means a person or people. The construction *t'in* is a suffix that represents dene, the person or people in relation to something else. Tsilhqot'in is the people (*t'in*) of the Tsilhqo (name of the river). Courts identify this relationship, but only at a superficial level devoid of its full meaning, as Vickers held at para 436:

> In the early nineteenth century, Tsilhqot'in people lived in a semi-nomadic hunter, gatherer society in a harsh environment. They were a rule ordered society, tied by language, kinship and customs. *Reverence for the land that supported and nourished them continues to the present generation*. Tsilhqot'in people no longer live as their forefathers at the time of sovereignty assertion. However, *the land continues as a central theme in their lives, providing continuity and stability from generation to generation*.[230]

The words *reverence*, *continuity*, and *stability* scratch at the surface of the full meaning of how land is understood as being integrated into the physical being. It is more than a *central theme*. It is *who they are*. I am not sure whether the judge could fully grasp the concept given the western predilection for the separation of land and people; land as something humans dominate and consume, or whether a judge would not want to venture too far down a path that recognizes land as a physical and inseparable part of a nation's entire existence. Either way, the western understanding falls short of a concept of land-human composition where one cannot exist without the other. In the Tsilhqot'in worldview, this interconnection composing people of the

[230] *Tsilhqot'in* BCSC (emphasis added).

land on which they intimately live, love, and manage through multiple and varied relationships is a primary reason for having no concept of relinquishing land to others in either their worldview or legal order.

In my years of living and researching with Tsilhqot'in people, I have never heard anyone say or suggest they possessed any authority to give away the land. Neither are there any references to a concept of divorcing oneself from the *nen* in a manner that would forevermore prevent their ability to remain in relationship with the *nen*.[231] I understand the reason for this logical impossibility to be that Tsilhqot'in people are not separate from the land. People are physically, emotionally, spiritually, and mentally comprised of the land, which I explain with examples throughout the remainder of this dissertation. The first example of the people/land fusion is the way Tsilhqot'in people describe themselves in context as *nenqayni*.

Nenqayni translates to *people of the land*, which is used to distinguish humans from other relatives that are also *of the land*.[232] The first part of the word is *nen* (which should be obvious by this point in the dissertation) means 'land' or 'ground'. *Qay* means 'a surface'. Combined, *nenqay* means the earth (surface of the ground); and *ni* is a suffix of the word *deni*, meaning the people. People of the land, or people of the earth. The inextricability of people from the land, and from the language, is explained in Elder William Billyboy's statement:

> the language, the land, environment, earth, it all works together as one. We are the children of Mother Earth as Tsilhqot'in People. If you separate those, then part of you is going to be […] missing here. And that's what we do not want.[233]

[231] It is this reckoning that emphasizes the absurdity and violence inherent in BC's *Land Title Act* the authorizes non-Tsilhqot'in bureaucrats to award fee simple interests in the *nen* to non-Tsilhqot'in people, effectively and finally divorcing Tsilhqot'in people from their land.
[232] This translation and the subsequent linguistic breakdown is from Linda Smith, *supra* note 72 at 9-10.
[233] CEAA Hearing Transcript Volume 19, 2010 Tl'etinqox-t'in, Anaham Reserve Community Session, p. 3247 to 3446. Cited in Linda Smith, "A Responsibility to the Seventh Generation" (2017) [unpublished] at 4.

The teachings are reflected in the statement above. The laws reflect and operate upon the interconnectedness the Elder describes. The laws function within this conception of all things comprising a complex whole, which is what I refer to as the holistic doctrine.[234] Not to conflate different worldviews, Anishinaabe scholar Leanne Betasamosake Simpson offers a variation of this idea of holistic doctrine, as people gaining meaning "through a compassionate web of interdependent relationships that are different and valuable because of that difference".[235] Axiomatically then, devoid of difference, everything (language, land, environment) just becomes the same, which they are not. However, through that difference of things, understanding of a one-ness, a completed-ness, of which people form only a part, is established. This begins to frame the Tsilhqot'in worldview, as one in a complex order of everything around, distinct from it all, yet simultaneously composed of everything, and "if you separate those, then part of you is […] missing."[236] Robert Lane grappled with holism, explaining it as *unity* around a common territory, which "is, of course, interrelated with the other criteria [a common language and culture]; and attempts to unravel them would be difficult if not futile".[237] Lane could understand the interconnections that constituted Tsilhqot'in people and identity, but he struggled with a way to explain it beyond a feeling of unity.[238]

The holistic doctrine emerges in Gilbert Solomon's statement, "the plants, the whole earth, and the people, the animals, the bugs, the fish, all those are all relations. They all come

[234] Mills refers to this as an ECO-system, or "epistemological-cosmological-ontological systems," or alternatively a lifeworld. I choose the term holistic doctrine as I believe it more effectively embraces the interconnected aspect of the world with humans featuring one piece of the interdependent composition than a way of understanding that same concept. In other words, I see this as more than a way of knowing, understanding, and being oneself in the world, as an ECO-system. I see it as only knowing, understanding, and being in the world through the composition of everything else, without which any knowledge of the world becomes meaningless, *supra* note 8 at 24.
[235] Leanne Betasamosake Simpson, "Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation" (2014) 3:3 Decolonization: Indigeneity, Education & Society at 11.
[236] William Billyboy, in Smith, *supra* note 233.
[237] Lane, *Cultural Relations*, *supra* note 45 at 165.
[238] *Ibid* at 166.

from water. […] we are all water."[239] The intimate and necessary connections that maintain interconnectivity, making people a physical part of the world in which they live, create a better understanding of the violence imposed through abstract separation of the world into parts. "Well, every time they [outsiders] are exploiting the land, taking trees away or mining, poisoning everything, it's also doing a number on us."[240] This statement makes sense under the holistic doctrine of the Tsilhqot'in worldview. Harm or damage to the land, to the animals, to the water, is harm or damage inflicted directly on the people. Holism provides the common flesh that makes people part of the land and all the land holds. Holism is a counter-positional theory-of-being to the idea of liberalism and liberal-rights.

I have not found a single reference to the language of rights in Tsilhqot'in discourse. There is some argument that, as with reason and logic, rights emerge from the legal order, which frames a definition of the people's conception of rights.[241] Do Tsilhqot'in people have a right to the free, unimpeded access to their water? The invocation of the word *right* in the question automatically summons the state, as to whether under state law Tsilhqot'in possess a right to water? This is not my question. I am asking whether the Tsilhqot'in legal order says anything about rights.

The moment rights are invoked in the context of the Tsilhqot'in legal order, land and water, liberal rights under the Canadian constitution become the framework for its meaning.[242] For example, Isabel Altamirano-Jiménez argues:

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[239] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 2.
[240] *Ibid*.
[241] Jeremy Webber, "The Public-Law Dimension of Indigenous Property Rights" in, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights*, Nigel Bankes and Timo Koivurova, eds (Oxford: Hart, 2013) at 79.
[242] There is an entire body of scholarship on rights including political and legal rights, individual (including Canada's *Charter of Rights and Freedoms*, s 8, Part 1 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11) and group rights (Aboriginal rights under s. 35 of Canada's *Constitution Act, 1985*),

> Through interconnections between the global discourse of rights, environmentalism, and the market, neoliberalism opens up a space for the recognition of Indigenous rights as well as for the institutionalization of management practices that have uneven implications for Indigenous places and for Indigenous peoples' senses of place.[243]

In this manner, Indigenous rights may offer some benefit to people, but the source and delineation of those rights are created within a hermetic framework of the state, creating a space for some rights to exist in exchange for surrendering a right to Indigenous spaces. I find the use of the rights language exceedingly difficult in this context, as it is profoundly over-determined in western thought.[244] How can people have a right to something in their world that is conceptually and functionally an integral part of their physical being? It would be like me saying I have a right to the arm that hangs from my shoulder, or a right to the blood that flows through my veins. Altamirano-Jiménez argues that neoliberalist ideology, which forms the basis for rights discourse in Canada, has a tendency to re-write Indigenous conceptions of identity and property:

> The case of private property highlights the contradictory character of indigeneity articulation as it intersects with neoliberalism. As a form of governance, neoliberalism disarticulates established meanings and establishes new ones. Scholars have explored how in settler societies Indigenous peoples are driven to fit certain preconceived criteria in order to achieve recognition.[245]

The language of rights with its neoliberal underpinnings simply does not capture the constitutional interconnected holism that comprises Tsilhqot'in people as land brought into the person through water. The *nen* is the people; the people are the *nen*. They exist in the world as one. There is no *right*, here. Rather, there simply is *being*.

Another example showing the absence of a rights concept can be found in Lane's anthropological work. Lane wrote that Tsilhqot'in people had an *expectation* of protection,

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with which I choose not to engage for the purpose of brevity. For a critique of rights discourse, see Mark Tushnet, "An Essay on Rights," (1984) 62:8 Tex L Rev 1363; and Borrows, *supra* note 30.

[243] Isabel Altamirano-Jiménez, *Indigenous Encounters with Neoliberalism: Place, Women, and the Environment in Canada and Mexico* (Vancouver: UBC Press, 2013) at 5.

[244] James Tully, personal communication, 17 July 2019.

[245] Altamirano-Jiménez, *supra* note 243 at 121.

which was only reliable if there was no intervening personal conflict or tension which would prevent it: Tsilhqot'in people "had a sense of common identity and expectations of aid and cooperation from fellow Chilcotin unless personal friction precluded it".[246] Lane identifies a more accurate description of Tsilhqot'in life than *rights* offers by stating the concept as an *expectation*. Subjecting an expectation to corollary circumstance does not support an argument that there was a right to protection. The people could expect protection *unless personal friction precluded it.* A right would impose an obligation to help, but there is no explicit obligation to help *per se*. Therefore I do not impose the language of rights on the Tsilhqot'in legal order, as there is no evidence to support it. The two logics do not intermingle well. Nor do the concepts of individualism and community as again defined by the concept of holism.

Holism means the individual person does not exist as an individual.[247] A person can only exist in the Tsilhqot'in social imagination. Being an individual in the Tsilhqot'in world meant they were dead.[248] Vickers cited Lane when considering the social organization of the nation: "Individuals had a high degree of autonomy. In theory, beyond the confines of the family, no one could force anyone else to do anything".[249] This statement conflates autonomy with individuality, as "no one could force anyone else to do anything," meaning there was no legally

[246] Lane, *supra* note 6 at 406.
[247] Nedelsky positions the individual as the right's-bearer under the auspices of the legal system. See generally, Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012).
[248] An Elder explained to me that if a Tsilhqot'in person was banished from the community for not contributing to community efforts, they would die on their own. I asked the Elder, what would happen if a person only looked after themselves and did not help out in the community? The Elder replied, "You would be expelled. You would be expelled, you'd would probably die cause you're, he's did it to himself. Well they'll keep an eye on him to see if he smarten up. The way my dad talk about it, that he, ninety percent of the time they would die because they never did what they're supposed to. But some of people would go and keep an eye on 'em, sneak up and just keep an eye on 'em." One way to consider this is the physical strain being alone in the *nen* places on a person, eventually leading to their death. I do not believe this is an accurate interpretation of the statement, as a Tsilhqot'in person could physically survive on his knowledge and skills their training provided. I believe the elder meant that to be cast out of society and alone meant the person died as a Tsilhqot'in, as not living in relation to other Tsilhqot'in was not existing at all. Interview of Thomas Billyboy at ?Esdilagh (31 July 2012) at 11.
[249] *Tsilhqot'in* BCSC at 357, citing Lane, *supra* note 6 at 408.

enforceable obligation to act in response to a notion of an expectation to receive some benefit. I am not sure why being able to force someone to do something represents autonomy rather than something else, like respect or deference. People did what they needed to fulfil their responsibilities as part of the collective. They had "expectations of aid and cooperation from fellow Chilcotins unless personal friction precluded it. […] Chilcotins could call upon other Chilcotins for help in time of trouble".[250] An individual with a high degree of autonomy likely would not risk harm to themselves in defence of others, unless the defence of the collective whole including and comprising the individual required it. A person certainly did not have any rights (in the liberal sense) as an individual:

> Sharing was ideal. If someone had something to spare it would be given on request and a return would be made later. […] Although there was little individual control over resources or possibility for amassing wealth such as foods, hides, and furs, some men through their knowledge, skills, and energy accumulated more than others. Most of the accumulation was channeled into gifts and feasts. A wealthy man was one who produced for distribution.[251]

The lack of accumulation of wealth reflects a value system based on the ability to provide for others, the community, which belies a concepts of liberal individualism, where wealth is horded for accumulation to improve the life of the individual. People were socially-minded to the extent their values, beliefs, and laws compelled them as part of the collective, which was not necessarily enforceable by the collective. This is a different way of being, of understanding the self in the world, which may be difficult to imagine from within a fully immersed liberal worldview.

Devoid of a grounding in the Tsilhqot'in worldview, the stories appear to support Lane's depiction of individualism, as the characters in most stories appear to act individually.

[250] Lane, *supra* note 6 at 406-407.
[251] Lane, *supra* note 6 at 404.

However, when the listener takes a step back and considers the context of the stories, these individuals are acting in the interests of others, from the family to the larger community. To consider just a few examples, in *Raven obtains Daylight*, Raven appears to act independently. He makes his decision independently, but provides daylight to the world in exchange for a few berries.[252] The young man in *The Young Man and Dt'an (Famine)* appears to act independently in his interactions with Dt'an, but ultimately provides for his family initially, and his whole village subsequently when he catches a greater abundance of fish.[253]

To offer a comment on why the young man in the story puts his family first when he catches his first batch of fish, I suggest that self-preservation appears to override generalized sharing, the logic being that a person who has proved to be successful must be able to survive in order to share in the longer term with the community. Likewise, preservation of the family first ensures long-term preservation of the community. I offer this thought to show the existence of reasoning in the rules involving the individual in relation to the community.

In all of these stories which appear to show individuals working on their own, the ultimate beneficiary is either their family or the community (in some stories these two groups are conflated). The lessons in the stories, then, are there to relate to individuals, instructing individuals of their roles and responsibilities as members of their larger groups. That is, the individual is the learner, but the group is the beneficiary of the individual's efforts and teachings.

[252] Farrand, *supra* note 49 at 14.
[253] Farrand, *supra* note 49 at 32.

c. Competence in Indigenous Laws

Competence is established when a lawyer has a sufficient working knowledge of the law to make them proficient in practice to serve the best interests of their client.[254] Competence in an Indigenous legal order will be difficult to achieve, but is not impossible. Competence is a responsibility rooted in a lawyer's Code of Professional Conduct. When I think of competence, I try to understand the obligation from an Indigenous perspective. In doing so, I am reminded of Johnny Mack's discussion of regeneration of cultural "principles and values" within himself.[255] Mack argues there is a two-step process to achieve regeneration "that first involves coming to know our teachings and second, acting and thinking in accordance with them," as a path to regenerating a person's skill, or competence, within one's own legal order.[256] Herein lies the dichotomy of polycentric or transsystemic knowledge. To hold meaningful and relatively accurate conversations in western and Indigenous legal orders, a person must be able to walk in both worlds. I argue that to walk in a world, or worldview, requires at least two elements: first, some knowledge of the language, and second, an understanding of the conceptual worldview that shapes epistemological and cosmological expression of a group's identity.[257] A person can have more of one than the other and still be knowledgeable, but full immersion requires both.[258] This

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[254] The Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, (2019) online: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-3-%E2%80%93-relationship-to-clients/#3.1-2. Section 3.1 Competence: "'competent lawyer' means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement […]. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

[255] Mack, *supra* note 74 at 16.

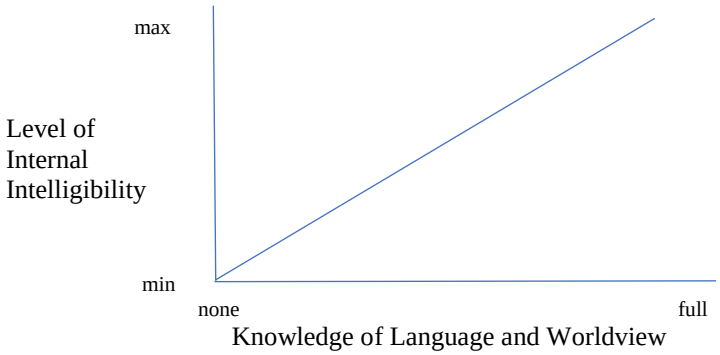
[256] *Ibid* at 17.

[257] Mills, *supra* note 8 at 24.

[258] I am not suggesting competence and immersion are functions of one another. A person may gain competence without full emersion, according to the practice that is expected.

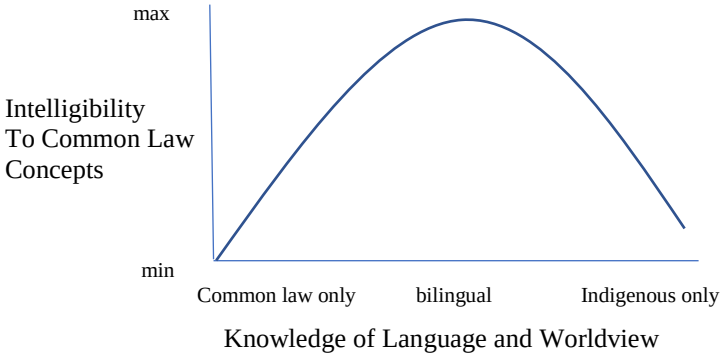
reasoning combines with Mack's two steps to recognize that knowledge itself is not enough, the knowledge must also be practiced. The principles and values, lived.[259]

Developing competence in two or more legal orders prepares the individual for learning how to communicate, translate, and interpret ideas transsystemically across legal orders. The more immersed a person, the better equipped they will be. To demonstrate visually, I provide the following two graphs. The first identifies the level of internal intelligibility of legal concepts based on fluency in language and an understanding of the worldview. The second shows the ability to translate concepts into a Euro-Canadian worldview increases as bilingualism and immersion in dual worldviews increases. These are merely sketches to give a visual perspective on competence in working across legal orders including across one Indigenous legal order to another.



Graph 1: Level of internal intelligibility as a function of knowledge.

[259] I am always striving to live by and express the principles of Tsilhqot'in law as I understand them despite not being Tsilhqot'in myself. This gives me a better, more tangible, understanding of abstract concepts.



Graph 2: Ability to translate Indigenous legal concepts into analogous common law concepts.

The purpose of this simple exercise is to show that relationships between language and worldview are required to gain competence in a legal order. Additionally, the graphs show the relationship between disparate legal orders requiring dual knowledges to be able to work and think across them. The gap on the second graph reflects the potential for people with only an understanding within an Indigenous legal order to be able to communicate aspects of their laws into a common law concept.[260] This is more difficult for minds trained in the common law with no understanding of an Indigenous legal order, as they would have no frame of reference for translation. The second graph shows the range, or what Matthew Fletcher refers to as a "spectrum," of knowledge between two extremes.[261] Individuals at the apex of the curve (those best situated to translate concepts into common law from an Indigenous legal order) are those who are bilingual in the local Indigenous language of the legal order and in English and/or

[260] This assumes western law is open and receptive to concepts that appear different, as was demonstrated in *Connolly v Woolrich* (1867) 1 CNLC 70 (Que. SC), where a Quebec Superior Court judge recognized as valid, the marriage of a non-Indigenous man to an Indigenous woman under Cree law.
[261] Matthew Fletcher argues that language is the key to accessing tribal knowledge, *supra* note 66 at 59-60. I suggest his argument goes beyond language alone to include worldview, as he argues that tribal customary law is easier to access in insular communities, "with few outsiders and where the trial language is spoken."

French, and has a deep working knowledge of both worldviews.[262] Without fluency, but a grounded understanding of the worldview, I place myself on the upward slope of the curve, but not at the apex. Competency begins in this range, as a deep understanding of the worldview is fundamental for grasping legal concepts;

As there is a range of knowledge about an Indigenous legal order from none to full immersion, there is also a range of uses to which the knowledge may be put. On one end of the spectrum, knowledge of a group's law may be maintained internally for community, social, political, and cultural purposes to maintain a group's identity and its relationships with one another and their surroundings (e.g. facilitating language courses, storytelling, and culture camps). On the other end, the group's laws may be employed strategically for the purpose of engaging with other legal orders, particularly, in today's context, with Canadian law. This end of the spectrum requires translation to ensure laws are accessible and intelligible to common law practitioners to serve a variety of purposes beneficial to the Indigenous group, such as negotiating and drafting agreements and contracts, asserting rights and title under the common law, drafting laws for Indigenous and non-Indigenous peoples within the group's territory, establishing governments with recognizable Canadian institutions.

The spectrum of Indigenous law utility from internal to external require different approaches to applying the legal order and different people for different tasks. For example, Elders and other knowledge keepers are best situated to continue the transmission of an Indigenous legal order and its institutions; whereas, cross-trained legal practitioners competent in the two legal orders (typically the local Indigenous and Canadian) are better situated for

[262] Fletcher, *ibid*, argues that these individuals are judges with "inherent knowledge," who are "fluent in the language […] with all its nuances and complexities," as "a mere translation of the stories into English may leave out fundamental fine distinctions, subtle nuances, and even correct meaning," at 90.

translating and applying Indigenous laws for strategic contemporary purposes, as shown in the second graph.[263] The dual training (which is now an official transsystemic JID/JD degree program at the University of Victoria Faculty of Law school) reveals a dual burden placed on Indigenous people.

Having to develop competency in dual disparate legal orders places a double burden on people working with Indigenous legal orders to be grounded in both Canadian and Indigenous legal orders.[264] The dual burden could be alleviated, or at least shared, when Canadian legal practitioners and scholars accept reciprocity as a general guiding principle and endeavor to learn the legal workings of at least one Indigenous group.[265] This dissertation offers some insight for Canadian law practitioners to consider the depth of knowledge and investment of time and effort required to work toward competence in one Indigenous legal order. As I have discussed, the closer to full immersion a person can achieve, the better suited they will be to working across an Indigenous and Canadian legal orders. Now that I have presented the relationship and duality of knowledge required to gain some competence in working across Indigenous and western legal orders, I begin my analysis with a theoretical framework illuminating the relationship between Tsilhqot'in law and water.

[263] See Christie on the development and application of Indigenous legal theories under the direction of communities based on their goals, *supra* note 61 at 210.
[264] I acknowledge there is also a dual burden on students studying the French civil code and the common law in Canada. I make a distinction based on the European origins of both of those legal orders and their struggle to reckon with the legal orders indigenous to the lands upon which Canada is established.
[265] See Calls to Action 27 and 28 recommending lawyers receive appropriate competency training in, *inter alia*, Indigenous laws in Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada, Volume 1: Summary* (Toronto: Lorimer, 2015) at 168. See also, Hanna, *supra* note 147 at 3.

2. Dechen Ts'edilhtan

Dechen ts'edilhtan are the laws of the *?esggidam* (ancestors)[266] which are passed down through the generations through storytelling.[267] The phrase loosely translates to "We have laid the stick; don't cross it. It's the law."[268] There are a number of ways to interpret meaning based on teachings from the Elders, which include the literal, that people should not step over other people's things,[269] the specific, with rules about marriage,[270] and the more conceptual, meaning "there was law and order."[271] The Elders do not mention any specific code or set of rules under *dechen ts'edilhtan*, as clear, specific positive rules would come from people rather than in stories. As with the practice of storytelling to pass down *dechen ts'edilhtan*, the meanings are left to the individual using common sense embedded in Tsilhqot'in identity (i.e. knowing what it means to be Tsilhqot'in), as Elder Ervin Charleyboy explained in direct examination:

> They leave that [meaning in the stories] to you to figure out. At least that's how I viewed it as a young person. I didn't think too much about it until I got older, and then I started thinking, these legends have meaning, you know. If you use common sense and think about it, then that's really -- that's how you're supposed to live.[272]

Based on the teachings of Elders, as is reflected in the trial testimony excerpted above, *dechen ts'edilhtan* is a live, fluid concept reflecting principles of constitutionalism. There is no set or singular meaning in the explanations Elders share. Rather, it allows for change and growth to remain relevant in Tsilhqot'in society. I interpret *we have laid the stick* to mean here is the law of

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[266] Christine Cooper, *Tsilhqot'in Nation v British Columbia 2007 BCSC 1700*, (Transcript, Vol 83), 2 May 2005 at 14544.
[267] Ervin Charleyboy, *Tsilhqot'in Nation v British Columbia 2007 BCSC 1700*, (Transcript, Vol 82), 19 April 2005 at 14260.
[268] *Ibid*.
[269] *Ibid* at 15638, "Mom stressed that keep your gun out of sight, because you don't want people stepping over guns. But in my belief, my dad says, if you want to be pure as what you are, woman's clothes on the floor, don't step over it. That's the law. Up to this day I stress that. Don't step over people's clothes, if it's on the floor."
[270] *Ibid* at 14261.
[271] *Ibid* at 14260.
[272] *Ibid* at 14262. I am grateful to Val for pointing out that common sense is not universal, it is grounded in social consciousness and understanding.

the ancestors that governs Tsilhqot'in people and Tsilhqot'in land, which includes non-Tsilhqot'ins who enter Tsilhqot'in land.[273] *Don't cross it*, means Tsilhqot'in people expect everyone to abide by that law. In other words, *dechen ts'edilhtan* provides that Tsilhqot'in people have their legal order, and everyone is expected to be law abiding.

Upon closer analysis, *dechen ts'edilhtan*, in the context of which it exists, conveys a statement from the ancestors to subsequent generations about law. The message is a declaratory statement asserting Tsilhqot'in authority to interpret the laws of ?esggidam and to make laws for the benefit of Tsilhqot'in people. *We* [the *?esggidam*] *have laid the stick* [set down the laws for *newenench'ed* – the nation]. This is the origin of Tsilhqot'in legal authority out of which arises jurisdiction over Tsilhqot'in *nen*. The authority is embedded in and passed down through the oral tradition. What are those laws setting out this authority? How is the authority defined? Are there limits to the authority? These are the questions I tackle from here on in this dissertation with a focus on how the answers apply to water. What is clear in the concept of *dechen ts'edilhtan* is that Tsilhqot'in have legal authority over their lands that finds its source in the earliest relationships on the land, and a constitution defined by the Tsilhqot'in legal order. This directs research to the oral tradition for inquiry into a better understanding of Tsilhqot'in legal and political society, which is the subject of the next chapter. The remainder of this chapter will focus on how foundational principles in the worldview, including interconnectedness, respect, and reciprocity inform a theory of law that provides a pathway for law to apply to water.

[273] *Ibid* at 14261: "[Dechen ts'edilhtan applies] to all Tsilhqot'in and whoever goes into Tsilhqot'in land."

3. Theory of Tsilhqot'in Law

a. Tsilhqot'in Legal Authority (Jurisdiction)

Colonial intervention of Indigenous peoples and their relationship with lands and waters introduced a legacy of refusing to recognize Indigenous systems of governance, laws, and jurisdiction.[274] This discussion tracks the discussion on the word *law* that I set out above. Words like *jurisdiction* and *law* are labels that do not come from the legal orders with which I have worked. Yet, these English labels serve a strategic purpose. When effectively applied to translate and describe Indigenous concepts in common law terms, Tsilhqot'in people are placed in the same playing field as colonial authority. I refuse to submit Indigenous knowledge to the Crown's "continued domination", but prefer to take up space and invoke dialogue and recognition on equal footing.[275] The language of *law* rather than of *culture* with its beliefs, norms and values is much more difficult for legal practitioners, judges, and politicians to dismiss as soft concepts of the *other*.[276]

When cultures and values are placed in their proper frame, as worldview, law, politics, and economies, they insist upon deference. Laws are taken seriously. Culture is a nice word conveying a nice image of people markedly different than western European civilization, but it

[274] This is common knowledge for most legal scholars today. See for example, Borrows, *CIC*, *supra* note 58 at 14; Henderson, *supra* note 101 at 118; Hamar Foster, "One Good Thing: Law, Elevator Etiquette, and Litigating Aboriginal Rights in Canada" (2010) 37:1 Adv Q 66, generally.

[275] Clifford cites Glen Coulthard in support of his argument that colonial power dictates the terms of engagement and shapes the perspectives of Indigenous peoples through that engagement with the Crown to ensure the dominant structures are never in question. According to Coulthard, "the production of the specific modes of colonial thought, desire, and behaviour that implicitly or explicitly commit the colonized to the types of practices and subject positions that are required for their continued domination." In order to disrupt these processes of domination, I argue establishing Indigenous perspectives as law-bearing changes the frame of the discourse, requiring engagement on terms recognized and recognizable across legal orders. This should make Indigenous perspective about authority less easily "misrecognized" or dismissed by the state. Clifford, *supra* note 94 at 763, citing Glen Coulthard, *Red Skin, White Masks*, *supra* note 63 at 16.

[276] For the use of *culture* in Canadian law as applied in Indigenous litigation, see *supra* note 70. For a discussion on *other* from an Indigenous feminist perspective, see Trinh Minh-ha, *Woman, Native, Other: Writing Postcoloniality and Feminism* (Bloomington IN: Indiana University Press, 2009).

does not carry the same weight as the language of law.[277] In other words, these labels help push for a more equitable distribution of power.[278] I am not suggesting these labels are erroneously placed to serve a strategic goal, as I have discussed elsewhere, Indigenous laws are not so readily separable from their social context.[279] Rather, I am advocating for identifying and recognizing the practice of law in an Indigenous social context for what it is – law.[280] Likewise, when I use the term jurisdiction, I am applying a recognizably European-based legal concept to an Indigenous legal perspective about *authority* to make decisions about a particular subject matter.[281]

The risk of avoiding the use of colonial terminology is the potential that an analogous concept (such as authority) receives less weight, and is easily dismissed as something other than proper Canadian jurisdiction.[282] Therefore, I use the words interchangeably. Although analogous meanings come from different worldviews and contain different conceptual meanings relating to how humans position ourselves in the world (individual autonomy or relational community), authority conveys the ability and power to make decisions that effect a nation. In this regard, authority means jurisdiction.

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[277] See Asch's argument generally in, Michael Asch, "The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*" (2000) 5:2 Rev Const Stud 119, and specifically at 135.
[278] For an examination of Antonio Gramsci's work on the relationship between culture and power, see for example, Kate Crehan, *Gramsci, Culture, and Anthropology* (Berkeley: University of California Press, 2002).
[279] Paul Berman, "The Enduring Connections Between Law and Culture: Reviewing Lawrence Rosen, Law as Culture, and Oscar Chase, Law, Culture, and Ritual" (2009) 57 Am J Comp L 101 at 102.
[280] It seems redundant to hearken back to this argument that Napoleon and Friedland made in previous years; however, it bears repeating. See Napoleon and Friedland, *An Inside Job*, *supra* note 68, "We believe that, for respectful and useful engagement to occur, the law in Indigenous legal orders must be treated substantively as *law*—to be debated, applied, interpreted, argued, analyzed, criticized, and changed," at 739.
[281] For a definition of jurisdiction in this regard, see Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" Research Paper for the National Centre for First Nation Governance (11 October 2007) online: http://www.fngovernance.org/ncfng_research/kent_mcneil.pdf.
[282] See Asch, *supra* note 277.

b. Is There a Tsilhqot'in Water Law?

A failure to recognize Indigenous ways of knowing the world allowed the entrenching of a singular Eurocentric perspective of the natural world to dominate law and governance on the lands of Indigenous peoples. To Canadian society, as it is elsewhere in the world today, water is construed as property and a resource to be used for the benefit of humans;[283] whereas for Tsilhqot'in people interviewed for this project, water is an important relation in a complex set of relationships that function together to maintain balance in the natural world. Learning to understand the Tsilhqot'in worldview about water's role in the world and how water permeates every aspect of life is helpful to begin to understand how law works in relation to water.

Law applies to water in the sense that law governs human behaviour and actions, which includes actions toward or involving water.[284] The translated recorded versions of stories reflect a perspective which holds water as a silent actor in the background of the narrative, as a lake to be paddled across, bathed in, fished in, and consumed for drinking. There is little (if anything) in these references to show that law is functioning in the context of water—at least on the surface. The worldview, however, allows for a nuanced contemplation of the inner workings of law that

[283] For example, in her book *Ethical Water: Learning to Value What Matters Most* (Vancouver: Rocky Mountain Books, 2011) Merrell-Ann Phare explains, "the prospect of a profit bonanza has set off a worldwide scramble to control water and infrastructure and turn water into a commodity to be traded in the same way as oil, timber, copper or pork bellies," at 25-26. To emphasize my point, see Astrida Neimanis, who discusses learning from water in a feminist perspective. She identifies the many ways people use water without considering the impacts of those uses, "Water serves as the seemingly silent receptacle of the toxins we pass into the sewage system, the plastics we throw into our oceans. And just as we imagine that its uncanny flows will clean up all of our messes, we also somehow imagine it as quantitatively inexhaustible, pumping it through deserts, hauling it up out of ancient aquifers, bottling it in little plastic disposable cylinders, using three barrels of fresh water to extract one barrel of oil." Astrid Neimanis, "Water and Knowledge" in *downstream: reimagining water*, Dorothy Christian and Rita Wong, eds (Waterloo: Wilfred Laurier Press, 2017) at 52.

[284] The theory I present here is part of an ongoing conversation I have had with Elders and other community members who made it clear that water is a functional part of interpersonal relationships. Through our conversation, I was able to derive the linking principles described in this section. I have shared these insights with the researchers at the Indigenous Laws Research Unit through my involvement with the Water Laws project which began in 2016. As such, understanding water's relationality forming the basis of a legal theory is part of a larger ongoing dialogue inside and outside of the academy.

flows through the channels of relationality among living and non-living inhabitants of the land. There are (minimally) three basic concepts that help refine an analytical lens allowing to see under the surface of the stories and into the actual workings of law in the context of water. These are interconnectedness, respect, and reciprocity, which I discuss individually in more detail below. These principles govern relationships, which explains how laws that govern people, do so in relation to people's conduct with water. The remainder of this chapter explains how principles form a theory of *dechen ts'edilhtan* on how the laws of the ancestors incorporate water beginning with the principle that everything is connected.

c. Interconnectedness

The Tsilhqot'in perspective holds water in its natural environmental and within social contexts. In the Tsilhqot'in worldview water exists in a relational engagement interconnected with and therefore underpinning all life.[285] The interconnectedness of all entities (animate and inanimate, human and non-human) is one of the foundational principles framing Tsilhqot'in law through which flows life and law. Accepting and understanding life's reliance on water, and water's role in facilitating interconnection other entities on the land, including the land itself,[286] leads to a conclusion that these entities exist in inextricable relation to one other.[287] The relationships of the interconnected world are governed by rules and principles (laws) to ensure they continue to exist in balance. Some of these laws are environmentally proscribed (e.g.

[285]Elder June Williams explained the obvious interconnection when she stated that "to me water is life. I wouldn't be alive without it, and neither would the animals, and the fish, and the plants." Interview of June Williams at Xeni Gwet'in (4 July 2017, pm) at 1. Also, "without water there would be no land, no wild animals, no fish, no people." Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 20.

[286] "Water and the land go hand in hand […] without water the land can die." Interview of Susie Lulua at Xeni Gwet'in (4 July 2017, pm) at 10-11.

[287] This is a rather obvious conclusion that Western science has long recognized as symbiotic relationships such as bees pollinating plants, birds carrying seeds in the berries they eat, water providing habitat for fish upon which people rely. This is rather common knowledge today.

gravity drawing water downhill, or photosynthesis using sunlight to produce energy in plants), while other laws are social, involving the role of humans in these relationships.[288]

Human are closely tied to water, as we are substantially comprised of water (I know, I drink a lot of it every day).[289] Participants in the research relate people directly to water, as "we know we are all water too."[290] This direct relationship suggests that changes in water affect changes in people directly, and occasionally in profound ways. For example, according to some Tsilhqot'in people, changing characteristics of water through the seasons is mirrored in changes to people's blood:

> She [Mabel Solomon] said our blood changes with the season, in the winter our blood is different from spring time to summer time. […] It's all connected to water, with the winter, snow, ice, and spring time, the water starts flowing, in the summer time when things are growing on the land. Our blood changes with the seasons. […] So you get sick, in the spring time when everything is melting, everything goes into the water, like creeks, lakes, you will get sick with water.[291]

This inseparable connection provides a logical reason for how impacts on the land caused by logging, mining, and other uses that affect water have such an immediate and visceral impact on Tsilhqot'in people. This close connection offers a logical explanation for how Tsilhqot'in laws involving harm are to be interpreted and applied broadly to extend beyond just people, but also to include water, because "your actions affect everything."[292]

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[288] See for example, Sylvia McAdam, *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Saskatoon: Purich, 2015) at 52-54; Tully "Reconciliation", *supra* note 153; Amba Sepie, "More than Stories, More than Myths: Animal/Human/Nature(s) in Traditional Ecological Worldviews," (2017) 6:4 *Humanities* 78-109; Heiltsuk Tribal Council, *Dáduqvɬá1 qɲtxv Ǧviɬ́ásaǩ: To Look at Our Traditional Laws* (undated) online: http://www.heiltsuknation.ca/wp content/uploads/2018/10/Heiltsuk_Adjudication_Report.pdf at 29; Shuswap Nation Tribal Council and Indigenous Law Research Unit, *Secwépemc: Lands and Resources Law Research Project*,(undated) online: https://www.uvic.ca/law/assets/docs/ilru/SNTC%20Law%20Book%20July%202018.pdf at 38.

[289] US Geological Survey, *The Water in You: Water and the Human Body*, online: https://www.usgs.gov/special-topic/water-science-school/science/water-you-water-and-human-body?qt-science_center_objects=0#qt-science_center_objects.

[290] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 2.

[291] Interview of Mabel Solomon and Dinah Lulua at Xeni Gwet'in (4 July2017) at 4, 8.

[292] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm), at 9.

The proximity of interconnected relationships reflects the role of reciprocity because "water gives life to all walks of life, all animals and to our berries. It's a whole big cycle of keeping the land going, plants, wildlife, our berries. And without the water, none of us would be able to survive and everything would die."[293] Logically, people directly feel any harmful actions impacting land and water:

> We have our berries and our medicine plants, and our grass that the wild animals depend on to survive, the bears, the deer, and the moose, all the wildlife in the forest. And mining, if there was mining in our community, it would poison all our waters. If they poison all our waters, then they would poison all our wildlife, our fishes and our waters, our community would be poisoned.[294]

The Elder's identification of how harms flow through the land into the people allows for an obvious deduction. Water is the one element that binds all of these entities (berries, plants, grass, animals) together, and acts as a conduit into human beings through which flows their consumption of the abundance of the land. The common law largely misses this fundamental connection because it resides elsewhere than on the land (in offices in Williams Lake, Victoria, Ottawa).

Removing law from the social, experiential practices of people's daily lives creates blind spots to the actual relationships between people and their land. Centralist state laws differ considerably from the human laws of the people, as they tend to focus on regulating individual, and often corporate, interests detached from place and local understandings of place. This disconnect is what forces many Canadians to think about water as a resource separate from its role in connecting people to their land, which allows for the activities (e.g. mining, forestry, industrial agriculture) that cause so much grief and violence for Tsilhqot'in communities.[295]

[293] Interview of Eileen William at Xeni Gwet'in (5 July 2017) at 4.
[294] Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 2.
[295] See Phare and Neimanis, *supra* note 283.

As human laws govern relationships in the Tsilhqot'in world, we may begin to understand how laws that overtly apply to human-human relationships may also apply to relationships between humans and non-humans, such as animals, plants, lands, and water. Elder Gilbert Solomon explains, "the sun, the plants, the whole earth, and the people, the animals, the bugs, the fish, all those are all relations. […] They all come from water. So, we are all the same."[296] The relationships between people and the world around means that legal obligations to protect a person's relations necessarily extends to protecting sources that sustain their relation's lives. The reasoning behind this is that any harm that is permitted to befall water, harms the people who rely on that water for their lives, as "we are all water too."[297] In other words, Tsilhqot'in recognize that people are constituted of, quite simply, water. As water facilitates the transmission of the land into the body of the people, the principle of interconnectedness produces the pathways for legal principles to extend beyond humans to non-human relations. The laws that govern these relationships are guided by two sub-principles, respect and reciprocity, which establish norms for conduct.[298]

d. Respect

Respect is a general principle that applies broadly within the Tsilhqot'in worldview. Its function is to insist on positive action (which may include refraining from acting in certain ways) toward the entities being respected, which I will discuss in more detail subsequently. Providing a specific detailed definition of respect from within the worldview is difficult, as the concept may

[296] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 2.
[297] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 1.
[298] I refer to these as sub-principles in the context of interconnectedness as they inform practices of relationality, or how relationships should be conducted. Although they also stand on their own within the legal order, this theoretical approach specifically identifies their function in guiding relationships.

change with changing circumstances, and some concepts may not translate properly into English. Furthermore, some definitions of respect may only be lived through the body on the land, making them near impossible to explain in words. The discussion of respect here is drawn from conversations with Elders and through actions of individuals and groups as exemplified in the oral tradition and in practice.

One way of showing respect towards the water is to manage its use, ensuring people do not waste it: "I have always tried to teach my kids not to waste water. Not to run the tap, hey, not to go to extremes".[299] Another way is to make offerings, "like tobacco, even water, or food, different kind of berries, meat, turkey".[300] Other participants signaled that paying the water is not always necessary, which suggests that how respect is performed may be context specific. For example, bathing may require a prayer, but does not require gifts, "you don't give them an offering you just pray to it, go into the water and bath. Just tell them where you are hurting and pray to it and it will heal your body. But you do not give the water an offering".[301] Although there are different ways to show respect for water, a person's actions in and around water must always be respectful. In this regard, respect may be considered a value, as it is an important characteristic of human behavior that people choose to value in their lives, yet it is better explained as a legal principle.

Respect is a legal principle because, as with many legal principles, it may lead to tangible consequences when it is not applied. For example, if a person fails to act in a respectful manner toward water, they may act carelessly and lose their life by drowning.[302] Another potential

[299] Interview of Phyllis William (5 July 2017) at 15.
[300] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 2.
[301] Interview of Eileen William at Xeni Gwet'in (5 July 2017) at 3.
[302] Respect manifests in the Tsilhqot'in tradition as awareness of dangers regarding water as James Lulua explains, "So we do have to respect the lake, how we travel on it, make sure that we are safe, that we have safety gear on, and respect the river cause its powerful, takes you down stream." Interview of James Lulua at Xeni Gwet'in (4 July 2017) at 5. Gilbert Solomon shared a story about a potential consequence of playing around with water by rolling a

consequence of disrespecting water may be the careless polluting of watercourses, which has far reaching effects on the plants, animals, and ultimately humans. Therefore, the principle of respect promotes a way of acting in the world based on a person's interactions, which impacts on others. Living as a respectful person means having some foresight into the effect of actions on other people and the surrounding environment, which includes the decisions that lead to action. In this regard, respect is applied through people's lived experience. Yet respect is also openly acknowledged, perhaps as a means of reinforcing the principle through openly stating one's appreciation of the benefits the respected world provides, as logically, appreciation promotes acting with respect:

> […] every time you consume it [food or water] you want to thank it, you always want to acknowledge what you are consuming, like especially food, you know thanking it, sun, thanking everybody, all our relations, if not for them, the water, sun, all that, we wouldn't have nothing.[303]

Thanking food or water is one way of explicitly exhibiting respect through a display of gratitude. Acting in respectful ways is another. Recognizing that when people fail to respect water, they will likely suffer some consequence provides a tangible dimension to the concept. Combined, the principle begins to take shape within the worldview.

The principle of respect emerged frequently in interviews, and is firmly embedded in the oral tradition. One of the important Raven origin stories involves Raven acting disrespectfully to a salmon by throwing it on the ground.[304] This act caused Raven to lose all the salmon he had drying in his smokehouse, and ultimately led to his near-starvation. This story alone presents a

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rock into it, "There is uh, there is a place along the river, by the river, there is a rock sitting way up there, there is a camp, and they told my cousin that if you roll this rock into the river and you come back the next day that rock is still sitting same place where you rolled it. So I was telling that to my cousin. Then he went over there and he rolled that rock. He came back, and it's still sitting there. Then he went over there, and he rolled it again. Second time. But he didn't live very long after that, he drowned in the water." Interview of Gilbert Solomon at Xeni Gewt'in (4 July 2017, pm) at 5.

[303] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 1.

[304] *Raven and the Salmon*, in Farrand, *supra* note 49 at 18.

link between acting with respect and the constant threat of starvation.[305] Any action which has the potential to ruin or cause the loss of a life-giving relation should be avoided, thereby elevating the principle of respect to normative rule to help ensure the maintenance of healthy relationships and the continued existence of various food sources. [306] This conclusion is explicit in Elder Dinah Lulua's statement:

> We are all going to die if we don't smarten up and respect water. We can't take water for granted, that it is going to always be there for us, we have to help keep it fresh. […] If we respect water, it takes cares of the land and animals, and humans. Without water, we would not have all that. People live where there is water. Animals go where there is water. Our plants, our medicine plants, our berries grow where there is water.[307]

This statement reflects the close connection of water to the food supply, showing how respect filters down through the chains of interconnected relations.

i. Respect as a Pathway for Law's Extrapolation to Non-Human Species

As in the Raven and Salmon story, respect is applied to the handling of fish and other animals that feed people. Salmon are an important food source for Tsilhqot'in families as it can be dried and stored in relatively large quantities for consumption over the long winters.[308] According to the legal order, respectful treatment of salmon contributes to ensuring their annual

[305] The threat of starvation comes out in other stories such as *Lendix'tcux* and *The Young Man and Dt'an*. Both stories show famine as one extreme, which, may be offset by times of abundance generally invoked by a person's acting according to their teachings.
[306] In this context I prefer to identify salmon as a relation rather than a resource, as all Tsilhqot'in relations potentially prevent starvation. In my interview with him, Elder Gilbert Solomon refers to "the people, the animals, the bugs, the fish," all as relations. Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 1.
[307] Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 13, 28.
[308] The importance of salmon as a main food source is commonly stated among Elders. In addition, the importance of salmon is mentioned in letters between colonial officials preparing to open a Hudson Bay fort at Alexandria in the Tsilhqot'in territory, "When Salmon ascends the Chilcotin River, the Inhabitants collect a sufficiency for their subsistence and reside upon their Lands, but when a failure happens, which is at least three years out of four, they are reduced to the necessity of removing with their Families towards the Sea Coast in quest of subsistence…". Letter from William Connolly to George McDougall (1 October 1829) in British Columbia Archives, Manuscript, Fort Chilcotin, MM/C43, 6-7, in *Great Unsolved Mysteries in Canadian History*, "Nobody Knows Him: Lhatŝ'aŝ?in and the Chilcotin War", online: https://www.canadianmysteries.ca/sites/klatsassin/context/furtradeculture/397en.html.

return during spawning season. Recounting the *Story of the Salmon Boy*, Elder Gilbert Solomon explains how respect informs the practice of handling salmon by ensuring bones are returned to the water:

> the elder will tell the boy, um, you see those children playing over there, you could eat one of those. Said they're salmon, eat one of those children that are playing over there, go eat one, but he said you have to do this to the bones, […] then the bones here, the tail, said this is what you have to do. Don't forget any bones, don't mess around. Just do exactly like this way. […] They are back in the water. There. So, the boy is doing that, [Gilbert mimes eating a fish, finding a cool bone, and putting it in his pocket]. And then they'll say, ah, there is the grandma, grandma, that is the one that's telling them to eat stuff [the salmon], she says, how come that boy over there got one arm? One arm missing? And the elder will say, you know, you know why that arm is missing. [Gilbert mimes the young boy taking the bone out of his pocket, sheepishly, and giving it to the elder]. Oh, he is going like that. So, they give them the arm. Anyways, she said, "don't do that, you have to follow what I told you what to do, you know, right there or this happens" [missing body parts]. […] [So] when somebody tells you stuff, you need to honour them, just do it, follow it, protocol. It's probably just giving you some kind of rule to follow, like do this mixture, you put all the bones in there [the water], don't be messing around.[309]

The flow of respect through relationships is exhibited in the story. Following rules shows respect for the teacher's (an Elder) knowledge, who teaches an epistemologically proper way of handling fish by respecting the fish as a whole, and not just valuing pieces. Notice in the story that the salmon are depicted in the same category as humans, "you see those children playing over there, you could eat one of those […] they're salmon." Listeners of the story are to infer that salmon should be treated with the same level of respect as human children. The effects of not properly handling salmon in a respectful way has the potential of bringing harm to not only the returning salmon, but also to the whole community and potentially the nation, as they could lose it as a source of food. The close connection between salmon and humans is evident in Elder Gilbert's statement about accepting salmon as people:

[309] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 3.

> we are honouring the spirits. Especially for the fish people, we know them as people, and we honour them, because they will be the last resource to feed us, when there is no, everything come extinct, fish will be kind of there if we don't poison the waters.[310]

Understanding salmon as people has profound implications for the laws that govern relationships by creating an avenue for making laws that apply to human relationships also apply equally to non-human relationships. Tsilhqot'in recognize the significance of the salmon in sustaining their lives, which logically places them at an equal level of importance to the people themselves.[311] Stated more plainly, the blurry line distinguishing humans from salmon facilitates application of the same laws that govern human-human relationships to govern relationships with important non-human species by extrapolating principles such as respect.[312] Non-humans, and the environment which sustains non-human populations, are intended recipients of respectful treatment, because without them, Tsilhqot'in survival becomes exponentially difficult, if not impossible.

ii. Respect Water

BC's industries, including oil & gas, mining, and agriculture, account for roughly 26 percent of BC's annual surface water use.[313] The hegemonic Canadian perspective tends to see

[310] *Ibid.*
[311] Consider the implication rights-based language would have here if it was found to exist within the Tsilhqot'in legal order. Salmon could have the same liberal rights as humans, and conceivably given the protection of the *Charter*.
[312] Whether laws of human relationships would also apply to species that do not provide an important food source to Tsilhqot'in people is not clear based on this analysis. However, the principle of interconnectedness suggests Tsilhqot'in recognize that every species has some important role in life such that that they too would be positioned in equitable relation to humans. Indeed, the Lendix'tcux origin story appears to support this argument, as even the moose's brain is used to create an animal. After several attempts they make a frog, which is so "ugly" they put it in the water and told it to live there and not on land. In other words, even the ugly frog, made from a forgotten piece of the primordial moose ancestor, was worthy of creation and existence in the Tsilhqot'in world.
[313] Government of British Columbia, "Amount of Surface Water Authorized to be Used Annually in British Columbia" (2006) online:

the environment in terms of commodity, as resources for extraction and profit, as Altamirano-Jiménez points out:

> nature and natural resources are almost exclusively depicted as economic potential, a depiction that does not always match Indigenous peoples' understandings of their place-based relationships with nature.[314]

This explains to some extent why industrial use of water seems to go beyond Tsilhqot'in conceptions about interconnectedness and respect in contemporary times, because of the disconnection from laws governing relationality and the threat of overconsumption.[315] However, as I argue subsequently, *dechen ts'edilhtan* continues to apply despite the uses perhaps not being in the contemplation of the ancestors (not that I claim to know what was in their minds, but arguably, images of today's large scale industrial developments would have been limited to tricksters, dreams, and nightmares).

Tsilhqot'in people struggle with the inconsistency of the common law as it interferes with respect in an interconnected world of relationships with the land and water. For example, Elder Gilbert Solomon explains how respect as a relational principle is divorced from the practice of resource extraction for profit, showing the dilemma Tsilhqot'in people are often faced with when making decisions about water and land:

> So we just see a handful of people being happy, making money, so the rest of us millions of people could suffer, you know, from drinking this water they messed up, they playing in. Well, that is not respect. They are not respecting the water. Say right now if the mine wants to still open, they say "yeah right, there is money to be made," but yeah right, we don't want that money. I mean, we want money, we are poor, but we don't want that money over there. We don't want no part of it. We don't want you, dude. Don't go there. This is the last place on earth, and no is no. No. No. We don't want you to do that, we don't want to turn a blind eye no more. No, no. […] When the forestry comes all of a sudden there is no more water and then we are really thirsty.

[314] Altamirano-Jiménez, *supra* note 243 at 8.
[315] "We [Canadians] have discovered to our dismay that the qualities that make water so diversely valuable to us are the same qualities that easily allow it to become contaminated, polluted and lost to further use. As our population has grown, and the range of our agricultural, industrial and recreational activities has multiplied, we have strained the waters those activities depend on. Water is already a $400-billion-a-year industry and growing rapidly." Phare, *supra* note 283 at 1-2.

> WHY IS THERE NO MORE WATER? […] Yeah, they like, we don't want them in these mountains doing whatever because they are going wreck the water, they are going to waste the water, something I don't know, how do you say, what's waste? […] Destroy it.[316]

Gilbert is distinguishing industrial uses and the harm that follows, from water as a respected relation people rely upon for use and enjoyment in healthy daily lives. This statement leads to an inference that industrial use of water (including land and other resources) for profit belies respect, arguably as there are additional costs associated with treating water in a respectful manner while operating industrial enterprises. From this inference, the logical conclusion that follows suggests that if corporate-driven industrial operations show disrespect toward water through over-consumption, waste, and destruction (as Gilbert states), then industry is not welcome because it violates Tsilhqot'in law. If this is accurate, then respect in the Tsilhqot'in worldview correlates with maintaining water quality and quantity sufficient to provide the needs of Tsilhqot'in people on a daily basis.

The exploits of non-Tsilhqot'in outsiders show a history of disrespect, as evident in the events leading up to the war of 1864 when Tsilhqot'in people prevented the construction of a wagon road through their country; or the provincial government's issuing of licences to clear-cut Tsilhqot'in lands without consultation or consent leading to the Tsilhqot'in title litigation; or Taseko Mine's plans in the Prosperity Project to convert an entire fish-bearing lake into a tailings pond.[317] With this history in people's minds, the decision to minimize or prevent resource

[316] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 16.
[317] See *Tsilhqot'in* BCSC at paras 264-285 (on the Chilcotin War); paras 60-79, 87 (forestry); see Wolfgang Zilker, "Prosperity Project – Fish Lake" *Protect Fish Lake – Teztan Biny*, online: Protect Fish Lake – Teztan Biny http://www.protectfishlake.ca/mining.php; Canadian Environmental Assessment Registry, "Backgrounder: Prosperity," online: Canadian Environmental Assessment Agency http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=46185 (mining). For more information on the Chilcotin War, see Terry Glavin and the People of the Nemiah, *supra* note 35 at 84-85, 95-97; Great Unsolved Mysteries in Canadian History, *supra* note 308; and for a settler account see Mel Rothenburger, *The Chilcotin War* (Mr Paperback, 1978).

extraction projects for profit are not difficult to make: "We want to protect it and keep it as clean as it is." The knowledge that pollutants produced from mining operations reaches through the water from the soil to impact the people is forefront in the minds of Tsilhqot'in people:

> if they poison all our waters, then they would poison our wildlife, our fishes and our waters, our community would be poisoned. […] If we respect water, it takes cares of the land and animals, and humans. Without water, we would not have all that."[318]

This statement imparts the inextricable weave of Tsilhqot'in legal knowledge, as it depicts the path interconnectedness creates for harm to flow from its source to people through the environment, while identifying that respect functions to prevent harm from occurring at the source. The statement also hints at the principle of reciprocity as a means of ensuring a healthy relationship (if we respect water, it takes care of the land and animals, and humans). From a Tsilhqot'in legal perspective, these incursions from outsiders violate Tsilhqot'in law on several fronts. First, it occurs without their consent. Second, the activities are generally destructive, which is disrespectful of the land and the relationship Tsilhqot'in have with the land. Third, there is no reciprocity between proponents and Tsilhqot'in people to facilitate a balanced relationship. Balance in a relationship would ensure Tsilhqot'in could continue to benefit from their *nen* and exercise authority over decisions to ensure any destruction falls within acceptable Tsilhqot'in legal parameters, such as taking only what is needed, using everything that is taken and not wasting (I discuss the source of these normative rules elsewhere).

Tsilhqot'in belief that respecting water and those who rely on water means people expect responsible use and the preservation of these life-giving relations that sustain people. The basics of reciprocity are contained in this relationship, where respectful conduct toward non-humans ensures continued existence of both humans and their non-human relations.

[318] Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 3, 28.

e. Reciprocity

The principle of reciprocity is juris-generative. The ubiquity of reciprocity and its transcendence throughout Tsilhqot'in practices involving others and their surroundings automatically produces legal obligations on people when they engage in a relationship. This process is evident through the relationships with animals who are hunted for food. When a hunter goes out to take an animal, she carries obligations which will maintain a balanced exchange in the relationship. The animal gives its life to the hunter; the hunter ensures survival of the animal. This is often embodied and celebrated openly through ceremony, which is an explicit gesture acknowledging the relationship and its associated obligation:

> Every time you consume it you want to thank it. You always want to acknowledge what you are consuming, like especially food, you know, thanking it, sun, thanking everybody, all our relations. If not for them, the water, the sun, all that, we wouldn't have nothing. That would be the sun, the plants, the whole earth, and the people, the animals, the bugs, the fish, all those are all relations. […] *we have to* treat everything like the way we want to be treated.[319]

The phrase "we have to" exhibits the obligation people carry to act in a certain way that comes back around to people in "the way we want to be treated." A broader reading of this statement is that *we have to* ensure the survival of everything to ensure our own survival. The obligation is necessary and not optional. It is fulfilled by protecting the habitat of the animals, which, logically, ensures animal species may then fulfill their ongoing obligation to feed, or otherwise provide for people, who, in turn, continue to protect habitat.[320] And so the reciprocal relationship goes. The imposition of colonial jurisdiction that interfered with this cycle has had a terrible

[319] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 1-2 [emphasis added].
[320] The protection of habitat is a primary obligation which contains a number of related rules and obligations governing the practice of taking animals, such as taking only what is needed and respecting animal remains, to name a couple.

impact on the Tsilhqot'in people, as their inability to protect the environment of the animals they hunt destabilizes populations of animals and strikes at the pride, honour, and integrity of the people themselves through a perceived failure or breach of their own legal obligations. Non-Tsilhqot'in often ignore the resulting colonial violence, which, if understood at all, invites the following account of how the principle of reciprocity balances relationships.

Reciprocity serves to maintain balance in relationships. At a fundamental level, balance is established when humans live sustainably in their environment, and their food supply is relatively dependable (accepting some fluctuations occur beyond people's control due to environmental events, such as variance in salmon runs, landslides into rivers or streams, or unusually long cold winters).[321] At a relational level, balance exists when humans actively contribute to ensure the sustainability of the food supply by ensuring the maintenance of healthy habitats. Reliance on the environment and its inhabitants for survival necessitates input to ensure continuance of seasonal harvests, which is the exchange at the nexus of reciprocal relationships between humans and non-humans. The combination of statements articulating a reliance on the environment and the need to protect the environment reveals the frame of balance to which reciprocity is applied. For example, Elder Dinah Lulua states the reliance aspect, "we have our berries and our medicine plants, and our grass that the wild animals depend on to survive, the bears, the deer, and the moose, all the wildlife in the forest."[322] Elder Marion William discusses how law embodies the knowledge to protect the land, when she states:

[321] The summer of 2019 offers a somber example when a slide occurred in the Fraser River near Big Bar, blocking passage for spawning salmon. These events will likely become increasingly prevalent with global climate change, introducing a new challenge into the fold of Tsilhqot'in law and political action. See British Columbia, *Big Bar Landslide Incident*, online: https://www2.gov.bc.ca/gov/content/environment/plants-animals-ecosystems/fish/fish-passage/big-bar-landslide-incident.

[322] Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 2.

> [law] tells people how to protect the land, the waters, how to use it appropriately. How to fish and how to use your medicine in a good way, to not over use resources. […] We protect the land, and use resources in every part of our land.[323]

Combined the Elders describe how protecting the land, limiting harvests, and broad utilization of the territory are legal responses to maintain balance which ensures sustainability. As such, reciprocity is a reasoned response to the many risks associated with life that is tied closely to the ebb and flow of the natural world. Reciprocity combines with the principle of respect and the understanding that everything is closely interconnected to generate rules and practices that exist to secure the continued survival of Tsilhqot'in people.

The principle of reciprocity is deeply rooted in the worldview, connecting present and future generations to the *?esggidam* through the origin story of *Lendix'tcux*.[324] In the story, Lendix'tcux and his three sons venture into the Tsilhqot'in *nen* for the first time. Their very first encounter occurs while entering the Chilcotin country. Lendix'tcux and his sons face a deadly moose who stands in the middle of a river and kills people who try to cross to enter the territory. They devise a plan, and execute it, where Lendix'tcux floats down the river and gets swallowed by the moose. When inside, he cut out the heart, builds a fire and cooks and eats the heart, killing the moose. The boys cut the moose open to release their father. The four of them then use all the parts of the moose to make "all sorts of animals" that will continue to live in the territory. As a creation story, the act of creation produces a special relationship that imposes on the creator (and her or his descendants) some obligation to protect and maintain their existence and balance in their relationship, otherwise, the act of creation is rendered rather moot.[325] The origins of

[323] Interview of Marion William (2017) at 12.
[324] Farrand, *supra* note 49 at 10.
[325] I suggest that if the existence of at least some of these new inhabitants cannot be ensured, then, conceivably, there is little point to the creation in the first place. Unless, of course, some are needed for one-time purposes, but I do not see any examples of this in my research.

creation at this point continue subsequently in the story when Lendix'tcux and his sons again come across moose.

In the second encounter, the travellers encounter two dangerous moose who kill people by running races with them and choking them to death in the dust they kick up. The first act of the moose (a bull and a cow) is to feed them: "the three boys went into the house, and the moose gave them food".[326] Afterwards, they race, and the moose kill the boys. Lendix'tcux executes a plan that kept him separate from the boys, allowing him to race the moose on his own, at which time, "he killed both the moose".[327] Lendix'tcux then went to his boys and revived them before returning to the moose, where "he made the moose alive again, and told them they must no longer kill men."[328] These encounters embody an example of reciprocity that exists to this day in the Tsilhqot'in worldview.

The moose at the beginning of the story provided the source of newly created Tsilhqot'in relations on the land, "all sorts of animals", who are, conceivably, relations that would not exist were it not for those *?esggidam* and their actions. Not surprisingly, the next stage of the establishment of a reciprocal relationships occurred through other moose. If the creation of animals in the first encounter with moose was insufficient to convey that obligations were consequently created requiring the maintenance of ongoing relationships, the second encounter declares the obligation. In the second encounter, the moose feed the boys. The moose kill the boys. Lendix'tcux kills the moose. Lendix'tcux revives the moose and states, "they must no longer kill men." In other words, moose must not let humans die (kill them) by making themselves scarce and unable to be hunted for food (feed the boys). In exchange, Lendix'tcux,

[326] Farrand, *supra* note 49 at 13.
[327] *Ibid.*
[328] *Ibid.*

his sons, and all Tsilhqot'in descendants will let them live again, which when extrapolated means; ensure they have a healthy habitat within which to sustain a healthy and viable population.

The obligations that transcend the generations exist in the present. The inherited obligations require Tsilhqot'in people to act when the moose population is threated due to deforestation and overhunting as a result of outside government jurisdiction that fails to manage forests or moose in a sustainable manner. The Tsilhqot'in obligation is evident in the actions of the nation when they banned the non-native moose hunt in 2018. Tsilhqot'in National Government's tribal chair Chief Joe Alphonse explained, "There's going to be a show-down over moose this year. We will look for ways that are non-violent to protect our moose, but we have to do it".[329] The words, "we have to" contain the obligation Tsilhqot'in people owe to moose.

Within and surrounding that obligation are the legal processes which determine how protection should be facilitated, in this instance, through application of a ban. There is no question here. The obligation binds Tsilhqot'in to do what they have to in order to fulfil their agreement, or they risk losing the relationship and the security of the food source. The failure of the Province frustrates Tsilhqot'in actions to meet their obligation to moose and other animals. Despite the Province's assertion of jurisdiction usurped from the Tsilhqot'in Nation without its consent (following the assertion of Crown sovereignty), the obligation contains and conveys to the Nation the authority to manage those relationships to which they are bound on the land.

[329] Monica Lamb-Yorski, "Tsilhqot'in move to ban non-native moose hunting", *The Williams Lake Tribune* (12 July 2018), online: https://www.wltribune.com/news/tsilhqotin-move-to-ban-non-native-moose-hunting/.

4. Discussion

The interaction of fundamental principles of interconnectedness, respect, and reciprocity creates the basis for the Tsilhqot'in legal worldview. The oral tradition is replete with stories about human and animal characters actively involved in resolving inter- and intra- societal conflicts.[330] None of these stories explicitly involve water directly as an active agent. Yet this statement is debatable, as water is not represented in the stories as making decisions. However, from different perspectives, the way water is used may be understood as entailing the participation of water in the development of outcomes. For example, in the story *The Man Who Married Eagle's Daughters*, water is used as a conduit to divine whether the husband has been unfaithful to his wives.[331] A person may understand water as actively participating in providing knowledge to Eagle's daughters in this process, and may question whether it would provide the same service if being used by any other individuals, such as their husband. Additionally, this insight hearkens back to the potential for bias discussed in the previous chapter, when English-speaking ethnographers potentially viewed water as a substance created for human use and consumption rather than being an animate actor in the story.

In the stories, water is also used for transportation, as a means of escape, fish habitat, transition to other forms, healing, sacred power, a place of grieving, bathing, and, of course, drinking.[332] Water in these stories appears in the background, passive. A non-Tsilhqot'in informed legal analysis of the stories risks resting on water's seemingly inactive role, which would create potential blind spots in an analysis. Questions about decision makers, such as, *what*

[330] The Accessing Justice and Reconciliation Report provided to the Tsilhqot'in Nation contains a rich analysis of these stories related to harm, *supra* note 210.
[331] Farrand, *supra* note 49 at 38.
[332] See for example, Farrand, *supra* note 49, *Story of Salmon Boy* at 24 (transportation, fish habitat, means of transition); *Raven and Tūtq* at 15 (escape); *The Blind Man Who was Cured by the Loon* at 35 (healing); *The Adventures of the Two Sisters* at 28 (sacred power); *Estěnē'iq'ŏ't II* at 48 (a place of grieving); *The Boy Who was Kidnapped by the Owl* at 36 (bathing); *Raven Obtains Daylight* at 14 (drinking, transition).

decision was made ? or *how did a decision resolve an issue?* bypasses water and focusses on the recognizable forms (human, animal) who are active agents in the story's development. However, the fundamental principles of interconnectedness, respect, and reciprocity provide the means of movement for laws to apply beyond humans into seemingly non-sentient entities such as water.

Water flows through the land and the lives that depend on the territory, reinforcing the interconnection between the land and its dependents. Water is the connective tissue that binds people to the animals, fish, plants, and the land. Based on this understanding, respect that is owed to others (i.e. people, fish, animals, plants) necessarily applies to water because of its connective properties that binds people to the environment. When a reciprocal obligation is owed to ensure an animal's continued existence, the obligation also applies to water through the recognition that everything else relies on water for life. This explains how laws that may seem to apply only to human–human or human–non-human relations, also apply to water. To have laws that require humans to act in a certain way for the benefit of ensuring continued existence of a species is to have laws that protect the very basis of that existence. Water is at the core of Tsilhqot'in life: "we are all water too."[333] In other words, water is constitutional, constitutive of Tsilhqot'in existence and identity – *Tsilhqot'in, people of the river*.

When stories are reviewed that do not address water directly, the principles embedded in these stories will apply to water because of the manner in which the fundamental principles structure relationships. For example, consider the story of *Raven and the Salmon*. The following example analysis applies the triangulated methodology of story, internal knowledge, and events, the sources of which typically blend together in discussion.

[333] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 2.

a. Story

> Once Raven laid up a great store of dried salmon and filled the skins with grease; and when he had finished, he brought a lot of large roots to the house and turned them into men, and they all began to dance. And as Raven danced, one salmon, which hung from the ridge-pole, kept striking his head, until Raven lost his temper, and, tearing it down, threw it out of doors. As soon as the salmon touched the ground, he came to life, and brought all the other salmon to life too, and they started for the water. Raven and the men he had made tried to catch them; but the grease on their skins made them so slippery that they could not be held, and they all escaped into the water and swam away.
>
> After that there was a great snowstorm, which lasted a long while; and Raven was snowed in, and was so long without food that he nearly starved. One day a small bird lighted in a tree over the place where Raven was, and he had berries in his mouth, and he told Raven that there were berries to be had all over the country. So Raven took his blanket and started to dig his way out, and before he had gone a foot he came through the snow, and found all the country green, and saw that he had been starving in a little snow-bank all those weeks for nothing. And in this way
> the salmon took revenge on Raven.[334]

The first few times I worked through this story as a new researcher in 2012, I identified the overarching principle as being about respect (mentioned earlier), highlighted by Raven's apparent disrespect for the salmon he kept bumping into, whom he ultimately threw to the ground. A listener may safely assume the teaching is about respect and the consequence of failing to respect, as Raven suffers both the loss of his "great store" of salmon and of his freedom. This analysis is not incorrect – *Raven owes salmon his respect*, as salmon feed Raven and his community. However, it is also not complete. As I considered the actions of the characters (Raven and Salmon) I erroneously omitted water as an active participant in the first gloss of my analysis. Water is not explicitly mentioned in the story. Yet it plays an important role that is both silent and obvious.

[334] Farrand, *supra* note 49 at 18-19. This is one example containing the principle of respect. Additional sources of this principle will be provided in the next chapter.

Without water, there would be no salmon. Additionally, water provides the means of escape for the salmon, and, in its frozen form, creates Raven's prison for his retribution (water may be an active participant in the story as a law enforcer by imprisoning Raven). These important roles make water necessary for the narrative to exist despite its glaring absence. Based on this reasoning, I argue that the principle of respect emphasized in the story – *Raven owes salmon his respect* – also applies as much to water as it does to salmon. Disrespecting salmon habitat through pollution, disturbance, diversion, or excessive extraction would directly impact the ability of salmon to return, feed, and spawn, which would prevent Raven from having any salmon to dry in his smokehouse. As the salmon fled in the story, they would be unavailable for harvest if the water cannot support their return (i.e. they could be seen as having fled).

This close interconnection between salmon and water allows the principle of respect to apply equally to both, giving rise, in this example, to an internalized reciprocal relationship. If Raven wants to continue to rely on salmon for his winter staple, he must respect salmon and its habitat by ensuring nothing diminishes either. As Raven maintains his responsibility to uphold this respect, salmon will continue to return to the river and Raven's smokehouse. This is an internal obligation, as it is not actively created directly with the salmon, but people acquiesce to be bound by it for the simple reason of survival by way of a sustainable source of food.

b. Internal Knowledge

The example of how this story embodies the principle of respect applying to salmon, and by extension its habitat, reveals an internalized obligation to ensure protection as a means of expressing or performing respect. Elders often articulate this reasoning: "Because we need water to live, so does all the plants, the birds and the animals, they all need water, so we have to protect

our water by all means."[335] Elder Eileen William says she "respects water because it takes care of the fish, in the river, in the lakes, or in the streams."[336] Respecting water means protecting it from contaminants, "We're all going to die if we don't smarten up and respect water. […] we have to help keep it fresh," meaning respect is actively performed through protection.[337] The responsibility to respect flows through the principle of interconnectedness which carries legal obligations to protect water is apparent in the stories, and is confirmed by Elders. Not surprisingly, the legal reasoning behind the laws applied to water inform practice Tsilhqot'in people take to the land in response to external threats, such as the protracted legal battle to protect the land and waters from the Prosperity Mine Project initially proposed in 2007.

c. Event

When Taseko Mines proposed the Prosperity Mine in Xeni Gwet'in territory of the Tsilhqot'in Nation, the Nation quickly responded in a defensive manner. Their primary concern was the proposed draining of Teztan Biny (Fish Lake), its conversion to a tailings pond to store mine waste-water, and the downstream impacts this would have on the surrounding land.[338] Considering the example provided above about the obligation to respect, and therefore protect water, their response is properly aligned with the Tsilhqot'in legal order that exists in the living fabric of the people and their communities.[339] Yet, Taseko's management railed against the

[335] Interview of Susie Lulua in Xeni Gwet'in (4 July 2017, pm) at 1.
[336] Interview of Eileen William in Xeni Gwet'in (5 July 2017) at 4.
[337] Interview of Dinah Lulua in Xeni Gwet'in (4 July 2017) at 13.
[338] See Raven and Susan Smitten, dir, *Blue Gold: The Tsilhqot'in Fight for Teztan Biny (Fish Lake)* (2010) online: https://www.cultureunplugged.com/documentary/watch-online/festival/play/3352/Blue-Gold--The-Tsilhqot-in-Fight-for-Teztan-Biny--Fish-Lake-.
[339] I highlight the *Raven and the Salmon* story as an example of the interconnection between story, internal knowledge, and community action. I acknowledge the concern over the use of the single story analysis as Matthew Fletcher argued for example, that the limits of analysis of a single story are boundless, and without limits, meaning may be lost. Fletcher, *supra* note 66 at 96. However, this story combines with several other stories to establish a definition of respect and the principle of protection which will be discussed in the remainder of the dissertation. The

Nation's response by suggesting they were simply anti-development, and pitted Tsilhqot'in people against the broader Canadian public interest.[340] However, Tsilhqot'in are not opposed to development, provided any work does not violate their obligations to the land and all its complexities and interrelationships.[341] In other words, Tsilhqot'in law does not impose a blanket prohibition on the use of land and water. The law is more complicated than that. Land and water may be used provided the use is not in violation of the applicable laws. As Roger William states, "we need to look at the ecosystem. We need to look at our culture [including laws]."[342] The remainder of this dissertation digs deeper into Tsilhqot'in laws that apply to access and use of surface water, from which a framework for water governance is drawn.

Once the principle of interconnectedness in the Tsilhqot'in world is understood, Tsilhqot'in law relating to water emerges. The theory underpinning how interconnectivity allows laws related to non-water matters also has an application to water is eloquently explained by Elder Gilbert Solomon:

> the sun, the plants, the whole earth, and the people, the animals, the bugs, the fish, all those are all relations. They all come from water. So we are all the same, if it has to do with water, the spirits. […] So, I guess that we have to treat everything like the way we want to be treated [….] Well every time they are exploiting the land, taking trees away

conversation of multiple stories define the limits and exceptions to general principles. One such story discussed subsequently in the next chapter is *The Young Man and Dt'an*, which reinforces respect by suggesting a prohibition against waste. For a helpful discussion of the connection between the land, stories, and the Tsilhqot'in people, see Smith, *supra* note 72 at 12-16. For Indigenous legal theories discussing interpretation across Indigenous and Canadian legal orders see Tracy Lindberg, *Critical Indigenous Legal Theory* (PhD Dissertation, University of Ottawa Faculty of Law, 2007) [unpublished].

[340] See Russell Hallbauer, "New Prosperity plan is environmentally sound" (4 November 2011) Republic of Mining, online: https://republicofmining.com/2011/11/06/new-prosperity-plan-is-environmentally-sound-by-russell-hallbauer-president-and-ceo-taseko-mines-northern-miner-november-04-2011/.

[341] In one news article, Chief Roger William "said he's not against all development, and the hope is tourism will grow." According to William, "Economics is very important. Jobs. Opportunities. But we need to look at the ecosystem. We need to look at our culture. We need to come from that, to be sensitive." Mychaylo Prystupa, "First Nations 'pulling a Chilcotin' in resource development battles across Canada" (20 June 2015) National Observer, online: https://www.nationalobserver.com/2015/06/20/news/first-nations-pulling-chilcotin-resource-development-battles-across-canada.

[342] *Ibid.*

> or mining, poisoning everything, it's also doing a number on us, as people who live on the land and care about those things.[343]

In other words, as Gilbert explains, water is the common life-giving thread that weaves through everything and everyone. As such, when land, water, or other life is negatively impacted, *people* are impacted. Water that is displaced, diverted in excessive quantities, or contaminated making it unsafe for human and non-human consumption, has a profound effect on Tsilhqot'in people physically, emotionally and spiritually because of their deep connection to water as a relation. Therefore, Tsilhqot'in laws applied to protect people against harm must necessarily extend to protect land and water because ultimately Tsilhqot'in people will be at the receiving end.

Had Taseko Mines been provided with knowledge of Tsilhqot'in law in a formal manner, such as legislation, the corporation may have proceeded differently. I suggest that moving Tsilhqot'in law from an internal knowledge to a strategically prepared public knowledge in the form of Tsilhqot'in legislation would invite a different understanding, debate, and deliberation between the Nation and other groups.[344]

Conclusion

The Tsilhqot'in legal order does not have a specifically designated category of water law. Yet Tsilhqot'in laws, *dechen ts'edilhtan*, governing people and their relationships extend to water because everything is connected and interconnected. The principles of interconnectedness, respect, and reciprocity serve to buttress healthy relations, healthy environments, and thus healthy humans who can rely on the land for their continued health into future generation. There

[343] Interview of Gilbert Solomon in Xeni Gwet'in (4 July 2017, am) at 2.
[344] I address strategic legislation in a later chapter. Simply put, not all Tsilhqot'in law should or could be made public, as it is embodied in individuals, nor would that project be particularly useful. However, relevant parts of Tsilhqot'in law should be drafted into law to provide non-Tsilhqot'in with the legal rules and expectations of the Nation. This is what I mean by strategic legislation.

are other interconnecting principles to support this reasoning, such as the obligation to protect families, which will be discussed in the next chapter. Briefly, the obligation to protect one's family compels people to act respectfully in relationships based on reciprocity to maintain balance with the land to ensure continued protection of their families. One aspect of protecting a family is to ensure they have enough good food and clean water to sustain themselves. Therefore, protecting the family reinforces other principles such as respect and reciprocity if for no other reason than to serve the interest of the family and its members.

The analysis of Tsilhqot'in law and its application to water through these principles (however linguistically and conceptually translated) contain various categories as a framework for articulating the law, such as who are legitimate decision makers or what is the substantive law regarding a particular matter?[345] The legal order does not delineate individual categories of law. Law and its ways of existing and operating through people do so holistically. Tsilhqot'in law is and remains dynamic. As issues change, so will the nuances of legal principles and processes in keeping with a reasoned and efficient response. Providing reasoned, efficient responses to problems is a generally accepted goal to maintain balance, safety, and predictability in Tsilhqot'in society. This is achieved through obligations created to manage relationships in stasis, which embraces sustainability. The next chapter expands and applies the theory of Tsilhqot'in law with a detailed analysis of *dechen ts'edilhtan* as applied to water.

[345] Again, this tracks, preliminarily at least, Napoleon's and Friedland's work as explained in, *Gathering the Threads*, *supra* note 128.

Into the Fray

After a long slow sweep along the Fraser River, so close to the water I could reach out and touch the swirling currents, we climbed again up the western bank of dried sandy till that makes up the Tsilhqot'in nen. We flew westward, the land slipping by beneath as though on a hidden conveyor. Over blue serpentine veins embedded in channels along the ground, I can see how the Earth's blood flows through the land carrying nourishment, life to all those who rely upon her. As we soared across the landscape like clouds silently drifting, I noticed paved roads had turned to gravel, and had all but disappeared now. Still, we continued. Deep into places that appear left alone, balanced. Just when I thought we would soon find the end of the earth, a tall line of peaks begin to stand up along the horizon. The breathtaking Coast Range. It *is* the end of the earth. Enchanted by how those distant mountains grow as though under their own agency, we dropped down and landed on the top of a birch tree overlooking a beautiful little lake.

Datsan looks down, carefully scanning up and down the shores of the dark waters of the lake. Completely surrounded by forest cover, I couldn't imagine how this little lake could ever be known by anyone. As soon as the thought crossed my mind, a rustling of branches immediately below us caught my attention. Then, out onto the rocky shoreline stepped a woman wearing a pack, followed by three children. They sat down on the gravel. The woman hoisted the pack and started pulling out a net. The kids watched. Easily bored, the youngest picked up a stone and threw it into the water. His mother put her finger to her lips and said something quietly in the language. I seemed to understand the words, translating to, "don't

disturb the water," I think it was, "you'll upset the spirits and scare away the fish." The child squatted back down and started helping the others stretch out the net.

As the scene played out below me, I started noticing sounds. My hearing was heightened in this deafeningly quiet place. My vision, too improved, as images that were once out of focus became crystal clear. Down the lake I could see a marten approach the water. He started splashing around, washing his hands. He had a small fish, which he quickly began gobbling down with a delightful ferocity. Further along, a bird swooped down for a drink, and I could see two tiny swallows darting across the surface, feasting on the mosquitoes that arose from brackish shallows. At the far end was a pile of twigs, carefully constructed and rising out of the water's edge like the back of a giant turtle. Then a beaver popped her head up along side the den, and swam out into the lake leaving a quiet wake trailing behind her. Across the shore, two small deer broke through the forest cover and cautiously made their way to the water's edge for a drink. Down below, the woman and her children had set their net, and were weaving together a rack made up of several branches found along the forest floor. All this was happening along this lake that, upon first arrival, seemed so remote and desolate. I realized it seemed that way because I couldn't see. I couldn't hear. Or perhaps I wasn't listening or looking.

Datsan had lent me his eyes and ears so I could see and hear what I was supposed to. This was a busy place that provided for a large community or communities of inhabitants. Datsan clucked and started getting agitated. He started hopping around on the branch, sticking his chest out and beating on it with his wings. Thump, thump, thump. A steady beat as he jumped and circled effortlessly among the treetop branches. He thrust his beak into

the air and started groaning out a deep guttural sound. As he swirled, I caught an image of a person, dancing. But it was Datsan. Then I saw it again. A person, hopping, swirling, dancing. Datsan was dancing and drumming, and singing his shrill raven song. The tree started trembling and I noticed the sun started moving perceptibly across the sky. It gathered speed in its celestial arch toward the west. The drumming got deeper, the singing more intense. The sun went down and came up again in a brief moment, swung across they sky again and disappeared. The people had left, and everything moved at lightening speed below at the little lake. The tree trembled and the sun came and went so fast that there was only a constant state of twilight. Daylight had vanished. Time blurred. Then, when everything was white, the sun slowed down and daylight returned. I looked at Datsan. Serious, contemplative.

A young man walks out onto the frozen lake and starts chipping at the ice until he reaches water. He drops a line and sits there. He lifts his line and drops it again, gently raising and lowering it. He does this for hours, but nothing. I notice he is wearing skins and fur, and I look at Datsan again. Had he brought us back in time? He must have. The young man waits patiently, fishing, waiting. I hear a rumble, and notice a rolling cloud descending a mountainside off in the distance. It's an avalanche. It looks as though it will sweep across the valley and swallow the little lake, young man and all. The boy stands, hearing the tremendous roar. The avalanche hits the valley floor and a massive cloud of white powder and fog race out onto the far edge of the lake. Suddenly, the boy gets a tug on his line. He pulls out a fish and quickly drops his line back in the hole. The cloud keeps coming, The ice cracks. A loud boom rings out throughout the valley. He should run. But he doesn't.

He catches another, and another, and another as the cloud swiftly approaches. Another boom. Another catch. Finally, the cloud settles at the boy's feet at the little pile of fish he has accumulated. He seems bewildered, and talks to the air. Then Datsan hops, and jumps, jumping again, drumming again. He starts singing, and the sun launches into motion. The sky turns dim grey again. The boy is gone. The tree shakes and trembles. This time, Raven's dance lasts a while. The land switches from white to green and back again, and again, and again. Just when I though we were going to reach the edge of time, the daylight starts returning, but the sun keeps sweeping across the sky. I hear a loud buzz off in the distance.

The trees leading to the lake from the east begin to tremble and disappear, as though a large beast is swallowing them up. Then I notice a path. No, a road. A man in a bright red hardhat steps out on the shore of the lake, chainsaw in hand. The sun speeds up, more and more people in bright safety vests swirl around below, swallowing up the greenery as though they are starving. East to west, east to west, the sun swings relentless through its celestial arch. The roar gets louder and the heavy machines show up. They dig into Earth, showing the gravel beneath the topsoil, like tearing skin from flesh. The pace is dizzying. I can see Datsan is tireless and tired all at once. People no longer come to the lake, which starts disappearing amid the open cancerous wound growing across the valley. Before long, the lake is a pond of grey-green muck that the trucks drive through on their way to haul another load of flesh from our mother. The sun slows to a halt. The water is gone, or dirty and unrecognizable, undrinkable. People come and go from the buildings and machines that have replaced the trees and shrubs, transforming it from natural and healthy into something industrial and foul.

I look over to Datsan. A smirk seems to flicker across his facial gesture, and he jumps from the tree and swoops down toward the chaos below, leaving me behind. "Hey, where are you going?" I grunt, but it only comes out as a garbled groan. I teeter and reach out to catch the branch and notice my arm is covered in shiny black feathers. My mouth is constrained, tight, held together in a long curved beak. I look down and see Datsan. He is standing there at the door of a truck, looking up at me. Smiling. It is me I see! He has switched us. He flashes a wave and jumps into the truck, spitting gravel as he drives away, leaving me to sort out my predicament. What can I do as a bird? I look around, and the question reverberates in my mind. What can I do as a human?

I lean forward and topple out of the tree, realizing I have no clue about how to fly. As I drop, I stretch out my arms and throw my head back. The air gathers under my wings and I swoop forward out of my fall into a sweeping dive, pulling up just short of hitting the side of a metal shack. I climb effortlessly and see the ground get smaller beneath me. The scale of the destruction comes into full view. I flap my wings just to get away, to find somewhere that looked more like the lake and the community that Datsan first brought me to, but looking around, those places seem to be fewer and much farther between.

Q: How do you know that there's a lodge there?

A: We went there about two years ago, and you can't even go near the water, the river, in that area now.

Q: And what were you doing there two years ago?

A: We were hunting. We were hunting for animals.

Q: And why can't you go near the water?

A: The -- the white person that owns the place doesn't want anybody going through his property.

- *Christine Cooper, Trial testimony*[346]

Chapter 4: Tu (*Water*) ts'edilhtan (Tsilhqot'in Law and Water)

1. Introduction

In this chapter, I cover access to and use of water as depicted in the oral tradition as a means of identifying and supporting the assertion of Tsilhqot'in jurisdiction over water. Jurisdiction is followed by the interpretation and articulation of *dechen ts'edilhtan* as it relates to water, offering a tangible legal regime with expectations that govern people's relationships to water. This analysis would be rather hollow without offering some understanding of people's reliance on and uses to which they put water, such as spiritual, sustenance, and health care and healing. The categories emerging from a discussion of water-uses minimally include an expectation of a particular water quality, water quantity, and natural flows. Expectations that water will exist with certain characteristics is informative as they influence Tsilhqot'in people's adherence to their laws, which will help in the identification of a contemporary governance

[346] Trial transcripts, volume 83, 2 May 2005 (day 223) at 14530.

framework for the use and access to water set out in the next chapter. From the articulation of laws, I derive the characteristics of water as mentioned above in categories that will allow for dialogue with the common law and as a basis for contemporary governance. I conclude that Tsilhqot'in people continue to possess and exercise valid legal authority over their waters according to Tsilhqot'in law despite colonial intervention of the past 150 years. *Dechen ts'edilhtan* applied to water is not only well-reasoned, but it provides a way of thinking about water that offers guidance toward a shared understanding for the effective governance of a healthy water supply into the future.

2. Tsilhqot'in Legal Context

The origins of Tsilhqot'in in their country is set against the backdrop of British colonialism, which has strived relentlessly to usurp Tsilhqot'in jurisdiction and ownership of their land. While the Crown's origins in British Columbia are a matter of history and public record, First Nation's origins are often silenced or trivialized as the mythological remnants of the esoteric nuances of cultural phenomena.[347] Undeterred by the injustice of the colonial imposition, the Tsilhqot'in Nation fervently maintains their authority over their lands, while

[347] On the problematic use of *culture* in Canadian courts, see Neil Vallance, "The Misuse of 'Culture' by the Supreme Court of Canada" in *Diversity and Equality: The Changing Framework of Freedom in Canada*, Avigail Eisenberg, ed (UBC Press, 2006) 97 at 99. Vallance argues the SCC uses the term repetitively without providing a definition, creating ambiguity and uncertainty for litigants. Michael Asch has argued that culture has been used in courts to identify Indigenous societies as inferior to western society, "*Calder* and the Representation of Indigenous Society in Canadian Jurisprudence" in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Hamar Foster, Heather Raven, and Jeremy Webber, eds (UBC Press, 2007) 101 at 104, 110. For discussions on the trivializing of oral histories in Canadian courts, see Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Vancouver: Talon Books, 1998) at 164. Culhane explains how anthropologist and expert witness Sheila Robinson describes pre-contact Gitxsan and Wet'suwet'en people as "static" and "incapable of change", while their oral traditions conveyed "supernatural occurrences" as a "basis of claim in many myths". Additionally, Lorraine Weir identifies the difficulty contemporary courts have in accepting oral traditions evidence and given them weight, *supra* note 127.

denouncing the Crown's attempted undermining of that authority in their *Declaration of Sovereignty*:

> From the Fraser River to the Coastal Mountains and from the territory of the Stl'atl'imx Nation to the territory of the Carrier Nations is Tsilhqot'in Nen (Chilcotin country). The heart of our country is the Tsilhqox (the Chilcotin River) and its tributary lakes and streams. This has been the territory of the Tsilhqot'in Nation for longer than any man can say and it will always be our country; the outlying parts we have always shared with our neighbours – Nuxalk, Kwakiutl, Lillouet, Carrier and Shuswap –but the heartland belongs to none but the Tsilhqot'in.
>
> […]
>
> When the Queen of England extended to our nation the protection of her law, by including our territory in the colony of British Columbia in 1858, she did so without our knowledge or consent.
>
> […]
>
> The Tsilhqot'in Nation affirms, asserts, and strives to exercise full control over our traditional territories and over the government within our lands. Our jurisdiction to govern our territory and our people is conferred upon us by the Creator, to govern and maintain and protect the traditional territory in accordance with natural law for the benefit of all living things existing on our land, for this generation and for those yet unborn. We have been the victims of colonization by Britain, Canada and the Province of British Columbia. We insist upon our right to decolonize and drive those governments from our land.[348]

Canadian politicians may consider the *Declaration* to be little more than hollow rhetoric, as the knowledge to support the claims it contains has not been readily available to outsiders.[349] This section should help ground the statements about jurisdiction and ownership made in the *Declaration* within Tsilhqot'in origins and its associated source of laws within *dechen ts'edilhtan* as they apply to water.

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[348] General Assembly of the Tsilhqot'in Nation, *Declaration of Sovereignty*, 1998 reaffirming the same of 1983, online: http://www.tsilhqotin.ca/Portals/0/PDFs/98DeclarationSovereignty.pdf.

[349] For example, when tensions were heating up over the threat of clear cut logging in the Nemiah Valley in the 1990s, Social Credit Forestry Minister, Claude Richmond, is reported to have "complained in the Legislature" that "a very few militant native Indians have chosen to draw an area on the map the size of many European countries and proclaim it as theirs," reported in Deborah Wilson, "Chilcotin Indians threaten blockade B.C. band may cut off logging to force land claim settlement", *The Globe and Mail* (2 July 1990), online: https://search-proquest-com.ezproxy.library.uvic.ca/docview/385635627.

3. Access to Water:

a. Tsilhqot'in Origins, the Source of Authority and Jurisdiction

I begin the analysis of Tsilhqot'in law about water with the concept of access because it broaches overarching categories of authority related to land and jurisdiction over conceptual legal matters within Tsilhqot'in geographic space and relationships. Since their arrival in the *nen* at least a few centuries ago, Tsilhqot'in people have and continue to aggressively assert their control over their country.[350] Control is asserted over their country as an interconnected whole, the Tsilhqot'in never having severed out any specific aspect of the *nen* to outside, colonial control.[351] Given the tension this creates against the uncompromising assertion of Crown sovereignty, mere assertions alone seem incapable of restoring effective authority over many aspects within the ambit of the Tsilhqot'in world, particularly natural resources.

Articulating a theory toward the source of Tsilhqot'in jurisdiction leans toward validation of the claims I make here. The source of jurisdiction has its roots in the people's introduction to the place, from (and through) which they *become* a people. When using the term jurisdiction, I am actually pressing toward a concept of inherent jurisdictional relationality which exists within the ontological and epistemological spaces of Tsilhqot'in legal reasoning – the relationships *within* the immediate Tsilhqot'in daily lives. This jurisdiction flows from the inherent right to self-government, which is undefined, asserted, and may be contested by the Crown and litigated or negotiated through agreements.[352] One of the sources of inherent jurisdictional relationality is

[350] To provide a time frame, I am relying on the evidence that was accepted in the trial, *Tsilhqot'in* BCSC at para 218. To the aggressive defence of their country, see paras 931, 935.
[351] As asserted in the *Declaration*, *supra* note 348.
[352] McNeil defines jurisdiction as "governmental authority", *supra* note 281 at 1. For an example of when jurisdiction is asserted and challenged in litigation, see *R v Pamajewon* [1996] 2 SCR 821. For an agreement recognizing jurisdiction over specific matters such as governance, culture and language, and children and families, see Tsilhqot'in National Government, Province of British Columbia, and Canada, *Gwets'en Nilt'l Pathway Agreement* (25 July 2019) at 4.

constituted through direct engagement with the land itself, as depicted in origin stories beginning with *Lendix'tcux*.[353]

The Tsilhqot'in origin story of *Lendix'tcux* (*lhin desch'osh* - little dog) explains the origins of Tsilhqot'in people in their country.[354] Lendix'tcux is a progenitor of the Tsilhqot'in people. He was the husband of a chief's daughter who, with his wife's consent and teachings, journeyed with their three sons into the Tsilhqot'in country. I have argued elsewhere that this initial excursion into Tsilhqot'in land involved various interactions with the existing inhabitants, which amount to acquisition of jurisdiction over the land, creating a political and geographic territory for the Tsilhqot'in people and their descendants.[355]

The first place the family reached in this journey was a river. The river was home to a moose who "killed every one who tried to cross."[356] As discussed earlier, Lendix'tcux and his sons devised and implemented a plan to overcome the moose.[357] After Lendix'tcux kills the moose, he and his sons made use of the moose's remains: "So they cut the carcass up into small pieces, and from the pieces they made all sorts of animals."[358] This act of creation is one complex mechanism for establishing authority or jurisdiction, as I explain below.

The first encounter of Lendix'tcux and his sons begins at a dangerous point of entry into new lands guarded by the deadly moose. The initial point is a challenge that on one hand could lead to death and a denial of entry or on the other hand lead to success in which case entry is earned and won. The decision to devise and implement a strategy to gain access to the

[353] Beginning with *Lendix'tcux*, other origin stories include Raven trickster stories and stories of other powerful beings such as Bear, Wind, Sun, and Salmon.
[354] Farrand, *supra* note 49 at 7-14. This was discussed earlier in the dissertation to articulate the principle of reciprocity.
[355] Hanna, *supra* note 156 at 376-79.
[356] Farrand, *supra* note 49 at 10.
[357] *Ibid*. Also see the account in Chapter 3 of this dissertation under Reciprocity.
[358] *Ibid*.

Tsilhqot'in country is an account of decision-making which requires legitimate authority and individual and collective agency, all of which the mother in the Lendix'tcux story possesses. The decision to journey into the Tsilhqot'in places the family in a position of authority over those who resist their presence on the land and threaten their lives. The first decisions made about the new country occurs when Lendix'tcux and his sons decide to journey into the Tsilhqot'in country. This decision rests with ultimate authority of the matriarch of the family, who must first decide whether to provide her consent to journey.

The wife and mother of this family is the ultimate decision-maker, as despite being abandoned by her community, she upheld her responsibilities to her children and husband, with little help from Lendix'tcux it seems. The inference in the story is that her children and husband recognize her authority, as they learn from her, and abide her decisions. Her teachings provide her husband and sons with the knowledge to be safe and successful in their journey, suggesting she has prior knowledge of those lands and its inhabitants. There is no mention of the mother's origins, but she clearly had some intimate knowledge of the Tsilhqot'in country, which suggests she may have some ancestral connection to the *nen*. If (as I suspect) this story connects to the Dene story of the first person on earth, first recorded and published by explorer Samuel Hearne in 1772, the woman at the head of the family, the ultimate progenitor of Dene future generations, received the land and all that it contains directly from the Creator. [359] In the Tsilhqot'in origin story, this 'first woman' may have lived in the Tsilhqot'in country previously, or, more broadly, may have been the first person as in the story Hearne recorded.

I argue that this first strategic deployment to gain safe access establishes the initial strand of Tsilhqot'in authority in the land that will become Tsilhqot'in *nen*. This initial act of entry

[359] Hearne, *supra* note 203 at 324.

involves passage across a river as a defining landmark to launch their travels. Unsurprisingly, the name "Tsilhqot'in" means the people of the river (*Tsilhqox* – a river and *t'in* – person of).[360] The origins of the people of the Tsilhqox River begin by crossing a river, meaning that the river, water, constitutes the identity of the Tsilhqot'in people in both name and experience.

The next part of this initial encounter involves the remains of the moose. The family "made all sorts of animals" out of the remains. This is an act of creation or perhaps transformation. The new animals are created out of dead remains of the moose, or, in other words, the moose is transformed into other entities.[361] The story only states they "made" the animals, suggesting (if the translation is reasonably accurate) the act was one of creation. Either way, the family was instrumental in materializing the animals which now exist in the *nen*. There is a logic that follows creation, whether actual or perceived, suggesting the story is a metaphor for the birth of relationship at that moment.

I acknowledge the potential analogies in the common law around ownership of property, intellectual property rights, and even patent law that vest with the creator of new items, concepts, works, etc., but do not suggest these are even remotely related here. Concepts of family are more closely aligned to this act of creation, as the act imparts a relationship from which responsibilities flow, similar to when children are born. This does not create ownership; however, there are responsibilities to ensure the continued existence of these 'offspring' such that they may exist to be of assistance to the proverbial parents in the future. In the creation of animals, the obligation to ensure continued existence is reciprocated by a future reliance on those animals to sustain human life. Therefor, jurisdiction is established in two ways over those

[360] Linda Smith, *supra* note 72 at 10.
[361] There are stories of transformation in the Tsilhqot'in legal order such as the *Story of the Salmon Boy*, where children change back and forth between human and salmon forms. Farrand, *supra* note 49 at 24.

animals. Creation conveys jurisdiction over that which is created, and the obligation to ensure continued existence reinforces the initial authority over the land requiring jurisdiction to manage habitats upon which the animals rely to ensure healthy viable populations. The jurisdiction over land is necessarily conveyed through the act of creating living entities, which, as mentioned, supports the authority gained by successful entry into the country.

At the end of the journey, Lendix'tcux and his sons are turned into stones, thus anchoring the origins of Tsilhqot'in entry into, and jurisdiction over, the *nen* for future generations as a form of writing law onto the land.[362] The Lendix'tcux origin story connects Tsilhqot'in people to the place of their homelands, which is inextricably linked to the waters of Tsilhqot'in *nen*. The following example offers support for the constitutive significance of water.

After Lendix'tcux and his sons create the animals and move on, they realize that they did not make anything out of the brain. This omission carried some significance for them, as they returned to the site and "tried again and again to make some animal from the brain".[363] After several attempts, they finally make a frog, which they threw into the water to live. I mention this part of the story because it provides a first instance of the rule to use everything that is taken, which may also be interpreted more generally as a prohibition against waste.[364] There are other stories in the tradition embodying a principle discouraging waste involving water, which comes up in interviews and is exhibited through the actions of the nation, defining the scope of the principle. Before approaching the details of this and other principles, understanding Tsilhqot'in origins giving rise to jurisdiction helps establish the validity of their jurisdiction with the competing assertion of Crown sovereignty and resulting Canadian law.

[362] Morales, *supra note* 84 at 42.
[363] Farrand, *supra* note 49 at 10.
[364] For another analysis on this concept see Hanna, *supra* note 156 at 380-383.

A foundational aspect of Tsilhqot'in valid authority to their lands is that the establishment of the relationship is with the land itself through its human and non-human inhabitants. This reflects a deep engagement with the land resulting in an inextricable connection to place that cannot be ousted by foreign influence without physical force.[365] The analysis provided in this chapter builds on the previous chapter by delving deeper into the connection to land, showing how the people *are* the land with water as the constitutive connective force flowing land through the people. One example in the interviews of this inseparability was given when the late Chief Ivor Myers had his ashes spread at a dried up marsh to bring the water back, as Marion William explained,

> There was another way to bring water back. That, Popcorn Cabin. They had a little lake there but it dried out. One of our past leaders that passed on, I recollect, Ivor Myers, he wanted to burn his ashes and put his ashes at Popcorn Cabin. And not too long after that the lake near Popcorn Cabin came back. Spiritual way of bringing the water back, I guess.[366]

[365] Some argue in persuasive detail that attempts to rout Tsilhqot'in people from the *nen* amounts to attempted genocide through the wilful spread of smallpox in the 19th century. See Tom Swanky, *The True Story of Canada's 'War' of Extermination on the Pacific* (Lulu.com, 2013). This reference is controversial, and is merely provided to underscore my point about dispossession. For a good critique of Swanky's book (which the BC Local News refers to as a novel, see Caitlin Thompson, "Tom Swanky's new book details 'smallpox war' in Bella Coola" (30 Nov 2016) online: https://www.bclocalnews.com/news/tom-swankys-new-book-details-smallpox-war-in-bella-coola/) see Robin Fisher's review, "The True Story of Canada's "War" of Extermination on the Pacific plus the Tsilhqot' in and Other First Nations Resistance," (Summer 2014) 182 BC Studies 217-218, where he comments "I have several concerns with the way this conclusion is presented. The line of argument is circuitous rather than straightforward and, therefore, difficult to follow," at 217. For a counter narrative, see Sage Birchwater, *Chilcotin Chronicles Stories of Adventure and Intrigue from British Columbia's Central Interior* (Toronto: Caitlin Press, 2017). In 2014, then Premier Christy Clark apologized for the execution of six Tsilhqot'in Chiefs, stating, "After the colony of British Columbia was established, Tsilhqot'in lands were declared open for access without notice or without effort in diplomacy. Many newcomers made their way into the interior. Some of those came into conflict with the Tsilhqot'in, and some brought with them an even greater danger. And that was smallpox, which by some reliable historical accounts there is indication was spread intentionally," online: https://www.youtube.com/watch?v=FXCsxf4-EPE.

[366] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 19. Confirmed by Eileen William, as translated by Susie Lulua, "She just said that this when former chief passed away, he wanted to be cremated in a meadow. There's a Tsilhqot'in names its called "Jigwedijan" in English it's called Popcorn Cabin. In the meadow there they burned his body. Only guys can go there, no women were allowed to go there. They spread his ashes all around there. The former chief, Ivor Myers, wanted to do that so they could bring water back to that place. Now there is a lot of water there, like a lake. From the ground." Interview of Marion William at Xeni Gwet'in (5 July 2017) at 19.

One of the few ways to make sense of this occurrence is the returning of the chief's ashes to the ground being sufficient to bring back water, as they are one and the same. There is a spiritual aspect to this event, but the connection between the Chief's remains and water is not missed by the people, as Susie Lulua stated, it was a "sacrifice [of] his body to do that".[367] Again, this example starts to reach beyond my ability to understand the complexity of the relationship with the sacred; however, the story as a live and lived event carries the concept of constitutional inseparability. That is, the human body and the water are together in life and death, in this world and beyond.

Being constituted of the land through water's permeable presence in all manner of life is the bedrock upon which Tsilhqot'in worldview and resulting law-ways are predicated. Journeying through the worldview illuminates the logic and reason behind the purpose and function of laws which are, and remain, valid and contemporary in their own right. The remainder of this dissertation proceeds on acceptance of the validity of Tsilhqot'in jurisdiction, within which, at least in part, laws are rooted.[368] Accepting also the embedded logic which prevents the inseparability of water from the land, people, and everything else, jurisdiction includes water generally and access to water specifically.

b. Access through Relationship

Given the Crown's sovereign claim to own all the lands and waters in British Columbia vis-à-vis Tsilhqot'in origins, the unavoidable question is how these disparate sources of authority

[367] *Ibid.*

[368] Mills, *supra* note 8, argues that laws are rooted in the "narrative lifeworlds," (which I refer to as *worldview*) and the "logical-structural lifeways," (which I refer to as *law ways* or simply *ways of being*), forming a people's constituted legality, (which I refer to as *legal order* or *legal milieu*) at 10-11. I argue that jurisdictional relationality is the authority to engage in and make decisions about relationships is not a unilateral authority, but one consisting of responsibilities of (minimally) reciprocity, gifting, and sharing that Mills addresses in his description of belonging to a community "constituted […] in networks of mutual aide," at 69.

may be reconciled?[369] This is the kind of question I hope this work lends itself to, which I take up more readily in the next chapter. For now, I am content with framing this tension as a means of setting out relationality from a Tsilhqot'in legal perspective. The Supreme Court of Canada has provided a potential pathway for responding to this question. Concepts in Canadian Aboriginal law are to be interpreted at the confluence of both Indigenous and European-based systems of law.[370] But what of Tsilhqot'in pathways to address the same problem? I do not attempt to analogize Tsilhqot'in acquisition of their country and the associated jurisdiction with English law related to acquiring new territory.[371] I do not believe these are similar, as it is Tsilhqot'in law that provides for the legitimacy of acquiring their authority to their country, not English law. To articulate the legitimacy of Tsilhqot'in inherent jurisdictional relationality with the land with European political, philosophical, and legal referents would be to compromise Tsilhqot'in structures of legality.[372] By all accounts, including the oral tradition, Tsilhqot'in people's knowledge and express exercise of government, legitimate authority, ownership, and

[369] *Water Sustainability Act* [SBC 2014] Chapter 15, s. 5(1) "The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except insofar as private rights have been established under authorizations." Groundwater is similarly vested in the Provincial government under s.5(2).

[370] *Van der Peet* at para 42; *Delgamuukw* at para 145. In Addition, Lamer CJC in *Van der Peet* held that Indigenous occupation of their lands could be reconciled with the Crown's assertion of sovereignty through s.35(1), which begs the question, how may the Crown's assertion of sovereignty be reconciled with the people on whose lands it now occupies according to any number of Indigenous legal orders? "[W]hat s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown," *ibid* at 31.

[371] The legal means of acquiring new land being settlement where a condition of *terra nullius* exists, conquer or cede through treaty. See Earl of Halsbury, *The Laws of England Being a Complete Statement of the Whole Law of England*, vol 5, 3rd ed by Lord Simonds et al., eds. (London, UK: Butterworths, 1953) at 544.

[372] Mills, *supra* note 8 at 10. As a general example, the plaintiffs in *Campbell v British Columbia* [2000] 4 CNLR 1 argued jurisdiction is a product of the Crown's assertion of sovereignty, and all other legal and political authority finds its legitimacy in that origin, otherwise it does not exist. The plaintiffs argued: "the [Nisga'a] Treaty violates the Constitution because parts of it purport to bestow upon the governing body of the Nisga'a Nation legislative jurisdiction inconsistent with the exhaustive division of powers granted to Parliament and the Legislative Assemblies of the Provinces by Sections 91 and 92 of the *Constitution Act, 1867*," at para 12. Although the Court ultimately rejected this argument, holding that legislative division of powers was not exhaustive, leaving room for Indigenous legislative jurisdiction (para 180), the BC Court of Appeal (a related case with different plaintiffs) abstained from deciding that issue, but instead held that Nisga'a legislative authority was a valid delegation within the Crown's jurisdiction, implicitly reinforcing the plaintiff's trial argument. See *Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)* 2013 BCCA 49 at para 8.

jurisdiction relating to the *nen* rests with the Tsilhqot'in people.[373] This is a good place from which to consider access to water through a Tsilhqot'in-centric approach, which of course is necessarily by way of the *nen*.

I have argued by way of example in Chapter 2 that access to land is governed according to the Tsilhqot'in legal order based on provisional relationships of reciprocity, rather than property interests acquired in a payment of rents or tolls. The law of relationality is also the basis for outsiders to gain access to water through the legal order. Relationality, with its commitments to reciprocate benefits is firmly grounded in two claims: 1) English concepts of property are not internally intelligible to the Tsilhqot'in worldview, and do not effectively capture their relationship to the land; and 2) the proper description of Tsilhqot'in relationship to the land ensures against starvation.[374] These interrelated concepts combine to create a path for outsiders to access water (and land generally).

In my years of research, I have never heard anyone say or suggest they possessed any authority to give away the land. Neither are there any references to a concept of divorcing oneself from the *nen* in a manner that would forevermore prevent their ability to remain in relationship with the *nen*.[375] I understand the reason for this logical impossibility to be that Tsilhqot'in people are not separate from the land, as discussed earlier. People who are deeply physically, emotionally, spiritually, and mentally comprised of the land tend not to conceive of its alienation.

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[373] The underlying sentiment in interviews is the inseparable connection of the people to the land and their authority over the land, which is often ignored as people are "bullied" so outsiders can get what they want from the land. See Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 14, 16. The explicit assertion of jurisdiction is stated in the Tsilhqot'in *Declaration of Sovereignty*, *supra* note 348.

[374] For a good discussion of English property in conversation with Indigenous concepts of relationality, see Bradley Bryan, "Property as Ontology: On Aboriginal and English Understandings of Ownership" (2000) 13:1 Can JL & Jur.

[375] It is this reckoning that emphasizes the absurdity and violence inherent in BC's *Land Title Act* the authorizes non-Tsilhqot'in bureaucrats to award fee simple interests in the *nen* to non-Tsilhqot'in people, effectively and finally divorcing Tsilhqot'in people from their land.

When Tsilhqot'in provide access to outsiders, they are offering access through a reciprocal relationship that exchanges access to *nen* (which includes access to the people) for some benefit in return. One means of accomplishing this is through marriage. A person who married into the Nation had all the obligations under the legal system (e.g. to share and reciprocate) and would be expected to know their responsibilities.[376] This concept is mentioned in the story *The Man who married Eagle's Daughters*. Eagle gave his daughters in marriage to a man from whom Eagle had been taking groundhogs from his traps, and got his hand caught. The marriage was in exchange for Eagle's release from the trap. The man came to live with Eagle and his daughters. "Every day Eagle used to go out and kill ground-hogs while the man staid [sic] in the house with Eagle's daughters, and after a long time the man turned into an Eagle himself". [377] This passage implies that through marriage, after enough time has elapsed, the person who married-in has effectively become part of the family. If the person is now identified as part of that family (became an Eagle himself), then arguably they are also part of the people/community/nation. Marriage is but one avenue among others. Likewise, access may also be granted through the entry into and maintenance of a reciprocal relationship as friends, through the exchange of mutually beneficial gifts such as access in exchange for benefits gained by the access granted.

Access to the *nen* is access to Tsilhqot'in people, their communities, their experiences, knowledge and skills, which is highly relational comprising a *whole* Tsilhqot'in. The responsibilities that flow from this relationship, such as allowing people to share in some of the newcomer's harvest or giving trade goods results in peaceful, respectful interactions between

[376] See Foster, *supra* note 150 at 31-32.
[377] Farrand, *supra* note 49 at 39.

people.[378] Knowing that holism is at the root of meaning, the logic then that underpins the reciprocal relationship becomes more obvious. When Tsilhqot'in offer themselves in relationship, which, as explained, is access to all that it is to be Tsilhqot'in including land and water, there is a reason for doing so. The reason is to benefit the people and their communities to ensure longevity (the principle of protecting family and communities, as described below, and the protection of future generations).

Life becomes better secured against hunger in any environment, particularly the high plateau of the *nen* where summers can parch and winters can reach -60 degrees Celsius, when people work together.[379] Sharing the land with others improves the likelihood of increased food supply or other beneficial goods, which in turn helps ensure healthier families. There is no logic to allowing people into the *nen* if they would not provide something of benefit to Tsilhqot'in people. Even the new tools and implements the newcomers were bringing in were of value. And there was an identifiable difference between the reciprocal relationship expected and a transactional economy for Tsilhqot'in people, to which the historical record offers evidence.

Hamar Foster writes of an account leading to the Tsilhqot'in War in 1864. As Alfred Waddington's road builders were making their way up the Homathco Valley, they would seek the service of Tsilhqot'in for labour. They were only willing to pay for that labour, whereas Tsilhqot'in demanded food in addition to other payments, "you are in our country, you owe us

[378] See for example, Foster, *supra* note 150, the newcomers "plowed land for the Tsilhqot'in and gave them potatoes, water and 'the privilege of gleaning in the fields in harvest,'" at 16.
[379] Letter from HBC Chief Factor William Connolly [of *Connolly v Woolrich* notoriety] to HBC trader George McDougall (1 October 1829). Connolly was sharing his experience of a year earlier as he was instructing McDougal to establish a fort in the Chilcotin. "The scarcity, or rather total want of Provisions which so frequently prevails there compelling the Natives to abandon their Lands during the winter season, it would therefore be a perfectly useless expense to occupy the Country during their absence...When Salmon ascends the Chilcotin River, the Inhabitants collect a sufficiency for their subsistence and reside upon their Lands, but when a failure happens, which is at least three years out of four, they are reduced to the necessity of removing with their Families towards the Sea Coast in quest of subsistence..." Online at https://www.canadianmysteries.ca/sites/klatsassin/context/furtradeculture/397en.html.

food," which, when ignored, heightened tension in an increasingly complex escalation of events.[380] Foster explains:

> The Tsilhqot'in who worked on Waddington's road would not accept blankets or food as wages. They regarded these items as their due, simply for allowing the road to pass through their territory. In other words, compensation for what would otherwise be trespass was one thing, compensation for working on the road, quite another.[381]

Tsilhqot'in were not willing to enter into a relationship that only served the interest of the outsiders, which Foster correctly ascertains as the "straightforward application of a legal principle. The road crew was in their country, cutting their trees, catching their fish, killing their game and probably using and incorporating their traditional trail".[382] As discussed earlier, where I depart from Foster's analysis is that this is not simply an economic transaction for access, such as selling labour for some form of payment, but an invitation and expectation of an ongoing mutually beneficial relationship.

In addition to the distinction between a payment for labour and some form of exchange for access to the *nen* (e.g. food), Chief Alexis articulated an understanding of economic transactions: "Alexis told him [Peter O'Reilly] that they had 'no objections to see white men settle in our Country – we would like them to come for we could then buy from them instead of having to go so far for what we want."[383] Tsilhqot'in people would not have sold the *nen* in a similar manner, where ownership of property transfers to another indefinitely as in the transfer of

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[380] Foster, *supra* note 150 at 30. The discrepancy over debts owed was compiled on top of the intentional introduction of smallpox and stories of the abuse of Tsilhqot'in women. See Swanky, supra note 365 at 200-205. Although people may find some of Swanky's claims and methods questionable (see note 365), Canada's history toward Indigenous women is self-evident, as described in the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), online: https://www.mmiwg-ffada.ca/final-report/?fbclid=IwAR3e4oi2hnJApw-w-EkpiJ8mtdVlTxpTdaAuXL8w7lZwky4NMgO8BulPgKs. The fact that young Tsilhqot'in women would "prostitute themselves for food" is sufficient to prove that the roadbuilders were withholding food in exchange for sexual services, which is abuse of women. See Terry Glavin and the People of Nemiah, supra note 35 at 95.

[381] Foster, *supra* note 150 at 30.

[382] *Ibid*.

[383] Peter O'Reilly, "Diary, Trip to Chilcotin via Bute Inlet," July-August 1872, BCARS, O'Reilly Family Fonds, MS 2894, Box 8, File 5, cited in Foster, *ibid* at 22.

a fee simple interest, or for a period of time as in a lease or rent, where Tsilhqot'in vacate the *nen*. The concept does not exist in the law, and the suggestion of its possibility creates an absurdity, as people cannot be excised from the earth that comprises them. Consider Marion William's explanation of how access to the *nen* was achieved in the past:

> Gain access to the territory? Back in the day there was a lot of trading, they made a lot of relationships in the trading areas. They made friends, if they had friends they would gain the respect to come into the community. My grandfather made a lot of trading friends and would do a lot of fur in his time trading all the way down to Skeetchestn, he has some friends there. A lot of time our people would use our Shuswap friend's names to sell more trading furs and stuff like that. They had an agreement together to use each other's names.[384]

This statement offers two points on the argument I am making. The first is that access is gained through establishing relationships with people. I have used the term reciprocal relationships. The insight is that one thing is exchanged for another: access in exchange for goods. The second evident point is the logic behind relationships of trade, which is to make life better, easier, safer. Having a lot of friends, with whom names are shared to allow increased exchanges, achieves these aspirations. Having friends is arguably safer than having enemies (especially with historic enemies such as Secwepemc), and increasing access to neighbouring territories allows for a greater distribution of goods for exchange, improving the quality of life generally.

It seems straightforward to interpret receiving something as a *payment* for using land, seen through a common law lens. Foster acknowledges the inherent challenges of understanding a different system from a different perspective, "we will probably never know about the domestic law of particular groups. […] And sorting it all out at this distance is a daunting task."[385] The daunting task provides all the more reason to sort it out, because, although

[384] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 9.
[385] Foster, *supra* note 150 at 5, 9. It may be daunting, but far from new to scholarship. British Social Anthropology set out to tackle this task in the early 20th century, only to be unfairly disregarded as the "handmaids of colonialism."

daunting, it is not an impossible task.[386] The explanation of the worldview provided above with its interdependence and interconnected relationality makes a shift from *nen* to *tu* relatively simple. Given the holistic approach of the Tsilhqot'in worldview, access to *nen* means access to people means access to water. Having set out the principles that facilitate the connections to water and Tsilhqot'in authority over access to water through the *nen*, I now move the analysis to access and use of water specifically. A shift of focus to water seems somewhat contrived given the discussion thus far (because of its multiple connections to everything else). However, to facilitate conversation across legal orders, a water-focus is necessary, which makes the starting point rather contentious for a legal analysis. The starting point for thinking about access to water in the Tsilhqot'in worldview is to recognize that water is sacred.[387]

See Hanna, *supra* note 147 at 831-837. On British social anthropologists being erroneously construed as "handmaids of colonialism", see Talal Asad, *Anthropology and the Colonial Encounter* (Ithaca Press, 1973).

[386] I struggle with Mills' argument on this point, as briefly mentioned elsewhere in the dissertation. Mills argues "One may be able to translate distinct *content* across common logics, but translating across distinct logics just makes no sense: a logic is by definition the thing through which sense is made," at 13. Perhaps I am not disagreeing with the argument as much as I do not accept that there are systems of logic that do not have at least some common recognizable logics. I am returning to my argument here on a different matter, which is one of relationality. If there are no common logics, then there could not have been understanding and agreement between European newcomers and Indigenous peoples in the early days of the encounter giving rise to the Peace and Friendship Treaties. The tension between the western state and Indigenous nations is not one of incommensurability between logics, but is one of entering a relationship, an agreement, and one party failing to meet obligations and uphold their end of the bargain. The logic in the two-row wampum is clear enough for both western and Indigenous parties, yet Canada turned its back on the relationship the wampum belt serves to memorialize. Take for example, Robert Williams Jr's account of how these logics were understood across logic systems, "In countless treaties, councils, and negotiations, American Indians insisted upon the relevance of the principles contained in tribal traditions such as the *Gus-Wen-Tah* for ordering the unique and fractious kind of multicultural society that was emerging on the continent. Throughout this period, Europeans secured Indian trade, alliance, and goodwill by adapting themselves to tribal approaches to the problems of achieving law and peace in a multicultural world," in *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600 – 1800* (New York: Routledge, 1999) at 5. I accept that Mills is arguing that inevitably the liberal path will supersede if both Indigenous and liberal paths are followed simultaneously, thus ending the "the negotiated or hybrid paths" in death. I contend that the choice of paths may not be so clearly defined, and a strategic arrangement of paths may be the only logical choice. This is an internal negotiation that serves to address basic common human problems such as the ones with which we are dealing in law and governance, institutions with which all communities of people grapple, as there is no successful entirely anarchistic society (to my knowledge). Anthropologist Claude Lévi-Srauss' work on kinship offers an example of how a common problem produces logics that are intelligible across distinct groups. Levi-Strauss shows how distinct groups with distinct logic structures (pan-indigenism abhors difference) tackle the universal incest taboo by developing complex systems of marriage to serve the same ends. See Lévi-Srauss, *The Elementary Structures of Kinship*, *supra* note 142.

[387] Spirituality and Canadian law make awkward bedfellows. The sacred, which often associated with religion, is a contentious place to begin, as western law's liberality claims to be impervious to religious and cultural differences.

c. Accessing the Sacred and the Principle of Gilbert's Fridge

Water is sacred in the Tsilhqot'in world. It is sacred because people pray to it and use it in ceremony.[388] Water is also the source of spirits. As Gilbert Solomon explains, spirits are always in the water:

> Well this one is on medicine, and I could see the water, I could see people they are all smiling at me in the waves, a whole lot of them coming in. They are all happy, smiling. And I tell that to another medicine person, I said oh the water is smiling. So if you are on medicine you see a different information about the water. If you not do medicine, then you wouldn't know what you were doing with water.[389]

Marion William also spoke of the water people:

> I don't know how many years ago, Nemaiah here was flipped over, so our underwater people is our old-ancient Tsilhqot'in people. And there was a land underneath us as well, that's why we call them underwater people. The water people are also, they stand on top of each other. They also can reach the top of the water and also the star people as well. So they always had a connection to the land to the sky.[390]

Given some translation, I imagine the water people of whom the Elders speak are fish. As with other relations, fish are closely connected to the people, who consume and become fish themselves. Gilbert sheds light on the intimacy of the connection when he shares the *Story of the Salmon Boy*:

> Like say the elder will tell the boy, um, you see those children playing over there, you could eat one of those. Said they're salmon, eat one of those children that are playing over there, go eat one, but he said you have to do this to the bones, eat the head, just

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For a good discussion on this point see Benjamin Berger, "Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed" (2011) 19:2 Constitutional Forum Constitutionnel 41 at 49. A troubling aspect of this tension is when sacred beliefs are the grounds brought to bear in litigation, as in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, where the court applied a s. 2(a) *Charter* test, holding that the Court's role is to protect people's ability to believe in what they wish, but not the object or focal point of the belief itself, at par 71.

[388] "You pray to the water and the water helps you," Interview of Eileen William at Xeni Gwet'in (5 July 2017) at 3. "Water in sweats…I think my grandma said the women's…we use it as prayer in the sweats to help us cleanse our bodies, cleanse our minds, keep us balanced in life." Interview of Marion William at Xeni Gwet'in (5 July 2017) at 18.

[389] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 3.

[390] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 12-13.

> pieces, lot of different pieces on the head, and they have names, she is telling them the names. […] [Next year] they are dreaming up here. They know the salmon is going to come. They know the first salmon is the boy, they know that he is going to be the one. So they are going to do a ceremony on this salmon, and if we catch this salmon, we singing a song for him, dar dar dar, so he is going to come and then we going to catch him, and then we are going to blow in it's mouth the father does, blow in its mouth, and then takes its comb out, like a fish comb hair, to comb, comb its hair, the fish hair, and it turns back into a boy, you know like that (Gilbert mimes combing hair).[391]

The line between when a person stops being human and becomes salmon or returns to being a human is not apparent. The annual reliance on and consumption of salmon brings people and salmon together in a profound and intimate way. It is another example of the land becoming people, and people becoming and re-becoming Tsilhqot'in through the connection with water. The *nen*, the people, the salmon, the water, together as one. This begs the question, how is access to water determined, when it is tightly bound up in the lives of people? Tsilhqot'in appear to have a seemingly simple response: *share it*. The principle of sharing provides the mechanism for allowing access, while establishing and strengthening reciprocal relationships. Marion William elaborates on sharing in terms of reciprocal relationships and access to land/water:

> So a lot of trading could have been taking place in sharing. Like sharing mutual agreement relationships with each other. Good understanding of sharing the land, I guess. Like if you went into another community, they would do the same for us too. Good relationship that we had with each other.[392]

Water is shared because everyone needs it to live. Tsilhqot'in will not deny someone water who is in need. They share with other communities if they need it, as Christine Lulua explains (through a translator):

> if the communities surrounding us their water is not good, she [Christine] said that if they want to come and take our water, it's ok, she said, they can take our water. She said

[391] Also in Farrand, *supra* note 49 at 24.
[392] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 12. This statement is a good example of how sharing, reciprocity, relationships, access to land all begin to weave together within the worldview, making separation for analysis difficult and artificial.

> we do not want to sell it, she said. She said we have enough water here for everybody, so we do not need to sell it, we can just let them take some.[393]

Sharing is a principle embedded in the legal order that prevents people going without in times of need.[394] But what then of the limits to this principle? What does take *some* mean? An answer would require reasoning within Tsilhqot'in logic, and a valid authoritative decision within the framework of the specific circumstance. A principle emerged in the story of *The Young Man and Dt'an* that establishes that limits may exist to the amount that can be shared.[395] The limit to taking water for various personal uses that I am describing here, including to share with others, is defined as *taking an amount which does not negatively impact people downstream.*[396] Not many people mentioned this limit.[397] I believe it is premised on such a level of common sense within Tsilhqot'in logic, and more likely, Xeni Gwet'in logic, as to be profoundly obvious. People in the Nemiah Valley have access to significant fresh water sources. So it may be difficult for people who have not experienced shortage, as many Xeni Gwet'in have not experienced such shortage as to be able to imagine times of stress when water may be limited.[398] Nevertheless,

[393] Interview of Christine Lulua at Xeni Gwet'in (5 July 2017) at 13, translated by Susie Lulua.
[394] The principle of sharing arises in many stories. A key example on what can happen if a person does not share is the story, *Wolverine and Wolf*, Farrand, *supra* note 49 at 41. Wolverine refuses to share with Wolf when Wolf is "thin and hungry," and Wolf goes away "disappointed and angry." When the roles are reversed, Wolf refuses to share with Wolverine. Within a short time, Wolverine "fell down from exhaustion and died."
[395] Farrand, *supra* note 49 at 32. I point to this story as an example of a limit to sharing, in this case, it is a limit which prioritizes the individual for self-preservation reasons before sharing more widely to others.
[396] When asked about how much water a person could use, James Lulua replied, that they could take what they need as long as they are "not taking the water away from this little community down here." Interview of James Lulua at Xeni Gwet'in (4 July 2017) at 15.
[397] Marion William also expressed this limit in reference to outsiders who needed water to sustain their lives: "Probably just as long as they use the water in an appropriate way and it's to help them to continue to survive and live, to not use it in any wrong way, or hurting somebody else." Interview of Marion William at Xeni Gwet'in (5 July 2017) at 12.
[398] Translator Susie Lulua speaking on behalf of the Elders participating in the interview said, "they can't see that [how water can be wasted, or the concept of water waste]. There is just too much water here, we have plentiful they don't know how a person can waste water." Interview of Marvin William, Phyllis William, Christine Lulua (5 July 2017) at 15.

access to water is still subject to scrutiny, largely because of colonial imposition over the last 150 years.[399]

People were specific about controlling access to water, particularly when it comes to family fishing sites. People are expected to respect other families by respecting their access to a fishing spot which may have been in a family for generations. This exhibits an internally framed concept of ownership, the limits to which I was not able to fully explore as part of my research, and may be a separate project, as I am interested in the relationship between ownership and respecting others:

> they respected each other's fishing spot. It was called Unkai. Unkai is where your fishing with a net, and Kayough is where they put the net into the lake. Kayough, it's called Kayough. That's the families Kayough. Like say um, June Williams' Kayaough, Susie's Kayough. And I, if I come to Susie's Kayough, I wouldn't go there and take her spot you know. But they would be there already, you just got to come and ask permission. Say, could I uh, fish here?

The simplicity in the rule of asking permission aligns with expected internal limits that comes along with an offer to share. I refer to this internally enforced, and overtly obvious limit as Gilbert's Fridge.

Gilbert explained that he would not expect people to just up and use his fishing spot without asking him first, equating it with just walking into his house and going into his fridge for whatever they wanted without asking him. This logic applies to limits of how much (water, fish) could be taken when needed. The logic of Gilbert's Fridge imposes that reason and respect both apply. Imagine a company like Taseko Mines pulling up to Teztan Biny (Fish Lake) and commencing to drain it for their own purposes (use as a tailings pond). Imagine the CEO of

[399] "We have to control the ranchers, like where they put their cattle, like if it's downstream, in there where cows contaminate, they have about 200-300 head, need to keep them away from the streams. That'll be the ranchers' responsibilities, like ours, to check where their cows are at." Interview of James Lulua at Xeni Gwet'in (4 July 2017) at 15.

Taseko being invited into Gilbert's house and told, "help yourself to whatever's in the fridge," and he pulls up his truck and empties it. This is the logic applied to the *nen* and *tu* from the Tsilhqot'in perspective. It is here to be used if a person needs it, "you probably have to respect and acknowledge," but don't abuse the privilege and leave the people with nothing.[400] This sets out the key parameters around access to water. Tsilhqot'in will share, but reciprocity, respect, and acknowledgement underpin the consent-based relationship with Tsilhqot'in people, who may grant access to water for mutual benefit.[401]

To this point, managing access to *nen*/*tu* is performed through understanding the laws within the nation (as with family fishing spots or sharing access with other communities experiencing water shortages) and through relationships structured and governed within the legal order that Tsilhqot'in people may enter into with outsiders. Being Tsilhqot'in is being an integral part of the *nen*/*tu* environment, which means access is managed through access to the people themselves.

From here, I provide an analysis and interpretation of the Tsilhqot'in legal perspective of the relationship directly *with* water structured through its uses. I identify two core principles which provide a foundation for the relationship between law and water. These principles are: protection of the family and community, and respect and protection of the environment through non-disturbance. The other legal principles I discuss are entangled within the web, interacting with the core and one another to provide a dynamic logic-system that is responsive to the relationship with water. The other principles I identify and articulate include: prohibition against

[400] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 6.
[401] On Tsilhqot'in consent, see Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48 UBC L Rev 873. See also more generally, UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: https://www.refworld.org/docid/471355a82.html.

waste; expectation of water in a stated quality fit for human consumption; expectation of a stated quantity of water sufficient for sustaining healthy ecosystems; and an expectation of natural flows.

4. Core Principles about Use

Tsilhqot'in laws are applied to water through the management of relationships. Relationships are guided by principles such as protection of the community and prohibition against waste which inform other aspects of water jurisdiction including access and use, water quality and water quantity. Principles and rules flow together to form a fabric of law that is dynamic and responsive to changing circumstances and social needs. The principle of protecting families and communities is bound to have some influence on how water could be used, particularly if that use degrades the quality or quantity in a manner which will put people at risk of disease or shortages. This is logical reasoning behind the connection. Similarly, prohibiting waste ensures an ongoing reliable source of water for uses upon which people rely. Uses do not only include drinking, but also to sustaining fish and wildlife populations, quenching the land, and as a means of transportation to name a few. Once the principles are laid out, I will discuss how they interact to provide a basis for Tsilhqot'in water law.

a. Protection of the Family and Community

The principle that a family and community is to be protected is predominant in the Tsilhqot'in legal order. It was identified in the Accessing Justice and Reconciliation (AJR) work conducted in 2012, which sets out the story analysis, interview support and reasoning. I provide

the following excerpt on the principle of protection from the AJR Report, followed by a discussion of how this relates to water:

> Protecting Individual and Community Safety:[402]
>
> One of the paramount considerations underlying responses and resolutions to harm in the Tsilhqot'in legal order is maintaining individual and community safety. Elder Marie Dick said that ensuring safety is one of the key benefits of law, along with providing for discipline and taking care of people.
>
> One example of a resolution that was motivated by community safety is the historical story of the thief whose fingers were cut off as a result of a chief's decision. The elder stressed that the community was tired of having their food and other important goods stolen and supported the chief's decision, provided it was effective.[403] Of course, this is a historical story and physical punishment would never be employed a[s a] response to this type of harm today, however, the underlying principle could still be applied through different means. In a different interview, one elder discussed the importance of using powerful medicine when people were taken, and using war parties to protect the community against invasions from other nations.
>
> The principle of protecting community safety is identifiable in several published stories. For example, in *Lendix'tcux*, the young woman abandoned by her community after giving birth to puppies responds to the abandonment by taking care of the puppies/children and teaching them how to hunt. Later in the story, Magpie tells the woman that the community that has abandoned her is starving. The young woman provides Magpie with food for his family. Later, the entire community returns to where the woman and her children/puppies are living and "they all lived in the village as before."[404] Although not explicitly stated, it could be inferred that the daughter agrees to live and share food with her community members in order to ensure their survival as individuals and as a community.
>
> The many published stories involving kidnapping are resolved by tracking and retrieving the kidnapped party, and then killing the kidnapper (and, at times, others who have conspired with the kidnapper). It can be inferred that imposing incapacitation would protect the community from further threats from that kidnapper. In *Raven and Tūtq*, Raven kills the entire community of the kidnapper, possibly to protect his party in their escape and from further retaliation. In *The Young Man and the Magic Tree*, the

[402] The AJR report was not publicly released, *supra* note 210 at 26. As the student researcher who learned from the Elders who participated in this project, I am inclined to reproduce this section as part of the research in which I have been involved over the years. Methodologically, I choose to build upon existing work, as my understanding of this principle has not changed with any new information I have received. I have updated the footnotes to correlate numerically with this dissertation. [Footnotes omitted]
[403] Interview of Tl'etinqox elder William Billyboy (10 July 2012), Tl'etinqox, British Columbia at 12, 15-16.
[404] *Lendix'tcux* in Farrand, *supra* note 49 at 8-10.

young man kills the kidnapper and his wife who has chosen to be with the old man, before going back to his old home with his faithful wife and their child.

Community safety warrants pre-emptive action in some of the published stories. For example, in *The Two Sisters and the Stars*, a menacing old man keeps tracking two sisters. Although he has not physically harmed them, the old man carries a sack of dried women's breasts, suggesting that he intends to harm them. The sisters surrender to his pursuit and carry out a plan to kill him.

Elder William Billyboy shared a story in his interview about Raven taking pre-emptive action by killing a group of foreigners who Raven knew intended to hurt his community:

> [Raven] told the people that there's bad people coming in, our people said we will deal with it tomorrow. But Raven went out to war by himself that night …and killed all the people. So, when our people went to deal with it the following day they couldn't understand why all the people are dead already, and it was the Raven.

It can be inferred that Raven went to war on his own to protect his community from imminent harm.

Although many stories discuss death as a resolution for harms committed, there are no contemporary examples of death being viewed as an appropriate consequence. It can be inferred that other responses, based on the same underlying principle of maintaining individual and community safety could be used to resolve similar harms under Tsilhqot'in law today.

These examples from the AJR Report show the principle of protection through interviews and stories. As the principle applies to people, water is logically incorporated into the fold upon application. For example, in some of the stories, water is a means of escaping danger (*How the Young Man obtained Thunder's Daughter*) or pursuing someone who has taken a family member (*Raven and Tūtq*).[405] In other stories, access to water is blocked by a present danger, which must be addressed, as in the story of *Estěnē'iq'ŏ't*.

[405] Farrand, *supra* note 49 at 26, and 15 respectively. In *How the Young Man obtained Thunder's Daughter*, the young man and Thunder's daughter run off together knowing her father will kill the young man. They escape by turning themselves into ducks and swimming across a lake. In Raven and *Tūtq*, Raven pursues *Tūtq*, who ran off with Raven's wife, across a lake to bring her home.

Estěnē'iq'ŏ't reflects the principle of family and community protection that directly involves water. In *Estěnē'iq'ŏ't,* the man people call Estěnē'iq'ŏ't (sasquatch) sits on a stone in the middle of a river that people use for transportation, and "the people were afraid to pass up or down the river in their canoes."[406] A man comes along and decides to address the problem. Cautious, he approaches Estěnē'iq'ŏ't, keeping one foot in his canoe "ready to shove off." The man learns about Estěnē'iq'ŏ't's grief, in which the man shares with him by crying with Estěnē'iq'ŏ't. The man's compassion helps Estěnē'iq'ŏ't, who leaves the rock, making the river safe once again. There is much more in this story; however, for this discussion, the identification of a few points sheds some light on law and water.

People use the river for travel. This seems unrestricted, as the "people" likely suggests anyone. Travel is unrestricted until there is a danger, a sasquatch sitting in the middle making "people afraid to pass". There is no mention of whether the man who addressed the problem had an obligation to do so, but an obligation may be inferred, as there is no other reason for the man to risk his own safety unless he is trying to make the river passable again for himself and others. The risk to the man is evident in his "being a little afraid" causing him to keep "one foot in his canoe." This is an example of taking a calculated risk, ensuring he had an escape route if the encounter was to go wrong. This story suggests that people expect to be able to travel safely along the waterways, and when there is danger, a person with the skills or knowledge to be cautious should assess the risk and remove the danger as safely as possible. In short, this is an example of community protection that applies to the public use of waterways.

The broader application of the protection principle to water is relatively easy to construct. Water is vital to life. Any threat to the water subsequently and directly threatens people's lives.

[406] *Ibid* at 48.

Therefore, maintaining authority over their water to protect it and ensure its continued health is a reasonable expectation with an obvious link to the protection of lives and communities. However, this broad application creates a rather general statement about authority over water and its uses, suggesting the authority is unlimited. I do not find this to be the case, as Tsilhqot'in are only one authority within their worldview. Accepting there are others to consider in relation to water, I begin to look at how the people take other non-human water users into consideration, some of whom may also share some authority with the Tsilhqot'in people.[407] The application of the principle of respect begins to shed some light on the manner in which Tsilhqot'in people act toward water use that ensures other interests are protected.

b. Respect and Protection: Law against Disturbances

In the story of *Raven and the Salmon*, Raven

> laid up a great store of dried salmon and filled the skins with grease; and when he had finished, he brought a lot of large roots to the house and turned them into men, and they all began to dance. And as Raven danced, one salmon, which hung from the ridge-pole, kept striking his head, until Raven lost his temper, and, tearing it down, threw it out of doors. As soon as the salmon touched the ground, he came to life, and brought all the other salmon to life too, and they started for the water. Raven and the men he had made tried to catch them; but the grease on their skins made them so slippery that they could not be held, and they all escaped into the water and swam away. After that there was a great snow-storm, which lasted a long while; and Raven was snowed in, and was so long without food that he nearly starved. One day a small bird lighted in a tree over the place where Raven was, and he had berries in his mouth, and he told Raven that there were berries to be had all over the country. So Raven took his blanket and started to dig his way out, and before he had gone a foot he came through the snow, and found all the country green, and saw that he had been starving in a little snow-bank all those weeks for nothing. And in this way the salmon took revenge on Raven.[408]

[407] The *Lendix'tcux* story contains a shift in authority to the descendants of the ancestors in the story, which speaks to authority. However, there are spirits, fish, birds, and other animals such as the beaver who have immediate relationships with water (remember the frog made from the moose's brain who was told that he must live in water and never on land. These are important inhabitants whose close relationship to water is well known, who have to be taken into consideration when decisions are made about water.
[408] Farrand, *supra* note 49 at 19-20.

The story explicitly states that the salmon came to life the moment it was thrown to the ground. The conclusion that all the salmon came to life and returned to the river as a direct result of Raven's treatment of the salmon is reasonable. Stated more simply, Raven's disrespect caused the salmon to leave, or, from Raven's perspective, caused the loss of his supply of food.

The principle of respect is deeply embedded in the story, as natural sources of law are invoked both by Salmon's agency in its ability to leave, and in Salmon's ability to take "his revenge on Raven" with the snowstorm. The statement on revenge implies that Salmon played some role in Raven's confinement. Recognition of the agency of non-humans in the analysis reminds people that their actions may have unintended results which may be meted out by the environment itself. The logic is inherent in this recognition, as a failure to respect salmon may lead to the loss of their existence (loss of populations) and the loss of important annual food for Tsilhqot'in people. The interconnection between water and salmon is obvious and necessary, as water "takes care of the fish".[409]

This connection is so inextricable that the respect owed to salmon must be applied to water, as separation is unimaginable. For example, to disrespect water by polluting it, ("we can't throw anything into the water, like any garbage into the water,") shows a lack of respect for salmon. Salmon require special treatment, such as people returning their bones back into the river. Elders teach "how to treat fish, what to do with it, don't fool around."[410] The principle of respect is not limited to Tsilhqot'in territory. Elders were taught by their grandparents about "the salmon that used to come down from Vancouver, they used to travel down the river to Henry's Crossing and then to Chilko Lake and whatever survives goes all the way back up to

[409] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 5. Phyllis William stated, "I just remember my grandmother mentioning for us not to spit in the water or throw things in the water, things that are not natural to the water." Interview of Phyllis William (5 July 2017) at 7.
[410] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 8.

Vancouver."[411] Pollutants that enter the Fraser all along the river contaminate the water, fish and wildlife that rely on it, ultimately reaching the people who eat those foods.[412] Respecting the water by protecting it is directly connected to the protection of families and community.

The story of *Raven and the Salmon* is foundational for its representation of interconnected relationships between people, salmon, and the environment, particularly water. According to the story respect is the guiding principle in managing this relationship as already explained: no respect = no food. What of the concept and understanding of this word *respect* that embraces the idea of caring or mindfulness? For example, one dictionary (and there are many) defines respect as "to consider worthy of high regard" or "to refrain from interfering with" as in respecting privacy.[413] Is this what Elder's mean when they say, "[…] respect water"?[414] Well, partially perhaps. The first definition simply speaks of high regard, which the Elders I spoke with generally hold for water. The second definition brings us closer to explaining respect in a Tsilhqot'in legal way for its invocation of action and restrain.

Respect as a principle is aspirational and motivational. As a principle, it invokes action. The work of respect is to encourage or discourage certain behaviours or actions toward others within the relational world. In other words, the concept of respect addresses the manner in which people engage with their surroundings and structure the attendant relationships. The Tsilhqot'in law of respect is anchored in agency and action with tangible results. To respect water, a person is expected to act, by engaging with water, listening to, speaking to, praying to, singing to, and utilizing water with minimal disturbance.[415] Minimal disturbance includes not throwing anything

[411] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 8.
[412] Interview of Dinah Lulua, Susie Lulua, James Lulua at Xeni Gwet'in (4 July 2017) at 12.
[413] *Marriam-Webster* online: https://www.merriam-webster.com/dictionary/respect.
[414] Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 11.
[415] "We talk to the lake and it will help fix your ailments." Interview of Mabel Solomon at Xeni Gwet'in (4 July 2017) at 1; We talk to the water, we sing to the water." Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 1; "they bath in the river and talk to the water, and the water will heal them." Interview of Christine Lulua at

into the water, not even a handful of beach gravel, as it disturbs the water and the spirits living within.[416] Pollutants and other toxic contaminants comprise a logical extreme to refraining from disturbing water as a means of being respectful.[417] Tsilhqot'in people cannot escape respect as a way of behaving toward water according to their governing law.

After living with the *Raven and the Salmon* story for several years, I recently gained a broader understanding about respect that came about when trying to make sense of a story Gilbert had shared:

> There is a place along the river, by the river, there is a rock sitting way up there, there is a camp, and they told my cousin that if you roll this rock into the river and you come back the next day that rock is still sitting same place where you rolled it. So I was telling that to my cousin. Then he went over there and he rolled that rock. He came back, and it's still sitting there. Then he went over there, and he rolled it again. Second time. But he didn't live very long after that, he drowned in the water. I told him, you want to just keep checking to see, see, and he just did it again. The rock went back up there again.[418]

I was not quite sure what to make of this story until I thought about it in the context of Raven and Salmon, when the internal logic Gilbert was sharing struck me. His cousin was not satisfied to accept what he was told about the rock returning to its original position if he rolled it down toward the river. Part of the message here is to convey that a teaching is sufficient in itself to be

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Xeni Gwet'in (5 July 2017) at 5; "you pray to the water and the water helps you." Interview of Eileen William at Xeni Gwet'in (5 July 2017) at 3; "Raven or different people getting information from water, and it might not be the same way as in the stories but just for example I have heard my father–in-law talk about people he said could read the river, could listen to the river, and to the sounds it makes, and it will tell them what the weather is going to do." Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 3. "We use it for, for drinking and for cooking, and for bathing…and also use it for our animals." Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 1.

[416] James Lulua, personal communication at Xeni Gwet'in, 5 July 2017; "we can't throw anything in the water." Interview of Eileen William at Xeni Gwet'in (5 July 2017) at 4; "I just remember my grandmother mentioning for us not to spit in the water or throw things in the water, things that are not natural I guess to the water; Interview of Phyllis William at Xeni Gwet'in (5 July 2017) at 7.

[417] "By mining, by logging, or uh polluting into the rivers, [we] aren't going to have any more fresh water […] We [are] all gonna die if we don't smarten up and respect water," Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 13. "Like say the Chilko River, that lodges there, they have their pipes in the river for their waste. Any kind of waste goes into the river. So, we need to learn how to deal with that, and get them to listen, understand. They want to be in this beautiful country but they are wasting, they are like polluting the river at the same time." Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 18.

[418] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 5.

accepted as correct. I cannot say whether a teaching should never be tested, although it often is, which, although noteworthy, is beside the point here.[419] Also beside the point is whether Gilbert's cousin actually physically rolled the rock down the hill only to have it return, or if he did so in his imagination only. Sometimes the frame of reason delineating imagination and physical reality is not so clear, which is what gives oral stories, particularly ancestor stories, their strength, believability, and impact in conveying ideas about reality. Nevertheless, Gilbert's cousin tested his teaching, not the teaching that the rock would return, as that is only the result of a teaching (as I will explain), but the teaching that a person should not roll rocks so they come crashing down a hill.[420] To wrestle with what may be construed as the logic behind this teaching, the outcome of which for Gilbert's cousin was to drown conspicuously shortly afterward, is to grapple with effects of the action itself.[421]

The analysis begins with the act of sending rocks crashing down a hill. Making rocks go crashing down a hill is potentially dangerous to others, which makes them a destructive force at worst. At best, crashing rocks down a hill is disruptive. It is disruptive to the land, to the plants, and to other life forms in the vicinity. More significantly its disruptive effect offers no real

[419] Although there may be some evidence to support this. Gilbert Solomon said "when somebody tells you stuff, you need to honour them, just do it, follow it, protocol. It's probably just giving you some kind of rule to follow, like do this mixture, you put all the bones in there, don't be messing around." Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 3. In the western liberal perspective, this seems rife with the potential for abuse and tyranny, but that requires a western liberal view. People do not give rules or teachings unless they are necessary to remain safe, or to continue relationships that will ensure food. There is no concept of a hoax to fool people into doing things for the sake of sheer entertainment at another's expense. There are no examples of this kind of deception occurring through teaching.

[420] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 8, "don't be rolling a be rolling a rock down the mountainside, don't roll a rock down the mountain and hear it crashing down, way down, having fun, don't do that, because other spirits going come here, you going to be stuck here."

[421] I want to acknowledge a comment from John Borrows here, with which I agree, "Perhaps logic was not at work here. All law is not logical or reasonable. I wonder how aspects of law that do not operate within the realm of reason might fit into your analysis. Or maybe logic was at work here, and we don't understand it. Or maybe there is some other force at work here," (30 January 2020). I do not believe there is an answer to this beyond accepting that I perhaps do not understand the logic, but the reasoning that serves as the base of my understanding of the principle against causing unnecessary disturbances likely finds its hold on the logic I import of my own teachings.

benefit to the person causing the disturbance other than their own personal amusement (e.g. finding out if the tale was true or not, or just to watch the destruction it causes). Of course, the tale must have been true (hypothetically at least), for there would be few other compelling reasons for its telling. The rock would return. In the first act of rolling the rock, there was no consequence, and the tale became experience. It became a veritable truth. But, for some personal reason we can only speculate about, that first test was not sufficient. Gilbert's cousin did it again, for no other reason but to learn the same truth, as though it might change a second time. It didn't change, and Gilbert's cousin died. So what does this tell us outsiders? The story offers one vivid example of how respect, or the opposite, disrespect, is reified through action, which reveals a direct relationship to *Raven and the Salmon*.

Unnecessary disturbances tend to cause some form of harm to the extent of violence to others. By others I am speaking within the Tsilhqot'in worldview which includes people, lands, plants, animals, insects, water – others. There should be little surprise then to realize that the disturbance, an act of violence, caused by rolling a rock down the hill to satisfy some individual curiosity at the risk of others would have a similar outcome as *Raven and the Salmon*. Raven's disruptive act of violence toward the salmon caused the departure of the salmon, which if repeated could eventually lead to Raven's death for his loss of salmon as an important annual source of winter food. In both stories, the land has agency. The rock returns to its original place; the salmon escape back to the river. Gilbert's cousin was acting as Raven, satisfying his own personal interest (to see if the rock would return; to act out against the salmon who Raven kept bumping into).

Not surprisingly then, Vickers held that one of the rules to which Tsilhqot'in Elders testified during trial was the offence of disruption or laws "against creating a disturbance in a

community".[422] Violators of the law against creating a disturbance could be punished by the chief and the community as a whole.[423] However, more strikingly, the warning to people imbedded in these two related stories is that continued disruptive actions of violence will invoke the agency of the land. The salmon will not return. To complete Dinah Lulua's quote provided elsewhere about respecting water, "we are all going to die if we don't smarten up and respect water."[424]

The analysis of the two stories in conversation with one another provide context for a deeply charged statement about the outcome of failing to abide by Tsilhqot'in law, a statement outsiders would otherwise see as a little more than axiomatic: *respect water or we die*. Viewed merely as a maxim without understanding the reasoning, outsiders may miss the relationships between the physical entities as governed by the logic of respect through acting or not acting in certain ways, and why knowing those things are important. If a person does not understand the linkages between those different but connected sets of reason and logic, the structure of the legal order, its legality, would be entirely beyond grasp.[425] The loss of the understanding of the embedded linkages within the legal consciousness will lead to death. In other words, the distinction goes something as follows: axiomatically, everything dies without water; internally logic invokes Dinah's warning, without adherence to Tsilhqot'in law about water, Tsilhqot'in die as Tsilhqot'in people.

[422] *Tsilhqot'in* BCSC at 431.
[423] *Ibid*.
[424] Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 8.
[425] Mills, *supra* note 8 at 11.

5. Use

a. Communicating Information

Water is used for many purposes in addition to the obvious ones already stated, such as drinking, bathing, health and healing, and spiritual and ceremonial. People also have some unexpected uses for water. In the story of *Raven and Tūtq*, water offers a means of communicating information, which is used in the protection of family. Tūtq runs off with Raven's wife and the pursuing Raven loses them in a fog.[426] Raven contemplates how he may get his wife back. In so doing, he took his paddle and

> asked it where his wife was. The paddle answered; but Raven could not understand, and he grew angry and threatened to break the paddle if it did not speak more plainly. Then he bent the paddle over his knee until it nearly broke; but still he could not understand what it said, and learned nothing about his wife. Raven went back and lay down again, and though it all over, and again went down and tried with the paddle; and at last the paddle spoke so that Raven could understand, and it told him that his wife and her lover were at a place called Tatsaqōl."[427]

Raven then sets out to locate his wife to bring her home. Water plays a few roles in this story. First, it serves as a means of transportation for both the fleeing Tūtq and later the pursuing Raven. Second, it serves to obscure Tūtq's escape with Raven's wife in the form of fog. Third, arguably, the paddle has information on Raven's wife's whereabouts because of its close association or relationship with the lake.

I make the inference of water as the source of information when considering how the paddle would have information that Raven doesn't. The paddle is always with Raven in the

[426] Farrand, *supra* note 49 at 15-16. The story does not mention whether Raven's wife was a willing participant. It only states that Tūtq was her lover, and that Tūtq "seized Raven's wife, and placing her in his own canoe, started to paddle away." Raven's ultimate rescue of his wife, considered in the context of several others stories reflecting the importance of family cohesion, (e.g. *Fisher and Marten*, *The Boy who was kidnapped by the Owl*, and *The Adventures of the Two Sisters*) suggests that family cohesion forms the status quo in the legal order. However, there are limits to the status quo depending on individual circumstances and obligations arising from different sources (e.g. *Tŝ'il?os*, *The Young Men who were turned into Stars*, and *The Man who married Eagle's Daughters*).
[427] *Ibid* at 16.

canoe. The only difference between Raven and the paddle is the paddle's consistent submersion in water. The water would certainly be privy to the direction and ultimate location of Tūtq's travel. Therefore, I assume the paddle gained its knowledge from being in contact with the lake water. This story presents an alternative explanation for water as a means of communication. The obvious means is a direct example, where information is imprinted in water, which then holds the information until someone else, with the right skills, comes along and reads it.

An example of water providing a means of direct communication is offered in the story of *The Man and the Three Wolves*, where the wolves draws a line in the snow (frozen water) to indicate to a man the direction of available food. This is an obvious use, as water is used as a medium for recording information with a visual sign (lines). In the other story, *Raven and Tūtq*, the information is also recorded in the story, but the ability to read that information is not for everyone, as it is not visual. The paddle must translate the information and pass it on to Raven. When a language barrier exists between Raven and the paddle, the transfer of information fails.

In some regards, this process of learning and articulating Tsilhqot'in law is similar. I often feel as though I am in Raven's position, listening to words I cannot understand, and feeling hopeful, when I can, that the information translated conveys the meanings intended. In the story, Raven uses paddle's translated information from water to accurately locate his wife, reminding me that, although occasionally fraught with frustration, with time and patience the teachings prevail. On occasion, people are able to directly read the information water carries without use of a translator.

In *The Man who married Eagle's Daughters*, a man married Eagle's two daughters. After living with them for an undermined length of time, the man "turned into an Eagle himself."[428]

[428] Farrand, supra note 49 at 38.

The man already had a wife, who was waiting for him when he went off with Eagle and married his daughters. After some time, the man left Eagle's home and returned to his own community with his new wives. Eagle's daughters did not like to fetch water, so the man always fetched water. When he went for water, his first wife would catch up with him, and "begged him to stay with her." He was afraid of his Eagle wives and returned to them with water. His wives would dip a feather, given to them by their father, into the water. When the water came up clear on the feather, they would drink, satisfied that everything was okay. Another time the husband went for water, his wife again caught up with him, pleading with him to come home. On this occasion they "had intercourse". When he returned with the water, his wives dipped their feather, "and this time she saw it was not clear, and she knew then that the man had had intercourse with his [other] wife." The Eagle women killed their husband that night while he slept and left for home, leaving "nothing but his bones under the blanket."[429] As with all of the stories, there are many aspects of law embedded within.

In this example, family (i.e. becoming family, who constitutes family, and the protection of family) is an obvious theme, connecting back to the core principle stated earlier on the importance of protection. However, I shared this example for the emphasis on the use of water to transmit information. The question begged is: how does water contain information about the husband's fidelity, let alone anything at all? Applying the holistic doctrine, the answer is the same, or at least similar, to one provided in my analysis of *Raven and Tūtq*. Water's ubiquity throughout the Tsilhqot'in world, connecting people past, present, and future through their many uses and their uptake, either directly or through consuming other water users such as fish, animals, and plants, imprints water with an image of the Tsilhqot'in world. In the Eagle's

[429] *Ibid.*

daughters story, the actions of the man, the Eagle's daughters, and the water intermingle. The man is physically drawing up the water, meaning the water is present during his intercourse with his wife. The water is witness, somehow storing the information that the Eagle's daughters are then able to receive or read. In any event, the information is there for those who can see/read/interpret/understand the information contained. People who have either a special relationship with water (the paddle, and probably fish and water-borne insects) or special internal abilities (perhaps through the Eagle's incredible vision) may read the messages that are constantly being imprinted in water. This is the best reasoning I can derive from the knowledge that Elders have shared with me as providing an answer to the question of how water communicates information.

James Lulua shares an example about a person directly reading information from water by listening to a river about changes in the weather, "There is a time when the river will be loud above, and then down below. That means the weather will change. […] So they [rivers] tell you things. I've never knew how my grandmother knew about the weather, she was listening to the river."[430] James' statement suggests that if a person learns, learns to listen or learns to see, they can learn to read the information water contains, as with Eagle's daughters. The indirect translation method seems to come from reading others who have a close, intimate relationship with water, as with the paddle.

People may learn to interpret what other water users are conveying from their knowledge of water. For example, "Where there is loons, there are fish. Plenty of fish. So if there is plenty of fish then the water must be healthy. If there is no loon, then there is no fish. [...] They are our fish finders."[431] This observation of loons provides information on the location of fish and the

[430] Interview of James Lulua at Xeni Gwet'in (4 July 2017) at 27.
[431] Interview of Dinah Lulua at Xeni Gwet'in, (4 July 2017) at 23.

condition of the water. Another Elder refers to these other water users who transmit information as indicators: “

> people they look at the animals and they were kind of indicating, and something on the animal it kind of tells them if the winter is going to be short […] look at animals for indication, that you know, there is going to be problems with the water source or, like you know, when they say early winter, you know that kind of stuff.[432]

Water and others who rely on water can communicate information. Information is relevant to the protection of families and communities, as it can tell people whether water is safe to drink or whether a watercourse is dangerous, as it was when Estěnē’iq’ŏ’t perched himself on a rock in the middle of a popular river. Occasionally, the information water carries is painfully obvious, “If you hear a roar when you’re boating down the river, get off. It’s a waterfall!”[433] Being able to gather information from water may seem esoteric and specific to the worldview, but the latter example shows one of the more basic insights on learning from water. Taken via the holistic doctrine and water’s ubiquitous existence, the limits of the information to be gained from water expand exponentially to the point where clear water can indicate or at least help determine fidelity. Logically then, the state of water also plays a role in the health of people, as a healer.

Healing

In the *Blind Man who was cured by the Loon*, a woman abandons her blind husband in the forest.[434] Vulnerable and alone, the man listens to the calls of a loon, the sounds of which lead him to a lake. There, the loon agrees to help the man regain his sight. Loon instructs him to dunk his head into the water, which restores his sight. In exchange for Loon’s help, the man

[432] Interview of Phyllis William at Xeni Gwet’in (5 July 2017) at 17.
[433] *Ibid* at 27.
[434] Farrand, *supra* note 49 at 34-35. In one interview, the gender roles are reversed, with a man abandoning his blind wife in the forest. Interview of Marie Dick at Tl’etinqox (10 July 2017) at 7, “she [Marie] said their stories are very similar as um how it was told. And, the way it was told to her, the story was, the woman was blind. The woman was blind, and it was the woman that missed the shot and the woman that was left in the bushes.”

gives her a necklace, which Loon wears around her neck to this day. In this story, the return of sight connects to protection and safety on the land. Water, the conduit through which safety is achieved, provides a source of health and healing.

The healing properties of water continues in today's consciousness, as "they [Tsilhqot'in people] bathe in the river and talk to the water, and the water will heal them."[435] One Elder mentioned that specific water sources are identified for the ability to heal, "we have a healing water also. It's sort of like a soda water near Riske Creek. […] people go there, go there, travel there and camp there a couple of nights. They pray to that water and ask the water to help them heal and they get water. It's a part of our healing too in that way."[436] The Elder is saying that there are varieties of water, from fresh streams to carbonated water that bubbles up from underground springs. They all have the healing properties, but some water, such as soda water, is identified as having unique healing properties. I learned through conversation that many of these springs are on private lands and no longer accessible to Tsilhqot'in people. However, some property owners allow Tsilhqot'in to access the springs.[437] This is an example of the Crown's interference with Tsilhqot'in authority, and how individual beneficiaries of that interference (ranchers) can help mitigate the impact. Private property can also impact the healing properties directly when it interferes with natural flows.

There are accounts of ranchers diverting streams which has significant impacts on the health of the stream.

> Over Choelquoit Lake, back in the day that lake used to be one whole lake, Choelquoit Lake, all the way to Lunch Lake. Now it's separated, and not only separated, it's shrunk

[435] Interview of Christine Lulua at Xeni Gwet'in (5 July 2017) at 5.
[436] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 15.
[437] "We were lucky because the rancher, it [the spring] was on the Rancher's land, he kind of knew from our people, from the past, how we use that water. How we use it for healing only and don't come to the land to destroy it. Or disrupt what he's doing, always had a mutual agreement with our people because its Tsilhqot'in land. It was stolen from us. But we always made, we have mutual agreements, we always spoke for what we believed in. What we fight for." Interview of Marion William at Xeni Gwet'in (5 July 2017) at 15-16.

> down quite a bit. Down the people in Tatlayoko they re-divert it that way, all the creeks going that way. There used to be a fish trap down by the end of the lake, used to be good bearing streams and now it's hardly a trickle. The kokanee died out because of it. They do go in there to spawn, but once they are in there to spawn, there's no water in the creek for the eggs to stay alive anymore.[438]

The natural flows are important for the health of those who rely on it, such as fish and other aquatic species. Beyond the health of the stream itself, the actual flow of water is relied upon for different healing practices. For example, water in its natural setting, such as a lake, is used to physically wash away poor health, "he [Marvin William] has a bath in the lake and it clears up the itchiness, and his body feels better."[439] The flow of water may be used for emotional healing, "like with the leaf, you know, putting your, um, your problems or whatever, talking to and putting all your stuff on the leaf and letting it go in the creek and then it takes away everything."[440] The flows are also used for spiritual healing, "if someone used bad medicine on you, you figured, you um, tie your hair on a rock, you tie it really tight and then you throw it in the middle of the river, so the person who is doing bad medicine on you, it will take it away."[441] The connection between healing, health, and community protection is logical, as healthy people are better situated to respond to various threats, such as infections, physical and emotional ailments, or times of hunger, giving them a better chance of continued survival. I believe this applies as much today as it did in the past.

The preceding analysis of the principle of protection and safety of family and community has direct links to water as a means of achieving that safety. The examples are not limited to the few stories selected and discussed above. Yet, in these few examples, the range of water's utility begins to emerge. Transportation, communication, and health and healing carry principles

[438] Interview of Alex Lulua at Xeni Gwet'in (4 July 2017) at 6.
[439] Interview of Marvin William at Xeni Gwet'in (5 July 2017) at 4.
[440] Interview of Phyllis William at Xeni Gwet'in (5 July 2017) at 7.
[441] Interview of Christine Lulua at Xeni Gwet'in (5 July 2017) at 6.

between related concepts that tie back to protection. Generally these include the principles that govern how people interact with water through respect, prayer, comprehensive knowledge, and reciprocity. Community protection relates to the uses of water identified above in a manner which makes thinking about them individually and in isolation difficult and unnatural. Such is the reality of working in Indigenous legal orders, categorizing concepts taken out of their contexts is a challenge. To elaborate, the analysis above will be discussed in relation to additional legal principles identified below. The intersection will inform a discussion about how expected water parameters such as quality, quantity and flows may be extrapolated from these principles, and the uses of water directly linked to them. Continuing against the backdrop of community protection, the legal principle discouraging waste ensures continuity of available resources (natural relations) for individual and community use.

b. Prohibition against Waste

There are several examples in the legal order of what appears to be a prohibition against waste. However, a prohibition of any sort, including one against waste, is more likely an interpretation of an amalgam of other principles interacting with one another. These principles include respect, sharing, and using everything that is taken (alternatively, not wasting what is taken) produce a conceptual framework for what amounts to be a prohibition against waste. The Tsilhqot'in story of *The Young Man and Dt'an* (famine/starvation) depicts these principles.

In *The Young Man and Dt'an*, a community endures a particularly harsh winter without food.[442] A boy tries fishing on a frozen lake, but his efforts are met with little success. His minimal returns are barely enough to keep him and his grandmother alive, and they resort to

[442] Farrand, *supra* note 49 at 32.

eating frozen rabbit dung to help sustain themselves. One day while on the ice, the boy is visited by Dt'an (Famine), who repeatedly strikes the ice with his walking staff as he approaches, driving fish toward the boy to catch. Famine, carrying a sack "filled with the food that people waste in eating (that is crumbs)," is searching "for two men who had insulted him and whom he wished to kill."[443] Before setting off to the mountain to continue his search for the men to kill them, Dt'an gives the boy some ominous advice, "the boy should keep a sharp lookout for him, as he [Famine] would surely come back that way." The fish the boy is able to catch on this first visit is enough to feed himself and his grandmother, "and they saved the rest for another time."

Heeding Dt'an's advice, the boy attends the lake every day until the spectral entity returns after succeeding at his task. Again, Dt'an strikes the ice upon his approach, corralling fish toward the boy. The boy catches an abundance of fish, and takes them back to his camp. He and his grandmother "ate all they wished, and there was still a great many left. The boy went around to all the other houses and told the people to go and take the fish, which they did, and there was enough for all."

I begin my analysis of this story with the inference that seeking men to kill them for "insulting" Famine, who is carrying a sack of "food that people waste", suggests that wasting food is a serious offence which may have severe consequences, such as death. This does not suggest that people may impose this severe sentence, as the sacred and natural sources of law are triggered, which possess the unsympathetic power to end life. The principle of protecting the community and sharing is closely connected in this story. Yet, also present is a principle of the priority of self-preservation. Arguably, if a person cannot provide for themselves first before providing for others, and perishes, the whole community would bear the loss of a key provider.

[443] *Ibid.*

This is evident in the boy keeping the remaining fish from the first catch for himself and his grandmother. He does not share with his community until he has an abundance. This may alternatively be construed as protecting family first. These priorities may only be valid in times of extreme stress as a means of ensuring survival. The principle of protecting families and community is eminent in this story, which is closely tied to a deterrence against wasting available food resources. The reasoning for avoiding waste is not difficult to discern. Wasting food, particularly in times of need, may lead to starvation. Some may liken the facts to the cliché of tempting fate, or more directly, spitting crumbs in Famine's face. The deterrence against waste is extended to include the habitats of the food source (fish), which is the lake in this case.

The way I interpret the story, Dt'an's action of pounding on the frozen lake to drive fish toward the young man sends an explicit signal. Through this action, Dt'an is pointing to the lake, indicating that this lake will feed the young man (Tsilhqot'in) when other sources of subsistence fail.[444] Again, the logic of what applies to fish will also apply to their habitat is obvious: "I would do anything to protect water. […] largest fresh water left, that is unpolluted, need to keep it that way for everything else, other than us humans. In order to eat something really good, it has to be drinking the good stuff."[445] Relational interconnectivity is plain in this statement. Protection of the water benefits the non-humans, which in turn protects humans who rely on the non-humans for sustenance. In short, protection of the water protects people.

This concept arose often in interviews. Elder Eileen William commented on the relationship by explaining that, "water takes care of the fish and when she's hungry she can catch a fish and eat it."[446] Elder Marion William explained the relational aspect as being cyclical:

[444] Hanna, *supra* note 156 at 381.
[445] Interview of Alex Lulua at Xeni Gwet'in (4 July 2017) at 9.
[446] Interview of Eileen William at Xeni Gwet'in (4 July 2017) at 4.

"Water gives life to all walks of life, all animals and to our berries. It's a whole big cycle of keeping the land going, plants, wildlife, our berries. And without the water, none of us would be able to survive and everything would die."[447] In these interviews, water is inextricably connected to the other lives that depend upon it. Therefor, when Dt'an pounds on the frozen lake, we may interpret this as teaching the young man that the lake and its fish will feed him and his community and their future generations, so do not waste either. Although I can only go as far as saying the story deters against waste through the threat of death, Tsilhqot'in people elevate *deterrence* to a *prohibition* against waste, as people make laws, stories only carry them.[448] See for example the Nation's recent *Tŝilhqot'in Nation Nulh Ghah Dechen Ts'edilhtan* (*Wildlife Law*), which provides for Wildlife Values including 3(a):

> all parts of harvested wildlife should be used; do not waste; wasting food can never be justified no matter how plentiful it seems because many people live from harvest to harvest; one good year can be followed by bad years which can affect the Tŝilhqot'in people.[449]

As identified above, the law against waste continues to be expressed in contemporary Tsilhqot'in society. Recently, the Nation's resistance to the Prosperity Mine development (a project that planned to drain Teztan Biny (Fish Lake) for use as a tailings pond) serves as another current example of the prohibition against waste (and its other iterations such as deterrence, and protection of fish, water, families and communities) in action. Mining minister for BC at the time of the initial project proposal could not understand why the Tsilhqot'in cared about a "tiny little pothole of a lake" anyway, which is "a shallow, mucky lake with too many small rainbows in it."[450] The Tsilhqot'in do not view the lake in terms that disassociate it from the broader context

[447] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 5.
[448] As discussed elsewhere in this dissertation, stories embed principles allowing concepts to be transmitted intergenerationally. This allows flexibility for people to remember principles and create laws suitable for the needs and times of society.
[449] *Tsilhqot'in Nation Nulh Ghah Dechen Ts'edilhtan supra* note 19.
[450] Justine Hunter, "Trout Above B.C. Gold Deposit Proving to be Fine Kettle of Fish for Ottawa"

of the land in the worldview, as Susie Lulua explains, "I know water and the land go hand in hand. Like the land needs water to survive and the water needs the land to form where to flow."[451] Furthermore, displacement is not limited to "too many small rainbows" in the minds of Tsilhqot'in people, but includes "all animals and insects and everything," all of which play a role in the world.[452]

The Young Man and Dt'an contains reasoning for the protection of fish-bearing lakes.[453] In times of stress through low food availability, lakes are a source of food even in the harshest of winters. This logic holds relevance in today's society, as nobody can guarantee Tsilhqot'in people that they will always be provided for. The people's connection to the land will remain a trusted relationship that can be relied upon in times of need. Sacrificing one fish-bearing lake is unacceptable, as this would create an exception without a reasonable means of assessing exceptions in their law. Within Canadian law, a test may include balancing interests, such as whether the greater public interest of creating jobs and revenue for the state outweighs the Tsilhqot'in interest in preserving a fish-bearing lake for the benefit of future generations?[454] As one Elder explains, "we need to protect [water] for the young generation that are going to be living on this earth [future generations]."[455] This raises questions which include, who constitutes the public in the heart of Tsilhqot'in country, and should economic benefits outweigh healthy environments?

The Globe and Mail (8 July 2010) online: http://www.theglobeandmail.com.

[451] Interview of Susie Lulua at Xeni Gwet'in (4 July 2017, pm) at 10.

[452] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 10. Far be it from a politician in charge of mining to determine what number constitutes too many fish.

[453] See Hanna, *supra* note 156 at 393.

[454] The National Energy Board recommended the GIC approve the Trans Mountain Pipeline Project on the basis that the nation public interest outweighs significant Indigenous and environmental impacts, see "Summary of Recommendations" at xi, online: https://iaac-aeic.gc.ca/050/documents/p80061/114562E.pdf. For an analogous result, see *Prophet River First Nation v. British Columbia (Minister of Environment)* 2015 BCSC 1682 at paras 57-62.

[455] Interview of James Lulua at Xeni Gwet'in (4 July 2017) at 9.

Arguably, the existence of a rich deposit of ore could be proposed as a sufficient reason for an exception to waste, but what are the logical limits? Would draining watercourses for sale to water-thirsty American states be included? Or perhaps adding lakes to sources of irrigation for agriculture in increasingly arid conditions? Once an exception is established in Tsilhqot'in law, there would likely be little to deter further degradation of water sources for economic purposes, leaving the original law, and its people, in an altered state without recourse to restore the loss and damage.[456] Exceptions may be offered on a limited basis, but I have not identified these types of exceptions in the legal order through my research. Possible exceptions is an area of further research which I envision beyond this dissertation. Likely, limited exceptions would be made through contemporary decision-making processes, but at this time, I am not sure how those might be informed by the legal order. Exceptions would likely be responsive to the prohibitions which I have identified through this research. Prohibiting waste of food such as fish and the environment in which they thrive is directly related to the protection and safety of Tsilhqot'in society, present and future, making this law a valid jurisdictional power for contemporary Tsilhqot'in governance.

There are other stories that exhibit a prohibition against waste, albeit through different principles. One such principle key in guiding behaviour throughout the legal order is the principle of respect, as explained above through the story of *Raven and the Salmon*. The concept of waste in a society that has a reliance on its many reciprocal relationships is directly related to respect, and the logic flowing from the principle that people are expected to act in ways of respect toward those relationships. Disrespect quite quickly turns into loss, and loss can easily lead to hunger. This is the interconnecting thread running through stories such as *The Young Man*

[456] Although the law may provide responses to reverse earlier decisions, my research did not investigate these questions. I am merely raising them to identify the depths to which subsequent research could go.

and Dt'an and *Raven and Salmon*. The stories resonate with one another, as Dt'an says this lake will feed people through the fish, and Raven and Salmon says these fish will feed you through the river. Both say little bits of waste (crumbs/one tangled salmon) may easily lead to the loss of all food and ultimately life. The reasoning through stories such as these is not impossible to conceive.

The communication across stories begins to compose a holistic image of the reasoned system of law, as shown in the *Raven and the Salmon* and Gilbert's story about rolling a rock down a hill. Thinking about these stories in relation to *Dt'an*, and stories where people and salmon become one another, as in *Salmon Boy*, the worldview and concomitant law-ways grow increasingly complete, as we realize that what we do to the *nen*/*tu*/*ts'eman* (land/water/salmon) effectively reverberates down to the people.[457] The richness of the holistic doctrine increases with every story, every interview and thinking across those sources, as *nen*/*tu*/*ts'eman* are intertwined and always at one with *nen*/*tu*/*deni*. In effect, the laws that apply to people regarding protection, harms, family, community, also directly apply to the *nen/tu* dynamic. The holistic interconnection means people are ultimately responsible for adherence to the laws that govern social conduct, as the Christian imperative *do unto others* seems analogous to the principle of reciprocity here, "we have to treat everything like the way we want to be treated."[458] The topic of enforcement is worthy of a brief comment here, as I will leave the greater details to the final chapter on governance.

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[457] Another story that has people becoming fish and living in their world for a time before changing back into a human is *The Boy who was kidnapped by the Owl*. "One day the boy's mother told him to go down to the lake and bathe, for he was dirty. He did not wish to go, but his mother took him to the water and told him to plunge in and swim. At last he did, and disappeared under the water, and did not come up again. […] Now the boy was not dead, but lived under water." Farrand, *supra* note 49 at 36.

[458] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 2. I am not suggesting that Christianity is woven into the fabric of Tsilhqot'in law, as nobody discussed this intersection. Although this inference could be made as a result of interaction with the outside world, I have no evidence in support of this.

These stories also carry a common thread on the enforcement of laws (evident in *The Young Man and Dt'an* and *Raven and the Salmon*). The stories repeatedly show the natural environment is a valid enforcer of laws (valid because people do not have a choice and therefore are mindful of consequences), giving people a reason to respect their surroundings and abide by laws. Failure to follow legal principles (e.g. respect) and rules (e.g. do not waste) may have serious consequences for an individual, their families and communities. Although science has attempted to subdue the environment by replacing the threat of starvation with agriculturally produced foods, Tsilhqot'in people are not fully dependent on outside solutions for their survival, "back in those days she [Mabel Solomon] said if you didn't get enough berries and meat and fish, you would starve."[459] Today, "we continue to have our fish and wildlife. To be able to keep coming down toward the Fraser River, because of them [grandparents of today's Elders] we are able to have our food source."[460] Protecting communities requires protection of the environment to be sure. If other systems fail, as Dt'an taught the young man, people will still have a source of food to rely upon. The threat of systems failure is seen as a consequence for someone's failing to abide the law. Whether science can prove enforcement through natural forces is irrelevant. That people act because of the possibility of natural enforcement is what matters. In other words, belief in the worldview matters, which is in large part a significant buttress to the validity of *dechen ts'edilhtan* for the Nation. Food systems, beyond fish and wildlife, require water of a certain quality and quantity for their continued existence, making apparent the link between protection of families and communities, and weaving into it the protection of water.

[459] Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 11.
[460] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 8.

c. Quality: Natural and Gendered

Water sustains life in multiple ways, some of which I have touched on in this chapter. The oral tradition of Tsilhqot'in ancestors shows water being used for transportation,[461] as a means of escape and protection,[462] a source of food and for drinking,[463] a means of transformation,[464] cleansing and healing,[465] to provide insight and communication,[466] and as a place to grieve.[467] This section covers water quality as required by some of these uses to serve expected and intended purposes. For example, water's ability to cleanse and heal requires water free of toxic contamination to fulfil its intended goal and not infect people with additional ailments. Two stories reflect the principles of healing requiring water to be of a particular quality: *The Blind Man Who was cured by the Loon* and *The Boy who was kidnapped by the Owl*.[468] In the first story, a blind hunter has his sight restored when a loon prescribes healing dips under the lake's surface. The need for clean fresh water is apparent in healing his sight. A polluted lake would likely not be of much benefit to health in any manner, particularly when coming in contact with someone's eyes. In the second story, a boy is explicitly told "to go to the

[461] Farrand, *supra* note 49 for *Raven and Tūtq*, at 15 (paddle to the village where Tūtq took Raven's wife); *Story of the Salmon Boy* at 24 (boy travels up and down the river with the salmon); *How the Young Man obtained Thunder's Daughter* at 26 (young man escapes from Thunder with his wife as ducks swimming across a lake); *Estěnē'iq'ŏ't II* at 48 (people use the river for transportation and are blocked by Estěnē'iq'ŏ't's presence).
[462] Farrand, *supra* note 49, *Story of the Salmon Boy* at 24 (boy becomes a salmon and lives with the salmon people); *How the Young Man obtained Thunder's Daughter* at 26(young man escapes from Thunder with his wife as ducks swimming across a lake).
[463] Farrand, *supra* note 49, *Raven obtains Daylight* at 14 (Raven enters the drinking water); *Raven and the Salmon* at 18 (salmon are a source of food for Raven); *The Young Man and Dt'an* at 32 (the frozen lake provides fish in a severe winter).
[464] Farrand, *supra* note 49, *Raven obtains Daylight* at 14 (Raven uses water to pass into the family as their child); *Story of the Salmon Boy* at 24 (boy drifts down the river and becomes a salmon).
[465] Farrand, *supra* note 49, *The Blind Man who was cured by the Loon* at 35 (Loon directs man to dunk his head in the lake to regain his sight); *The Boy who was kidnapped by the Owl* at 36 (mother tells her son to go down to the lake and bathe).
[466] Farrand, *supra* note 49, *The Man and the Three Wolves* at 33 (wolves communicate by drawing lines in the snow to point the man in the direction of a bear sleeping in a winter den); The Man who married Eagle's Daughters at 38 (the women use water fetched by their husband to determine his fidelity).
[467] Farrand, *supra* note 49, *Estěnē'iq'ŏ't II* at 48 (Estěnē'iq'ŏ't sits on a rock in the middle of a river to grieve).
[468] Farrand, *supra* note 49 at 35 and 36 respectively.

lake and bathe, for he was dirty".[469] The boy goes into the water and lives there into the winter. Again, the relationship between clean water and cleansing the body to wash away dirt is obvious.

Elders spoke of the necessity of having clean water for the fundamental purpose of sustaining life. It has to be "fresh, clear for drinking,"[470] and "because we need it to live, so do all the plants, the birds and the animals. They all need water so we have to protect our water by all means."[471] However, clean water does not necessarily mean pure water. Clean water is good for drinking. It is also natural, but not all natural sources of water are clean and safe for drinking. As Elder Mabel Solomon explains, water's quality changes with the seasons, she "said that water gets contaminated in the spring time and everything is melting. There's a lot of stuff that goes into the water and you can get sick from that."[472] More profoundly, Mabel, who was one of the few remaining old-timer Elders, spoke about the transcendence of water through people in a manner that helps explain the holistic doctrine, as translated by Susie Lulua:

> She said that your blood also changes in the spring time. So you get sick, and she said in the spring time when everything is melting, everything goes into the water, like creeks, lakes, and you will get sick with the water. And another thing she mentioned earlier too when I was asking her about water, is that not all water is good. Sometimes when you make tea in water, it turns black, that's what she said too.[473]

Mabel is explaining the interconnectedness of water and humans in a way that espouses the idea that when water is impacted, people are impacted, because water and people are one-in-the-same (water changes in the spring time; your blood also changes in the spring time). In so doing, Mabel acknowledges that not all water is good for people. Sometimes spring runoff gathers contaminants from the surface of the ground, also closely connected (*nen*/*tu*), giving clarity to

[469] *Ibid* at 36.
[470] Interview of Phyllis William (5 July 2017) at 4.
[471] Interview of Susie Lulua (4 July 2019, am) at 1.
[472] Interview of Mabel Solomon at Xeni Gwet'in (4 July 2017) at 4 (translated by Susie Lulua and Dinah Lulua).
[473] *Ibid*.

reasons for rejecting activities that carry the potential to pollute. As Gilbert explains "We know that water and the land together they raise all these plants, and we are here, you know."[474] We are here, a reminder that everything is connected, "every time they are exploiting the land, taking trees away or mining, poisoning everything, it's also doing a number on us, as people who live on the land and care about those things," because the toxins flow from the land, through the water, and end up in the people: *nen*/*tu*/*deni* interconnectivity.[475]

Not all water is potable. Likewise, some water that is not clear is nonetheless natural and drinkable. This is an important distinction in the legal logic that allows for natural conditions, while rejecting pollution and other forms of human caused contamination. As Phyllis William explains,

> I just remember my grandmother mentioning for us not to spit in the water or throw things in the water, *things that are not natural* I guess to the water. […] like with the leaf, you know, putting your, um, your problems or whatever, talking to and putting all your stuff on the leaf and letting it go in the creek and then it takes away everything. So it was just like putting objects that are natural to the water, not stuff that is foreign to it.[476]

Some of these natural albeit unusual sources of water are powerful sites used in healing and ceremony. There are a few locations throughout the *nen* where naturally occurring soda water bubbles to the surface: "we have a healing water also. It's sort of like a soda water near Riske Creek".[477]

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[474] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 9.
[475] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 2.
[476] Interview of Phyllis William (5 July 2017) at 7 [emphasis added]. Compare this with Dinah Lulua's statement, "Don't put any garbage in the water, rivers, lakes. Don't put any fuel in the water from boat motors and other fuels. Don't contaminate the waters in any way," Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 14.
[477] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 15. I heard from several people that most of these sites are on private ranch lands, and people require permission from the property owner to access these sacred sites. Access from the western legal property perspective holds more authority than the inherent jurisdiction of the people who have never sold or surrendered these sites to anyone.

Elders in multiple interviews discussed the importance of the healing powers of water, including in the context of the four directions of a human being, physical, mental, emotional, and spiritual. Women "use it as prayer in the sweats to help us cleanse our bodies, cleanse our minds, keep us balanced in life. It's also a way of healing with our emotional, our physical, our medicine wheel."[478] Throughout the interviews, women, more predominantly than men, spoke of the sacredness of water, indicating that the relationship women have with water differs from that of men.

One possible explanation for women's increased attention to water's sacred power is their recognition that they pass water to their children through the body of the mother, which will impact their health and development. For example, Marion William explains, when a woman is "with a child, the mother has water, breastfeeding the child," and when older, "the boy or the girl, reaching puberty, they would only drink handful of water as they fast for three days and nights," as part of their transition from children to youth.[479] Water represents a constitutional source of being for Tsilhqot'in far beyond identity relating to their connection to the river. It feeds the flesh and lives of the people making them a physical part of the land, reinforcing interconnectivity through the idea that Tsilhqot'in are also kin relatives to the land transmitted generationally through childbearing and childrearing processes.

Water as being constitutive of Tsilhqot'in at the core of human existence rather than in mere identity deepens the understanding about the connection between a people to a geographic place. Tsilhqot'in people possess an inner physical, spiritual, and emotional connection to the land that lives through their flesh, as it has for generations. To be Tsilhqot'in is to be the land in substance, since the time of the ancestors and maintained daily by the intimate and vulnerable

[478] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 18.
[479] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 17.

process of renewal, consisting of drinking, bathing in, praying to, speaking to, paying and respecting the water that courses through the land. Nobody is more closely associated with the facilitation of that process than mothers because of their ability to initiate life by passing through them to their unborn children the water that connects them to the *nen*.

The oral tradition conveys the concept of water flowing through mothers to their children. In *Raven obtains Daylight*, the world is dark all the time. A man keeps daylight in a box, and does not share it with anyone. Raven wants to get daylight. He devises a plan involving water. Raven waits at the place where the family gathers water for the home. "Raven, when he saw the man's wife coming down to drink, turned himself into a fir-needle and went into the water, and the woman swallowed him as she drank. Soon the woman became pregnant and gave birth to a child. Now this child was Raven."[480] As a child, Raven is able to get the box, turn himself back into a bird, and bring daylight to the world. The use of water to facilitate the birth of a child in the story brings to the fore the connection of water in childbirth. Water facilitates Raven's *becoming* a human child. This is a form of temporary strategic transformation (I will speak more on this aspect in the next chapter). However, Raven never ceases to be Raven, even when he is a human child, as he is able to return to his natural form the instant he accomplishes his objective, acquiring daylight.

Men speak of water differently than women. Men address water more plainly as a physical substance. For example, Marvin uses water for practical purposes, such as bathing, "[Marvin] said he baths in the lake. He said he baths in the lake sometimes his body, his body gets itchy, and then he has a bath in the lake and it clears up the itchiness, and his body feels

[480] Farrand, *supra* note 49 at 14. There is no mention of the woman giving or refusing consent here. Assumptions could be made either way. Likewise, her becoming pregnant within her marriage is also only assumed.

better".[481] Marvin's use of the water may also be understood as utilizing the healing properties of water. Men also discuss the sacred powers of water. For example, James Lulua recognizes water's sacred and powerful properties:

> To me water means a lot to every community as you worldwide, a lot of communities are starting to fight for their water rights, protecting their water cause its valuable, and not only valuable, it's powerful, it's healing, as it's being used in sweat lodge, spiritual use, and that, and also in your own home or use in the, what we use daily, on the daily basis, in your community, your own home.[482]

However, based on my conversation with other men, recognition appears to be the extent of a man's engagement with water. Where men recognize water's sacred power, women engage more directly with those properties. Upon returning from a workshop at Tl'etinqox in January 2017 with the Indigenous Law Research Unit, I attended a water ceremony at the Chilcotin River near Yunesit'in that former Xeni Gwet'in Chief Marilyn Baptiste conducted. The men in attendance were permitted by exception. Marilyn explained that usually women perform the ceremony without men. One of the reasons for this gender-specific exclusion of men may be the shared identity between women and water as life-givers. Another reason may be identified in a story about a girl who was turned into stone:

> The first time when a girl menstruates, they don't drink from a cup. […] When the girls menstruated, they used to be shy about it. Girls that were menstruating didn't stay in the villages. They used to live in the bushes. This menstruation period lasted three days or more.
>
> Once this girl went down to the river to get water. She filled the palm of her hand with water to drink. In those days, that was all she was allowed.
>
> A young man followed the girl down to the river to try and rape her but the girl didn't want to look at him because she wasn't supposed to during her menstruation period. He met her on the way down to the river but she crouched down and that's when she turned into a rock, in that position. This is how the girl turned into a rock, long ago.[483]

[481] Interview of Marvin William at Xeni Gwet'in (5 July 2017) at 4 (translated by Susie Lulua).
[482] Interview of James Lulua at Xeni Gwet'in (4 July 2017) at 1.
[483] Rosalie Johnny, in Terry Glavin and the People of Nemiah, *supra* note 35 at 31.

The relationships in the story place young women and water in close communion. The girl drinks directly from her hand and not a secondary vessel. A young woman also lives apart from the community, because at that moment in her life, she has an abundance of power.[484] Men are a threat during these times, and the man in the story does not appear to have appropriate intentions toward the girl who is entering womanhood. The inappropriate behaviour toward women applies directly to the water because of the woman's heightened relationship to water during this time in her life. In other words, the story is showing that men are not of a proper (or appropriate) mind to carry on a sacred, spiritual relationship with water. Women are water's vessel for passing life and land on to future Tsilhqot'in children. Men play a role in regeneration, but it is limited compared to a women's role and her relationship to water in the process of gestation and childbearing. This is not to suggest that men do not have knowledge of water's sacred properties, but their relationship to water seems focussed more on its uses.

When James Lulua was asked about how people show respect for water, his response is devoid of spiritual connection and focuses on the tangible, "That's what you were asking, I guess, about respecting the water. So we do have to respect the lake, how we travel on it, make sure that we are safe, that we have safety gear on, and respect the river 'cause it's powerful, takes you down stream".[485] For James, water's power is in its ability to move objects rather than a sacred ability. This shows a distinction from the manner in which women discuss water's power more often as a healer and sacred place. There are exceptions, however. Not all men are farther removed from water's sacred properties than women.

[484] "If it's your first moon you have to stay away from the rest of the people because um you got a lot of energy." Interview of Agness Haller at Yunesit'in (17 July 2012) at 14.
[485] Interview of James Lulua at Xeni Gwet'in (4 July 2017) at 5.

For example, Gilbert's life as a *deyen* or spiritual leader, makes him an exception. His practices and understanding of the sacred likely elevates him above other men when it comes to engaging with water on a spiritual level. That being said, his engagement rings of connections to the tangible:

> Yeah, we know what the water is, connected with the mountains up there, glaciers. We know that it is there for us, all, all, you know, all summer, all winter, it takes care of us. And we know, we know about mountains that they are sacred and powerful, and can't be messing around with those, those spirits, because we have karma, you know, that we don't want to even point at the mountains because we believe all these spirits is there, and we know that water is powerful medicine for all humans on earth. The most powerful medicine is that water, without that we are like dehydrated and dust, you know. We talk to the water, we sing to the water.[486]

Without water, people are dust is a reasonably tangible deduction to make. This could be easily relegated to the status of men and water as discussed above, were it not for the other aspects of Gilbert's statement. He states the obvious (water is life) while simultaneously acknowledging water's multi-dimensional fusion of the land, people, and the sacred, and people's responsibility to openly acknowledge water's many roles. But, as I mentioned, Gilbert is the exception. Water's sacred powers exist more squarely in the realm of women. Beyond the sacred, everyday uses tend to be more women-focused.

Women use water for many purposes, requiring water be of a particular quality. Lane's use of division of labour as a category to understand gendered roles identified women as being more closely associated with "camp work", "Women did camp work, prepared skins and clothing, wove baskets, and gathered plant foods and materials".[487] Dinah Lulua affirmed Lane's depiction of a family's water uses with an added emphasis on the quality expected or needed:

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[486] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 1.

[487] Lane, *supra* note 6 at 403. Lane did not, however, suggest division of labour was fixed. He added that "men and women often shared tasks and some individuals by preference engaged in tasks traditionally performed by the opposite sex. This was not considered deviant or noteworthy," at 404.

> We use it for, for drinking and for cooking, and for bathing, and also use it for our animals, we feed our cattle and horses throughout the winter. It's the type of material used for, from the well to our home, coming out of our taps, that's why we have a boil water advisory here, down this end, with a few of our homes. If we take a cup and drink from our creek, straight from our creek, we can drink as much water as we want.[488]

People require water to be of a quality that is fit for human consumption. Ironically, well water from the taps must be boiled while water taken directly from the creek is clean for drinking. Water is logically required for several different purposes including to sustain animals, domestic and otherwise. Naturally, people are concerned over any threat of contamination.

Logging and mining are connected to the contamination of water, affecting people through myriad ways people sustain themselves from the land,

> By mining, by logging, or uh polluting into the rivers, we aren't going to have any more fresh water left in this world. […] I think it's important that, to keep our water fresh, and to keep mining and forestry, logging away from water sources, because those things will, well logging would dry out all our water sources, and we have our berries and our medicine plants, and our grass that the wild animals depend on to survive, the bears, the deer, and the moose, all the wildlife in the forest.[489]

The connection between mining and logging and contamination is well known among the people.[490] In the story *The Man who married Eagle's Daughters*, the daughters' ability to receive information after dipping a feather in the water the man had gathered offers a metaphor, and raises a couple of related questions about the implied quality of the water.[491] The metaphor of clean water being equated to integrity and fidelity, and cloudy water representing betrayal and disruption is obvious. The first question is whether the water must be clean for the Eagles' test to

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[488] Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 1.
[489] *Ibid* at 1, 14.
[490] See also Marion William "We would continue to not allow mining or logging, because those two are the biggest devastation." Interview of Marion William at Xeni Gwet'in (5 July 2017) at 5; Phyllis William "a lot of these sensitive areas would probably have, uh, restricted access. And with the logging happening in our surrounding communities our area is really sensitive because we can't maintain the soil and stuff with all the weather and everything else that is around it that is affecting it." Interview of Phyllis William (5 July 2017) at 10; and Gilbert Solomon, "Well every time they are exploiting the land, taking trees away or mining, poisoning everything, it's also doing a number on us." Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 2.
[491] Articulated elsewhere in this dissertation. Farrand, *supra* note 49 at 38.

work? Who is to say that soda water would not work equally as well? The answer is likely simple, which is related to water's use in the story. The water being sampled with the feather is water that is to be used for drinking, which must be fit for human consumption. In this regard, the water must be clean enough to drink, and therefore, clean enough to test the fidelity of its fetcher.

The next logical question then is, could water that is not being used for drinking store the same information? This is a question to which I do not have an answer, other than to say, the analysis shows that water conveys messages in many ways, and is interpreted and read in many ways. Whether people believe the Eagle's ability to read the water to determine if her husband is faithful is irrelevant for the purpose of this discussion, as the story is simply another narrative that supports the importance of clean water for Tsilhqot'in people's physical, cultural, and spiritual needs. However, arguably the best water for reading into a person's activities may be the water the person also ingests, as this provides water that has reached into the deepest layers of a person's body, but that is merely speculative.

The stories and the voices of the Elders intersect on the point that people require water generally to be fit for human consumption. Whether water is used for bathing, healing, or just plain drinking, water must be clean for the usual uses to which people put water. It stands to reason that if water must be clean for drinking and healing, the expectation that water should be clean for sacred, spiritual uses is not a big leap in logic. Imaging dumping a cup of toxic water on the hot stones of a sweat lodge, or expecting someone else to do so in their ceremonial practice. The toxic steam could negatively impact people's health, and would likely be conceived as an affront to the spirit world. Simply put, Tsilhqot'in people rely on and expect their water to remain of a quality that is safe to drink and to use in daily activities, including sacred and

ceremonial practices. This conclusion may appear trite, as it may be argued that people generally need clean drinking water. The difference here is the need is anchored in the lives of Tsilhqot'in people on their unceded territory, which gives rise to their legal order. In other words, the need for clean water bears distinction, as it is given the weight of Tsilhqot'in law.

d. Water Quantity: Sufficient Flows to Support Fish

Accepting that water must be of a *quality* fit for human use, and fit to nourish the other life that ultimately human's may consume, then it is not a stretch to argue that water must be of a *quantity* that also serves those same functions. For example, the story of *Raven and the Salmon* becomes moot, indeed impossible, if there is not enough water in the river to support salmon. The internal logic vanishes if the narrative is inconceivable. Without sufficient river flows and conditions to support salmon, there would not be any salmon. The story becomes meaningless, and Tsilhqot'in begin to die as a people.[492] Ranching has a significant impact on stream flows in the Tsilhqot'in *nen*. Understanding how the reduction of these flows impacts directly on people who bear the responsibility to ensure their laws are carried out to protect rivers and their aquatic species helps support an argument for sharing jurisdiction over water. The ability to make decisions on water uses in times of shortage is premised on the rule that a person cannot impact others who also rely on the same water.[493] The principle of non-interference with other users includes non-human users, which has the potential to create conflict within the territory between conflicting legal orders. Going back to the example of the draining down of Choelquoit Lake

[492] Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 8, see *supra* note 424.
[493] James Lulua, *supra* note 396. There is indication in the interviews (made obvious in the logic) that Tsilhqot'in people have a priority interest in water, and therefor the flows: "If they [outsiders] had no connection familywise or whatever, um, probably would have some unhappy feelings around that [not getting access to all the water they want to bottle and sell]. Just because you know this is our water, not theirs out there." Interview of Phyllis William (5 July 2017) at 13.

described by Alex Lulua, the impact of trying to resist the infringement of Tsilhqot'in law led to tension:

> Over Choelquoit [possibly Chilco] Lake, back in the day that lake used to be one whole lake, Choelquoit Lake all the way to Lunch Lake. Now it's separated, and not only separated, it's shrunk down quite a bit. Down the people in Tatlayoko they redivert it that way, all the creeks going that way, there used to be a fish trap down by the end of the lake, used to be good bearing streams and now it's hardly a trickle. The kokanee died out because of it. They do go in there to spawn, but once they are in there to spawn, there's no water in the creek for the eggs to stay alive anymore, and some farmers came up to my dad's ranch years ago and pulled a gun on my dad. Me and my brothers were in the house when we seen that. They're telling them not to re-divert the water back to Tatlayoko no more, saying we were using it too. Now that lake is disappearing big time and wiping out, oh yeah trout, they're stocking it but wiped that out as well, because of that, the trout were spawning there in the spring time and kokanee were spawning in the fall time. And I was in the house when me, my dad was outside with those two ranchers, one had a gun on him and I seen them. I was inside the house watching everything, so I grabbed the gun off the wall and got it ready. I was scared too, that they would shoot my dad, so I was going to shoot them back.[494]

The ranchers believed they had a right to the water grounded in their licence to divert the stream, (assuming they had one). Under Tsilhqot'in law (non-disturbance, protection of water flows) the negative impact on the fish required the participant's father to correct the stream flow to its original condition, which led to conflict and the threat of extreme violence. The strength of the obligation a Tsilhqot'in person carries is represented in this anecdote as being the extent to which the father was to risk his own life to correct the stream's flow. The father's obligation to the other users, such as fish, was sufficient to put him in the face of conflict with angry non-Tsilhqot'in ranchers. This is an example of the tension that often exists between worldviews. One worldview prioritizes the importance of maintaining relationships with the species that will continue to feed the people, whereas the other worldview prioritizes the right of individuals to protect economic interests. This is the tension Tsilhqot'in people face when carrying out obligations to which they are bound under *dechen ts'edilhtan*. Ensuring other users are protected,

[494] Interview of Alex Lulua at Xeni Gwet'in (4 July 2017) at 6.

means ensuring there is a sufficient quantity of water to go around. In other words, according to Tsilhqot'in law, the ranchers were not prohibited from using water, only that they could not have it all.

For similar reasons to expecting water to be of a certain quality, there is an expectation that water will remain in its natural flows, and allowed to fulfil the purposes it serves. Dinah Lulua, Alex's relative through marriage, commented:

> I think your dad probably would have had the right to that water because it was naturally going to what we used to call Eagle Lake is now called Choelquoit Lake. I think um the people that lived along the lake, I think that if the water was fed into that lake, I think they should have had the right to it, to change it back to where it should have been, where it was going naturally.[…] Yes, and in the past, for years water naturally flowed to where it needed to flow, into lakes, other streams, eventually heading down to the ocean.[495]

Elders elaborate in other contexts the principle of sufficiency of river flows that this story represents, primarily that there is a purpose for water flowing where it does, to serve its intended purpose.[496]

Rivers are powerful, and their flow must remain sufficiently strong to carry away harms, troubles, and heal injuries.[497] People go to rivers to bathe, and have the water carry away various ailments. Without a sufficient flow of water, this practice would cease to exist. Additionally, without sufficient flows, salmon could not reach spawning grounds, and fish would die off. The idea that natural water flows should remain undisturbed is based in the principle against

[495] Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 7, 8. In this statement, Dinah is referring to a right according to Canadian law vis-à-vis the ranchers. Under Tsilhqot'in law, Tsilhqot'in people would have merely exercised their authority and done the *right* thing by restoring the flow.
[496] Dinah Lulua stated that "in the past for years water naturally flowed to where it needed to flow, into lakes, other streams, eventually heading down to the ocean." Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 8.
[497] Phyllis William stated, "with the leaf, you know, putting your, um, your problems or whatever, talking to and putting all your stuff on the leaf and letting it go in the creek and then it takes away everything." Interview of Phyllis William at Xeni Gwet'in (5 July 2017) at 7.

disturbances (explained elsewhere), and is rooted in logical reasoning that without them, the environment that created them could itself change for the worse.

Conclusion

Tsilhqot'in people have always controlled access to their *nen* and the *tu* that exists within the territory. This chapter has explained from where that authority derives, giving reasons for its continued expression and ways for engaging with it under *dechen ts'edilhtan*. People may use water as they need it, provided their needs suit specific purposes such as to sustain life. There is no opening for commercial uses currently under the legal order, as the people have not faced these uses in the past that could potentially deplete or contaminate entire water sources. Their laws exist to preserve and protect water to ensure the continued health and longevity of the people, as a people, as a nation. Unless a contemporary government under direction of all the authorities involved make changes to how water may be utilized in a contemporary global capitalist world, I do not expect much will change regarding the use of water. Those decisions rest with the people, as they always have. The laws that serve protection are quite clear, as are the reasons for their existence.

The reasoning flows from the logic around why laws apply to water, and what purpose those laws serve. Again, most of the principles can be tied back to protection of the people. Of course people who have relied on the water in their lands since time immemorial exercise an authority to protect them, if for no other reason than to protect the people and the longevity of the nation. The rules and principles that develop in support of the overarching law are also reasoned. A prohibition against waste ensures the unnecessary and reckless depletion of water that serve multiple functions, such as for drinking, as habitat for fish and other aquatic animals,

to hydrate large animals, to provide a habitat for insects that feed a variety of birds. The list goes on. All of these interrelated species provide support for other species, particularly people. Decisions about water's uses are made at several levels beginning with the individual, then a family, to the community and its leadership, up to the National collective, depending on the circumstances.[498] Families will make decisions about their local usage. Where that usage may impact others, they turn to the community and its leadership.[499]

The rule against disturbance relates to the rule against waste, both of which connect to the principle of respect. Disturbance is unwanted for a number of reasons, such as the risk of harm it presents to unsuspecting innocents who may be in harms way, as with a boulder crashing down a hill. Disturbance may also lead to destruction of land and possibly water. For example, the disturbance of a riverbed may interrupt or prevent salmon from spawning, which would have an obvious impact on people.[500] Disturbances through logging may lead to changes in water sources and flows. A rule against disturbance may seem trivial to some, but the reasoning shows its importance, considering the potential loss of water and important food sources.

Placing these types of rules and principles under the principle of respect also makes sense, which explains why respect is a part of the law. People are expected to make decisions that embody respect for people, land, water, animals, fish, and plants. They are expected to not act in ways that disturb or destroy or waste these important relations, and inversely to act in ways that protect and preserve. Respect contains both positive and negative aspects attached to a person's actions. As such, respect is an institution within which these specific laws are found.

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[498] See, Napoleon, *Tsilhqot'in Law of Consent*, *supra* note 401 at 884.
[499] When asked about using a local stream for irrigation, James Lulua stated he would "probably have to sit down with the Chief and Council." Interview of James Lulua at Xeni Gwet'in (4 July 2017) at 15.
[500] Chief Joe Alphonse once explained to me that in the past, disturbing a river bed could invite a serious punishment including death. This reflects the importance of salmon to the nation. Personal communication August 2016 at the TNG offices in Williams Lake.

These are only the legal elements that are apparent to me, which by no means is exhaustive. I am certain there are other laws, rules, norms and principles that go beyond the scope of this dissertation. Future research will undoubtedly reveal more depth in this area of Tsilhqot'in law.

Returning Home

Figuring out the subtle nuances of flight, a twitch of this feather, a flick of another, took some time, like a toddler learning to walk. A basic understanding of aerodynamics helped, and before long I was able to avoid trees, traffic, and the side of mountains. I followed the river that flowed past the carnage of the mine site and meandered down into the little community some distance away. I veered east toward the village, leaving the river on its path southward.

As I approached, I could see the village's hulking water tower perched high on a bank above the small buildings. I noticed a gathering at one end of town. I love gatherings. I swooped to land in a treetop overhead. It's a funeral. The loss of an Elder is always upsetting. The history, knowledge, language, relationships, all interrupted. Turning my head, I could start to make out the voices below. They were talking about the sadness of this event. Straining to hear better, I hopped down a few branches, and learned that this wasn't the loss of an Elder, but a young man in his early thirties. Cancer. I could make out the long faces. People didn't look well. It was more than sadness. There was a sickness that hung over the small crowd. People were talking about the lucky ones who got out and moved away. They didn't have to eat the food here any more, or drink the contaminated water. I looked back at the water tower. It loomed ominous, crouching like it was ready to pounce.

The river was contaminated, which leached toxins into the water table. Even though the water was treated, it was not entirely clean. It wasn't the same water they were used to. Full of chlorine with traces of arsenic and mercury – too small to trigger any alarm for the health authorities, so many parts per million, below the threshold. What did science know better than

these people here who have lived in relationship to this land, connected to it through the uptake of water? Besides, it wasn't the water alone. It was the combination of trace amounts in the water with the accumulation in the biomass of the country foods. The fish, deer, moose, birds. These all contributed to the stockpile of harmful elements in people's bodies. I felt sick just thinking about it. Datsan!!! Where are you? Why have you put me here? What can I possibly do?

I panicked. It took everything I had just to get away from that place. The silent violence imposed through another nation's, Canada's, idea of the good life. I had to escape. I just flew, and flew, until eventually I reached a long blue lake tucked into the base of a string of white snow-capped mountains. I could see Ts'il?os from on high, his head tilted back, staring up into the stars. Why wasn't he doing anything about this evil inflicted on the local people? Perhaps he was planning to exercise his will and would wash all those miners, those outsiders off the *nen*? Perhaps this was his way of saying the people strayed too far from the teachings of dechen ts'edilhtan passed down from their ?esggidam? Perhaps they showed him disrespect when they didn't do everything in their power to outlaw and prohibit the destruction, as it violated the law of respect by allowing a disturbance to the land and the wasting of a lake? And the most basic of all laws lay in tatters at the feet of the gathered crowd at the funeral, the law requiring protection of the people. I don't know for sure, but these were all swirling through my head when I landed in a tree off the shoreline of the big azure-turquoise lake.

I spotted a dim light through a window, and got a little closer to take a look. The place looked familiar. I saw the deck, and the light coming from an upstairs bedroom window. I

know this place! It's the place I've stayed at when visiting the community. There was some movement in the window. I looked closer. Oh my—it was me, laying on the bed, reading! Hey, Datsan! I want my body back. I'm not capable of doing anything. This gift you gave me is too much. Too powerful. And yet I knew I was completely powerless to change what was happening. Raven ignored me, flipping a page, before turning out the light. A loon cried out on the lake. My eyes heavy, I closed them and I drifted.

The smell of breakfast cooking brought me out of my slumber. I rolled over and fell on the floor with a thud. I held out my arms. No feathers! My chest. No feathers!!! Whew! I am back. I ran downstairs to see the hosts preparing breakfast. Excited and hopeful, I ask about the mine. "Mine?! What mine?!" "So far we've been able to keep it out of here. It's against our laws you know." I have never heard such beautiful words. I was only dreaming.

On the drive home toward Williams Lake, I stopped to stretch my legs at a small pullout off the gravel road. My dog jumps out and I throw the ball for her. Out of nowhere, Datsan appears, swoops low and cackles before swinging up and out of sight, as abruptly as he had arrived. I couldn't help remembering the story an Elder told me years ago, about Raven coming to warn the people of an impending invasion. He couldn't wait for the people to respond, so Datsan took matters into his own hands and killed the invaders before they reached the first village. I can't help but wonder if he will intervene under today's threat, or if he will leave it to the people this time. Only time will tell.

Deni texalchug. He looked after law and order.

- Ervin Charleyboy, trial testimony[501]

Chapter 5: Governance

The act of governing is an integral part of being Tsilhqot'in in relation to the *nen* and *tu*. This reckoning must be accurate, as people did not wander aimlessly throughout the land devoid of social, legal, economic, spiritual or political contexts. If there was ever a time where humans (or at least anatomically modern human with the capacity for advanced reason and intellect) lived in a state of nature, as Hobbes described, it was long before the Tsilhqot'in or Dene were ever a people.[502] Tsilhqot'in travelled the *nen* regularly in deliberate seasonal patterns.[503] At one level, these seasonal rounds provide access to food, while not over-exhausting a particular species.[504] At another level, as I have argued elsewhere, "the act of traveling the territory is a direct and deliberate function of occupation and jurisdiction that defines Tsilhqot'in title."[505] In other words, the seasonal round is an act of governance which involves every Tsilhqot'in person, from the *?esggidam* (ancestors) of *sadanx* (long ago) to the people of the present.[506]

Governance is a practice rooted in tradition with origins in the *sadanx*. A glimpse of the practice of governance is offered in the story of *Lendix'tcux*, who, as described in the previous chapter, travels through the *nen* with his sons in a systematic manner under the authority and teachings of his wife.[507] Lendix'tcux carves out jurisdictional space in the *nen* through creation

[501] Trial transcripts, volume 82, 19 April 2005 (day 219) at 14261.
[502] Thomas Hobbes, *Leviathan: Or the Matter, Forme and Power of a Commonwealth Ecclesiastical and Civil*, Michael Oakeshott, ed (Toronto: Touchstone, 2008) at 97-133. Anthropologists such as Marcell Mauss, *supra* note 153, and Claude Lévi-Srauss, *supra* note 142, have argued that Hobbes' state of nature could not have existed for social modern humans.
[503] Clearly described in *Tsilhqot'in* BCSC at 380-397.
[504] *Ibid* at 397.
[505] Hanna, *supra* note 156 at 390.
[506] *Ibid* at 370.
[507] Farrand, *supra* note 49 at 7-14.

and the many encounters and resulting relationships they established with the local inhabitants. Tsilhqot'in people inherit the *nen* with all of its attendant responsibilities and obligations. People continue to govern in the manner of the seasonal round, in addition to other western forms both imposed (*Indian Act*) and strategically selected (Tsilhqot'in National Government).

Governance is relevant to laws pertaining to water for obvious reasons that cross political and legal regimes. In the common law and legislative realm, water is considered a public resource managed by the Province.[508] In the Tsilhqot'in perspective, water is a constitutional source of being, giving Tsilhqot'in people inherent priority and jurisdiction over *tu* on the *nen*. These differing perspectives do not necessarily have to be mutually exclusive or result in a conflict of laws, as one function of government is to negotiate collaborative relationships that serve the interests of its people.[509] This chapter provides a sketch of the practice of governance through the lens of the legal order, which is divided between decision-makers and enforcement.

I begin by considering the practice of governance through the legal order, which offers insight to inform contemporary governance in the ambit of water governance. Providing a chapter on governance makes sense considering all Tsilhqot'in people have responsibilities to *nen* and *tu*, and as such, all, from the individual to the community, share the responsibility to manage water through collective action.

[508] *Water Sustainability Act*, [SBC 2014] C 15, section 5 (1) states, "The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except insofar as private rights have been established under authorizations." Subsection 2 claims to vest groundwater in the government of British Columbia.

[509] I am making a common assertion here; however, see the dated book by Frank Cassidy and Robert Bish, "Indian Government: Its Meaning in Practice" (Lantzville, BC, Oolichan and The Institute for Research on Public Policy, 1989) where they write "Government starts with people, people who have problems in the course of social and economic life, problems they must solve in an authoritative and general way. […] They [Indigenous governments] were most often an integrated part of other social and economic arrangements, but they still did things and delivered the services governments must provide," at 3.

1. Governance in the Legal order

The traditional Tsilhqot'in system of governance relies on a range of people to carry out its functions. Individuals were responsible for their own personal actions and relationships with the land and others, as repeatedly depicted in the oral tradition. Many of the stories tell of how individuals respond to different situations on the *nen*. A good example which has already been discussed is *The Young Man and Dt'an*. The young man is ultimately responsible for feeding himself and his grandmother, and when there is an abundance, his village. The young man and his grandmother make the decision to distribute the remaining fish to the village after "they ate all they wished, and there was still a great many left".[510] In the story, the young man is solely responsible for his relationship with Famine, despite the far-reaching consequences on others if he fails to respect that relationship. However, through the story, Tsilhqot'in people are reminded of Famine's latent yet ubiquitous presence. This example shows how closely connected the individual is to all of her other relations including relatives, community, and the lake and fish that feed them all. The extrapolation of responsibilities from the individual outward offers a sketch of traditional governance from the Tsilhqot'in non-centralized traditional system.[511]

Tsilhqot'in traditional governance is decentralized in the sense that it had no "formal, centralized processes for enacting law" according to Canadian standards.[512] Rather, similar to the form of decentralized authority Robert Clifford identifies within WSÁNEĆ law, the Tsilhqot'in

[510] Farrand, *supra* note 49 at 33.
[511] Val Napoleon explains decentralized government as it pertains to Gitxsan: "the Gitksan do have law, the ayook, which derives from the long-term social, economic, and political interactions of the members, House groups, and clans. This decentralized law is created by the conduct of Gitxsan peoples in their relationships with one another over time—as individuals, House groups, and clans—and with non-Gitksan peoples. Gitksan peoples had ways of formalizing law that derived from social interactions over time, and these teachings are part of how Gitksan peoples managed themselves historically, and arguably they are still reflected in contemporary governance functions." Napoleon, *supra* note 26 at 5. How this description applies to Tsilhqot'in governance, is that, as with Gitxsan governance, it too is "created by the conduct of [Tsilhqot'in] peoples in their relationships with one another […with] ways of formalizing law that derived from social interactions over time," at 6.
[512] *Ibid* at 5.

tradition is carried out in a "collective contemplation" of the matters it serves to address.[513] Yet, it did, and continues to, rely upon legal institutions, despite not being readily recognizable to common law thinkers. As discussed earlier in this dissertation, creating and sharing stories is one of the legal institutions that serves to record and transmit law inter-generationally. The manner in which relationships are structured is another legal institution. I refer to this institution as *relationality*, as it carries the rules and norms about how relationships (human-human and human-non-human) are governed and how outsiders may become part of a larger collective.[514] Institutions are comprised of different people who have different skills and knowledge. Whether individuals, Elders, youth, communities or leaders, everyone has various roles and responsibilities in governance which are not easily parsed out in reality. However, I discuss these separately in the context of governance while highlighting their inter-relationships where possible.

a. Decision-makers

I begin this section by giving a general account of decision-making authority in the Tsilhqot'in tradition, after which I will narrow the authority as it pertains to water. The account provided here is to give a sense of how de-centralized authority operates throughout the people, who are not the only entities involved in making decisions. Mountains, such as Tŝ'il?os, spirits and animals also possess decision-making authority, taking power out of human hands,

[513] Clifford, *supra* note 94 at 778.
[514] See for example, Hanna, *supra* note 147 at 828-831. My distinction is a broader category than that offered by anthropologists, who refer to relationality through kinship focusing primarily on marriage and other human-human relationships. See Lévi-Srauss, *The Elementary Structures of Kinship*, *supra* note 142. However, Indigenous scholars apply the term kinship to the institution that regulate relationships to capture the broad reach of kinship relations. See for example, Morales, *supra* note 84 starting at 51.

reminding people they are only part of a larger operational world.[515] This being a deeply internalized area of Tsilhqot'in logic and worldview, I will not pursue a deep analysis on sacred power.

I am convinced that these non-human entities in the Tsilhqot'in world posses powers beyond the grasp of most outsiders. Upon our return from the Nemiah Valley in 2017 after conducting interviews with Xeni Gwet'in Elders, the two UVic law student researchers and I stopped to take one last look at Ts'il?os and snap a few pictures with our phones. We failed to consider that taking the picture by pushing on the phone gave the appearance of pointing at the mountain. Not two minutes after leaving that spot, we encountered a flat tire. Coincidence? Perhaps. My Secwepemc father-in-law said it happened because we pointed at the mountain, and we were not ignorant of the potential for misadventure when we did so. We were advised in one of the interviews, "Don't point at Mount Tatlow", "he will get you one day".[516] The trouble with recognizing authority bound up in the land is a difficulty with conceiving of its practical application.

People trying to work with the substance and procedures of Tsilhqot'in law will not possess the knowledge for engaging with these non-human decision-makers, which would subject them to internalized authority. Having said that, outsiders seeking to engage with

[515] There are several references to Tŝ'il?os' (Mount Tatlow) ability to decide whether people will catch fish or an illness. For example, Theresa Billy warned, "if you have bad feelings toward this Ts'il?os, you know, the man, the wife [?Eniyud], and the children, it rains hard and you know if you have bad feelings for this Ts'il?os, you'll freeze or it will rain really hard." Interview of Theresa Billy at Tl'esqox (19 July 2012) at 12. Gilbert Solomon discusses the power of spirits in relation to the mountains, "And we know, we know about mountains that they are sacred and powerful, and can't be messing around with those, those spirits, because we have karma, you know, that we don't want to even point at the mountains because we believe all these spirits is there." Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 1. Phyllis William mentioned the idea that if a person has ill intentions, Tŝ'il?os may not let them catch fish, "I'm thinking, if a person with bad intentions or that kind of person went up to eat the fish, they probably won't get the fish, I'm thinking right? Because you know he is sensitive to umm the people's energy or what they represent. I don't know, if they get the fish, the person might get sick." Interview of Phyllis William at Xeni Gwet'in (5 July 2017) at 23.

[516] Interview of Phyllis William and Susie Lulua (5 July 2017) at 21.

Tsilhqot'in law will have to rely on human resources content with the knowledge that Tsilhqot'in people know how to engage such powerful forces which comprise the sacred internalized Tsilhqot'in physical existence and worldview. I am not suggesting the outsiders cannot know some of the basics. "Don't point at Mount Tatlow." "Respect Mount Tatlow."[517]

> Your actions affect everything, and they are teaching you don't be doing that, don't be rolling a rock down the mountainside, don't roll a rock down the mountain and hear it crashing down, way down, having fun, don't do that, because other spirits going come here, you going to be stuck here, dealing with rain dude, and you not going to be happy about it you know, that sort of thing.[518]

The knowledge may be arcane, but the teachings are free to those who want to learn from Elders and community members with specialized knowledge. The field of potential spiritual and natural decision-makers aside, which I did not study as part of this research, I continue with human decision-makers.

The people who carry authority to make decisions range from the individual to the collective, depending on the circumstances.[519] For example, individuals are responsible for how they conduct themselves in relation to the *nen* and others. People generally do not force one another to act in certain ways.[520] People act in accordance to their upbringing guided by their knowledge of *dechen ts'edilhtan*.[521] Beyond the individual, families are the next logical authority over decisions, particularly as they affect the family. Families deal with family matters and also

[517] Interview of Susie Lulua at Xeni Gwet'in (5 July 2017) at 21.
[518] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 8.
[519] Napoleon, *Tsilhqot'in Law of Consent*, *supra* note 400 at 884.
[520] Lane, *supra* note 6 at 408.
[521] According to Lloyd Meyers, "we been taught that our older brother, our parents, it's the right way to go [… or an] elder will teach him, tell him stories, what to stay away from, what to do. That's how we learn." Interview of Lloyd Meyers at Yunesit'in (17 July 2012) at 12. Agness Haller discussed knowing who in a family was to be approached to address problems, "if you um, know there's a trouble on the reserve and you know which family's causing problem, you have to know who in that family has the strongest voice to control that family. Approach that person to ease the fire down. That's how it's been, like if um, if my family are doing something, he gets approached and he let me know, hey, what's going on. And it's my responsibility (inaudible) talk about what's going on. Interview of Agness Haller at Yunesit'in (17 July 2012) at 24.

with inter-family relationships.[522] From families, decision-making authority rests with recognized leaders, called *nits'il?in* (chief).

Nits'il?in exercise authority at the community level. They wield the ability to make decisions regarding inter-family relationships that cannot be resolved by the families themselves. Their authority also extends to people who are causing problems within the community, such as people who are stealing, and matters involving newcomers to the *nen*.[523] Typically leaders are recognized by the communities, whose recognition legitimizes a leader's authority.[524] However, the community as a whole may collectively decide on matters that affect the whole community either by giving direction to their *nits'il?in* or addressing the matter directly with the *nits'il?in* fulfilling their role as a member of the community.[525] In other words, the authority of *nits'il?in*

[522] Marie shared an experience where "She said she remembers the first jail at Alexis Creek, jail was just like a chicken house, a little house and dirt floor. She, she got drunk in public so she got thrown in jail, she spend over night in jail, there's not washroom, dirt floor, just like a chicken house. Then the next day she got out um she rode her horse back home and her father got mad at her for being in jail, she got disciplined. She thought she was going to sleep but she was told to go hunt, the family are starving. She had to go hunt, she kill four rabbits and make rabbit stew." Interview of Marie Dick at Tl'etinqox (10 July 2012) at 12. In the same interview, Patrick Billyboy said "he got disciplined by his parents many times." Interview of Patrick Billyboy at Tl'etinqox (10 July 2012) at 12.

[523] In a translated story, where the translator is translating what Patrick was saying, "One of the things he [Patrick] was told was not to look at girls in the wrong way. Have respect for the girls, that, that's what he's talking about. And um, when you done things like that um you would be placed before the chief, back then the chief was very powerful. You get placed before the chief and you would have to pay back with what you own, it could be a horse, it could be your land or saddle. He said that's how strict they were with us. And if you misbehave in a very bad way they would tie you up to a long stick, ha, ha. That's what he said." Interview of Patrick Billyboy at Tl'etinqox (10 July 2012) at 12.

[524] Agnes Haller shared the following: "Say, um, if that a, one that was really had the strongest voice in this community died and this community gotta decide, ok, who's going to take his place and (inaudible) everybody would gather and they would pick a right person that would be fair to everybody no matter what. That's the one that would take the person's place. There was no hereditary chief's, the way the elders talk about, there's always somebody that's going to be fair and strong and firm hand but not to the point where they're selfish and stuff like that. […] This one person was brought to the big chief um he says I have nothing to pay you. I have no land, no horse whatsoever, and he still took his shirt. They will take your clothes if they have too, you still have to pay whatever you have. In our community back then, long, long ago, this must be part of a legend too. There was somebody that was um a stealer, he steal things, he'll break into your house, he'll steal your groceries, he'll steal your clothes and he was doing that for a long period of time, people got tired of him, so one day the watchman caught him and they brought him to the big chief and he had no remorse, he laugh about it. So the big chief ordered to um the watchman to um cut off his fingers, all his fingers. And that's how he got disciplined." Interview of Agness Haller at Yunesit'in (17 July 2012) at 24.

[525] Agness Haller explains how the community works through the chief, "They let their chief know whoever is going to decide, they always have a place where they gather high in the mountains, I think, like there's a certain point of a mountain near where they would gather. They have the runners go back and say okay, if you guys decide to go meet

was not despotic. They often made decision with the advice and counsel of others who possessed specialized training in a particular area.[526] For example, if a *nits'il?in* had to make a decision on whether to approve a marriage, they would consult with their *deni texalchug* (keeper of law and order), who would "say [whether] it's okay for these two to get married because they're not closely related. Because they kept track of, you know, marriages".[527] Today, the six communities of the nation are bands recognized under the *Indian Act*.[528] The chiefs and councillors in the communities are elected according to provisions set out under the Act, which includes the potential for custom elections.[529] As it is today, under the old system, *nits'il?in* were not the only community leaders, and therefore, not necessarily the focal point of decision-making authority, as Elders and spiritual leaders also had their roles.

Elders were, and are, relied upon for their years of experience in their capacity as knowledge holders with whom other members could consult and receive advice. On occasion, Elders could also make final decisions about important matters.[530] Likewise, spiritual leaders had a role for their specialized training and knowledge about the sacred and natural relationships in the Tsilhqot'in world. Spiritual leaders and Elders are deeply connected to the land, making them

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a certain day over there with the other chiefs that's where they would decide on. Agness Haller at Yunesit'in, 17 July 2012 at 24.

[526] Gilbert Solomon affirmed in his cross examination that chiefs worked with councillors in the time of the ancestors (trial transcript, vol 79 at 13818, lines 36-40, and 13756, lines 13-25), although that almost certainly did not mean councillor as defined in the *Indian Act*. William Billyboy mentioned that chiefs had councillors who would help with important decisions when they went above the family, "they had the, a counsellors too. So, like what they choose to be counsellor's they probably had quiet a bit, I guess, maybe five, six. […] So, if the chief and the counsellors decision not the other family." Interview of William Billyboy at Tl'etinqox (10 July 2012) at 15.

[527] Ervin Charleyboy, trial testimony, volume 82 at 14262 lines 34 to 37.

[528] See s. 74 "Elections of Chiefs and Band Councils" of the *Indian Act*.

[529] Section 2.1 "Definitions", "council of the band means […] "(d) in the case of any other band, the council chosen according to the custom of the band, or, if there is no council, the chief of the band chosen according to the custom of the band; (conseil de la bande).

[530] "Theresa said that whatever needed to be done way back, the elders made those decisions, um, any decisions that needed to be made or they consult with the elders." Interview of Theresa Billy, at Tl'esqox (19 July 2012 at 10). I did not learn what specific kinds of decisions Elders would make; however, they always seemed to be an important part of decision involving their own family and their community at large.

important advisors when it comes to matters about the *nen*. For example, when Marion William was asked who an outsider should see if they wanted to enter the territory, she listed off leaders, Elders and medicine people (*deyen*, also referred to as spiritual leaders or healers):

> Probably just to see the leaders, second of all to see medicine people or elders. Because the elders and medicine people will be one of the main people to know a deeper spirituality into proper protocols and rituals and ceremonies, and whatever you needed to know. They would be a good person to see.[531]

A spiritual leader or healer interacts with the spirits of animals[532] and the land through dreams, songs and prayer after specialized training and communing with places of power in the mountains.[533] Through this process, a *deyen* will develop power and knowledge, or *niminh*, which they put to use in healing people and guiding them with the decisions they make in their lives.[534] Highly respected, *deyen* continue to play a role in Tsilhqot'in socio-legal processes, but as I mentioned earlier, I will not delve too deeply into this knowledge for the purposes of this dissertation. Knowing these individuals have a continued role in internal functioning of the legal order is sufficient here, as my focus will be placed squarely on the strategic application of laws through contemporary governance. At this point, I narrow the view on decision-makers from the general to the specific, as it relates directly to water.

Individuals continue to hold the authority to make decision about water, provided they do so according to *dechen ts'edilhtan*. In other words, Tsilhqot'in people have relatively open

[531] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 9.
[532] One of the more powerful animals in the Tsilhqot'in worldview is the bear. Farrand, *supra* note 49, published three stories relating to the bear, *Story of the Woman who became a Bear* at 19, *The Man who married a Bear* at 23, and *Yitai (the Great Bear) and the Hunter* at 30, each of which mentions the transformation powers of bears and their relationship with humans. I chose not to include these stories in any analysis for my lack of training and authority to use them. For an authoritative perspective on the power of bears, see Linda Smith, *supra* note 72 33 to 62.
[533] Ervin Charleyboy explains the powers of *deyen* and their healing abilities at, trial transcripts, volume 82 at 14197, lines 31-47 and 14198 lines 1-45.
[534] For a thorough description of *niminh*, and the bounds of this sacred power, see Smith, *supra* note 72 generally and at 73-74 specifically.

access to and use of water subject to rules, such as they do not take more than they need, do not waste, do not create unnecessary disturbances, do not have a negative impact on users downstream, and are respectful of the interests of family fishing spots. When circumstances lead to the potential violation of one of these key laws, particularly the impact on downstream users, decision-making authority becomes more centralized to the community or leadership, who appear to hold water-specific authority over decisions related to water.[535]

Decisions about water specifically occur primarily at the leadership and community levels. When asked specifically about who had the authority to make decisions about water, Elder Marion William provided the list of decision-makers as follows:

> I think chief and council, and also we have those elder's meetings. A lot of stuff would go through chief and council and also with the elders. Because they would get their directions from the elders and also from the community as well. They'll inform everybody and ask what everybody thinks, to put their input through as well. So it's the community as well.[536]

I believe these decision-makers hold this authority because they are the people communities placed in that role, and who the communities recognize as having authority over such matters. Without community recognition, a person's or group's decision would not be valid or carried out.[537] This conclusion aligns with Lane's observation that, "leaders existed only by virtue of a voluntary following".[538] I believe Lane is referring to the creation of a valid leadership through community support, rather than suggesting that leadership only existed ad hoc. I believe there

[535] According to Dinah Lulua, back in the old days, a chief would have been consulted if an outsider wanted access water for fishing. Interview of Dinah Lulua at Xeni Gwet'in (4 July 2017) at 10; When James Lulua was asked if he could just divert a stream for his own uses, he replied "Well if I wanted to do something like that, I would probably have to sit down with the chief and council." Interview of James Lulua at Xeni Gwet'in (4 July 2017) at 15.
[536] Interview of Marion William at Xeni Gwet'in (5 July 2017) at 16.
[537] William Billyboy explained that in the old ways, the community chose their chief: "The people, vote, like they, they, they vote, like they vote by not on a paper they just go who you walk up to it. If I go choose (inaudible) it be on that side. So, the Chief (inaudible) in the central over here, not like around that branch out. The central supposed to be the Chief. […] You have to manage everything not in a crooked way. You (inaudible) if you do, well some people like a, I guess in a way you have to share your knowledge, you have to be good to be a Chief." Interview of William Billyboy at Tl'etinqox (10 July 2012) at 15.
[538] Lane, *supra* note 6 at 408.

were always leaders whose authority was validated by the collective, which appears to align with the knowledge Elders shared on this point.

b. Adjudication

I only aim to offer a brief comment on adjudication here. I cannot identify a clear distinction between law-makers, decision-makers, and adjudication, as often these categories overlap in the Tsilhqot'in legal order. This may be because the specific details have not been a part of my main focus. Or it may be that I simply do not have the knowledge to discern the difference from an outsider perspective. In any event, people and groups identified as decision-makers appear to have possessed the authority to make decisions about people (Tsilhqot'in and non-Tsilhqot'in) and the *nen*.[539] Adjudicating disputes seems to be a function of this authority, particularly when conflict involved families.

The adjudication of family disputes was performed at the family level. It was only when disputes arose to involve a broader part of the community that a recognized leader, such as an Elder or a *nits'il?in* would become involved.[540] Where water is involved, adjudication would be performed by communities through their leaders.[541] In historical times, there likely was not much of a distinction between water and the land. There also was not much concern over conflicts

[539] Patrick Billyboy explained, "when you done things like that um you would be placed before the chief, back then the chief was very powerful. You get placed before the chief and you would have to pay back with what you own, it could be a horse, it could be your land or saddle. He said that's how strict they were with us." Interview of Patrick Billyboy at Tl'etinqox (10 July 2012) at 12.

[540] When asked about who made decisions about water in the community, Marion replied, "A lot of stuff would go through chief and council and also with the elders. Because they would get their directions from the elders and also from the community as well. They'll inform everybody and ask what everybody thinks, to put their input through as well. So it's the community as well." Interview of Marion William at Xeni Gwet'in (5 July 2017) at 16.

[541] If James Lulua wants to divert water from a stream to irrigate his hayfields, he says "I would probably have to sit down with the chief and council," and provide them with the details of the diversion such as quantity to be used. Interview of James Lulua at Xeni Gwet'in (4 July 2017) at 16. According to Marion, "A lot of times we leave it [conflict with people who are polluting water] up to our leaders, and our leaders deal with it politically for us." Interview of Marion William at Xeni Gwet'in (5 July 2017) at 10,

about access and use of water, as likely it was unimaginable that there could be shortages of fresh, clean water.[542] Therefore, considering the holistic doctrine, I assume that the same authorities who adjudicate conflicts relating to land would adjudicate conflict relating to water.

c. Enforcement

Despite the analysis of enforcers of law in this section, which was gleaned from interviews and trial testimony of Tsilhqot'in Elders, the trial court did not find the evidence compelling enough to recognize that laws were enforced in historic Tsilhqot'in society. At para 357, Vickers explained his grasp of people's conformity to laws:

> [357] Traditionally, no one leader of all Tsilhqot'in speakers was recognized. The enforcement of conformity to behavioral norms – to the extent that it occurred at all – occurred at the family or encampment level rather than at the level of band or nation. Prior to contact, as Lane wrote in his 1981 article in the *Handbook of North American Indians*, at p 408: "Individuals had a high degree of autonomy. In theory, beyond the confines of the family, no one could force anyone else to do anything."[543]

[542] When asked a question regarding over-use to the point of wasting water, the interpreter, Susie Lulua explained, the Elders "can't see that. There is just too much water here [in the Nemiah Valley], we have plentiful, they don't know how a person can waste water." Interview of Marvin William, Phyllis William, Christine Lulua at Xeni Gwet'in (5 July 2017) at 15. Not all of the Tsilhqot'in communities have the same abundance of water. Christine Lulua in the same interview explained that neighbouring communities do not have good water, and "if they want to come and take our water, it's ok, she said, they can take our water. She said we do not want to sell it, she said. She said we have enough water here for everybody, so we do not need to sell it, we can just let them take some," at 13. Christine was referring to other Tsilhqot'in communities, "because you know this is our water, not their out there," referring to outsiders to the Tsilhqot'in. Interview of Phyllis William (5 July 2017) at 13. Clearly there is a national sense of belonging and ownership of water. One question that arises from this discussion is, if water is of such abundance in the Xeni Gwet'in, do the laws about preservation (not wasting) still apply? The answer is yes, for certain. The interviews contain references to these rules. Phyllis William teaches her children not to waste water, "not to run the tap, hey. Not to go to extremes." Interview of Phyllis William (5 July 2017) at 15. Marion William shared a teaching from her grandmother against waste and gives reasons for the rule, "Grandma always says use what you need and not take too much, like just maybe a handful of what you need of anything, because if we take too much we can kill off the plants, our medicines, our berries, or we could kill of our animals, our wildlife." Interview of Marion William at Xeni Gwet'in (5 July 2017) at 11. Likewise, not polluting may be construed as a way of not wasting, as polluting a water course would effectively be wasting otherwise good water. In sum, even in locations where the abundance of good water makes the idea of running out unfathomable, the law and its rule and principles still apply, likely as a means of ensuring the unimaginable never happens.

[543] *Tsilhqot'in* BCSC.

This paragraph reflects a myopic view of the forces that compel compliance with their legal system. As such, the focus of this section on enforcement is to provide a reasoned response to the question: What compels people to abide laws, particularly when there are no obvious (at least to western eyes) institutions of enforcement (i.e. police and courts) or a prevailing threat of consequence such as fines or incarceration? Some argue the strength of ancestral norms and values are sufficient to compel people to abide laws simply because they agree with them.[544]

Stó:lō author Lee Maracle identifies the irony in a democratic society where its legal system requires force to ensure compliance, "only fools accept that a society that requires force to ensure proper social conduct is a democratic one."[545] Now, far-be-it from me to suggest Lee Maracle may be a little naïve, although she recognizes the shortfall in her traditional teachings on Stó:lō /Coast Salish law.[546] Acknowledging distinction between legal orders, I do not believe the only reason Tsilhqot'in people adhere to their laws is because they believe in them.[547] In general, people will have many reasons for complying with their society's laws.[548] Deeper analysis reveals several reasons for compliance with *dechen ts'edilhtan* in addition to a belief in them, such as the fulfilment of obligations to others and to hedge against being subject to natural or spiritual consequences.

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[544] Lee Maracle, *supra* note 134 at 40-41.
[545] *Ibid* at 41.
[546] *Ibid* at 42.
[547] The existence of watchmen in the past suggests compliance had to be enforced at least to some extent. William Billyboy explained, "Back then he says if you've done anything wrong it was the watchman, we called them watchmen back then, they are the people that would bring the people who are bad to the big chief." William Billyboy at Tl'etinqox, 10 July 2012 at 12.
[548] British social anthropologists studied the internal workings of various legal orders around the world in the early 20th century. In his book, *Crime & Custom in Savage Society* (New York: Harcourt, Brace & Company, 1926) Bronislaw Malinowski (I cannot believe I am responding to Lee Maracle with an old dead white anthropologist's work) reasoned that "reciprocity, systematic incidence, publicity and ambition," served as "binding machinery" to ensure compliance, at 68. I have elsewhere argued that people likely abide their laws simply to remain part of the community rather than risk the isolation of being ostracized. See also, Asch, *On Being Here to Stay*, *supra* note 144 at 128; and HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1993) at 88.

i. Sacred and Natural

Sacred and natural forces serve to remind people that bad things can and do happen.[549] There is power in the earth and environment, much of which cannot be seen. Unseen forces are acting upon people at all times (e.g. gravity, wind, desire), and if not acting upon, then they are ready to act. The potential to bring on the invisible forces that accompany people in the human world compel adherence to law. As Gilbert Solomon explains,

> your actions affect everything, and they are teaching you don't be doing that, don't be rolling a rock down the mountainside, don't roll a rock down the mountain and hear it crashing down, way down, having fun, don't do that, because other spirits going come here, you going to be stuck here, dealing with rain dude, and you not going to be happy about it.[550]

There appears to be no practical distinction between the power of the spirits of the sacred (ancestors and other supernatural beings), and the power of the spirits of animals, which are also imminently prepared to impose some form of influence on people for their actions. For example, in the *Raven and Salmon* story, Salmon get its revenge by confining Raven to a snowbank to suffer hunger longer than was necessary.[551] Based on the events of the story, the salmon possess the ability to choose whether to be eaten as sustenance or to flee if they are mistreated. They also possess the power to influence other natural elements such as the weather, and to some extent the fortune of others with whom they are intimately in relation. This is a complex association and wielding of power that is not wholly outside the control of the human counterparts, provided they

[549] Borrows cautions against accepting authority of sacred sources of law without question. For example, there is a risk of creating an oligarchy if "a person or group were to make claims that they were the only ones able to understand, interpret or proclaim sacred or natural law, or were somehow indispensable to the process of law […] No one person should be granted this degree of authority, but most legal systems struggle to to contain powerful groups and individuals who proclaim the infallibility, necessity, or inevitability of their rules," Borrows, *CIC*, *supra* note 58 at 50.

[550] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 8.

[551] Farrand, *supra* note 49 at 19, "So Raven took his blanket and started to dig his way out, and before he had gone a foot he came through the snow, and found all the country green, and saw that he had been starving in a little snow-bank all those weeks for nothing."

act according to *dechen ts'edilhtan*. The law in this particular example involves respect, and is defined as not creating unnecessary or violent disturbance.

People mind the power of spirits to ensure balance in the physical and spiritual worlds, as the relationship between the two is not disjointed. People's actions echo into the spirit world, which may invite serious consequence. The corollary of non-disruptive respect is the act of honouring to give an active expression of respect: "we are honouring the spirits. Especially for the fish people, we know them as people, and we honour them, because they will be the last resource to feed us, when there is no, everything come extinct, fish will be kind of there if we don't poison the waters."[552] Key in understanding how these unseen powers compel adherence of the law is the relationship to starvation and survival.

Not having enough salmon to get a person, family, community through a winter is a disconcerting thought. *The Young Man and Dt'an* is explicit on the ever-present threat of starvation, "keep a sharp lookout for him [Famine], as he would surely come back that way."[553] These messages in the stories and interviews about acting a particular way (with respect, non-disruptive, sharing and helping) to avoid starvation creates strong support that Tsilhqot'in are not merely living a romanticised relationship with their environment, but rather they are pragmatists. People live off the land through their relationships with whom they co-exist. These relationships are inherently violent, as lives are taken (fish, moose, deer, etc.) to feed people. The threat of starvation is a strong influence for adhering to laws that in many respects ensure the continued survival of other species. *Dechen ts'edilhtan* is abided because people believe the spirits of the sacred and the natural can and do control a person's potential success in hunting, or, put another way, in staving off starvation. This belief is sufficient reason to live by the laws of the people,

[552] Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, am) at 3.
[553] Farrand, *supra* note 49 at 32.

which stand in addition to other theoretical reasons such as maintaining order and safety in society, as described in the opening quote in this chapter.

ii. Human

Sacred and natural powers hold significant influence over people. They offer an internalized manner of enforcement that resides within the individual to act in a lawful manner with respect to the world around. However, when people run afoul of the law despite the ubiquitous power of the natural and spirit worlds, Tsilhqot'in *nits'il?in?* (chief) had people who would bring wrongdoers to them for adjudication of their actions.[554] These individuals, known as *nitaxelchug*, (watchman), served as law enforcers.[555] At trial, Gilbert Solomon said they were enforcers who would bring people to the chief, "if somebody does wrong, then the chief will make sure the person that did wrong be brought to him".[556] A watchman's power did not end there. They were also the person to mete out any punishment the chief decided was warranted.[557] Combined, watchmen working immediately for a chief and his council in the days of the

[554] Elder Elizabeth Jeff testified that the Tsilhqot'in word for chief, *nits'il?in?*, is new, and the original word used for thee leaders was *?alquh*. There was no information as to how the roles of chiefs may have also changed, but according to Mrs. Jeff the selection process remains the same in the present as it did in the past. She stated, in relation to the selection process, that "it's the same as it is now, where all the people talk about who they want. And after they finish talking about who they want, they pick the person that they want and all the people agree on this. Trial transcript volume 93 at 16212-13 lines 47, 1-4.

[555] Gilbert Solomon, trial transcript, volume 79 at 13756, lines 39, 40, 43, 44.

[556] Trial transcript volume 79 at 13819 lines 34-36. William Billyboy also conveyed this information to me during an interview. "Back then he says if you've done anything wrong it was the watchman, we called them watchmen back then, they are the people that would bring the people who are bad to the big chief." Interview of William Billyboy at Tl'etinqox (10 July 2012) at 12.

[557] William Billyboy, *ibid*, shared a story about a man who was a compulsive thief, stealing from other members of the community. After the watchman brought the thief to the chief for adjudication of his repeated offences against the community, the watchman carried out the penalty of cutting off the thief's fingers. "so one day the watchman caught him and they brought him to the big chief and he had no remorse, he laugh about it. So the big chief ordered to um the watchman to um cut off his fingers, all his fingers. And that's how he got disciplined. Before he got release, they told him that if you continue to steal or be bad, the next prediction is that you're going to lose your eyes. So, from there he became a teacher, he started um working with young people and told them this is what's going to happen to you if you're bad, if you're stealing things, your not listening your going to lose all your fingers like I did."

ancestors provided a physical human element to the enforcement of *dechen ts'edilhtan*.[558] This means people did not always simply abide the law because they believed in it, or because they feared repercussions from the sacred. Human beings, with all of our human frailties and weaknesses, occasionally required the threat of physical consequence for order to be maintained.[559] As Ervin Charleyboy explained in his testimony,

> What my dad told me, they [the ancestors] had this – they call them deni texalchug, but they looked after the law and order in those days. And usually there was more than one, but they had one head guy in there all the time.[560]

In other words, the exercise of law through government was deliberate and calculated based on *dechen ts'edilhtan*. Vickers acknowledged that Tsilhqot'in was a "rule ordered society," and that the law was enforced with certain ferocity.[561] The strict enforcement of laws was applied across the Tsilhqot'in people throughout their communities under a national system of law and governance. Yet the trial judge did not appear to find a cohesive nation arising from within Tsilhqot'in social organization.

2. National Government: The Western Lens

Vickers struggled to see early Tsilhqot'in communities as much more than a haphazard collection of families living in small communities with a chief (relying on the anthropological evidence). He did not appear to understand the Tsilhqot'in collective as a nation, at least around the time of the Crown's assertion of sovereignty in 1846:

> [363] Tsilhqot'in people living in bands had a chief. The presence of several bands meant there was more than one chief. They met together as a group for feasts, celebrations or annual gatherings and there was no single person who was the chief of

[558] Gilbert Solomon, trial transcript, volume 79 at 13756, lines 10-15.
[559] See William Billyboy's story about a chief who ordered a recidivist thief's finger be cut off, *supra* note 557. See also, Hart, *supra* note 548 at 86.
[560] Trial transcript, volume 82 at 14261, lines 10-14.
[561] *Tsilhqot'in* BCSC at 431.

> the entire Tsilhqot'in people. Given their semi-nomadic nature, there was frequent movement for hunting, gathering and making the tools and clothing needed for survival. Thus, there appeared to be little time for art, in the way that was pursued by coastal Aboriginal people. There were no totems. There was no evidence of a crest system such as that described in *Delgamuukw*. There was no evidence of named ceremonial groups and no evidence of any honorific ranking system such as is found amongst some Aboriginal people. The oral traditions, stories and legends told from generation to generation provide the binding social fabric for Tsilhqot'in people.[562]

Vickers relied heavily on the Robert Lane's 1953 anthropological PhD dissertation, adopting Lane's conclusion about Tsilhqot'in socio-political organization as a "loose and flexible group organization".[563] The appearance to western eyes (Lane's and Vickers') may seem loose and flexible, but Elders' testimony gave accounts of a reasonably well-organized political structure operating at the level of a nation.

Daily Tsilhqot'in governance, which functioned at the community level, contained publicly recognized decision-making authorities, specially appointed people to enforce laws, and "runners" who could gather information.[564] Runners traveled quickly throughout the *nen* to pass

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[562] *Tsilhqot'in* BCSC. I am not railing against Vickers' decision here, as he ultimately found the Tsilhqot'in had occupied the *nen* on a territorial basis sufficient to support a declaration of title on at least part of the claim area. My discussion and analysis of the decision focuses rather on his articulation of governance, or lack thereof, as the notion of a people who are "semi-nomadic […] hunter gatherers" (para 944) conveys an image of people whose sole purpose is to wander around their land in search of food, and cannot have a very complex socio-political organization. The test for title does not require evidence of a highly organized society (in relation to western civilization) as in Aboriginal rights cases where plaintiffs claim rights to a commercial practice (eg *Van der Peet*), only that the people occupied the land to the exclusion of others (even the test in Baker Lake only required that the claimants "and their ancestors were members of an organized society," not that there was a particular stage of social advancement that had to be met (*Baker Lake v Canada* [1980] 1 FC 518 at para 82)). There is an unstated inference that for a people to have a system of laws that serve exclusionary interests on a territorial basis, they must have a social organization sufficient to produce and implement laws to serve the intended purpose. Nowhere in the decision does Vickers discuss the complexity of Tsilhqot'in governance beyond his reference to Lane's 1953 work which concludes that Tsilhqot'in social organization was based on "a loosely associated group of families," (para 358) but that they nonetheless were also "a rule ordered society" (para 431). I credit Vickers' effort to understand Tsilhqot'in political organization, as he used comparators with other First Nations to give him some point of reference (paras 363 above and 429: "there is evidence appear to have been broadly similar to the laws of other many North American Aboriginal groups"). In his search for understanding Vickers shows the lack of knowledge of Tsilhqot'in concepts of political organization, which supports my argument that courts are not equipped to properly and effectively adjudicate these cases on the merits, perpetuating colonial violence.

[563] *Tsilhqot'in* BCSC at para 362.

[564] "There was times that -- when they had to have a war or do something, the runner called Nezulhtsin would go out and gather the information of where these people were, and they had to get together and organize what was going to happen," Thomas Billyboy, trial transcript, volume 89 at 15591, lines 37-42.

communications between communities[565] about matters such as when outsiders were entering the territory,[566] news of a gathering or ceremony,[567] or other important information between chiefs.[568] What strikes me is how the classification of a "semi-nomadic" people who do not have the same political institutions of other coastal nations, "no totems," "no evidence of a crest system," no "named ceremonial groups" or "any honorific ranking system such as is found amongst some Aboriginal people," provides the basis for the Court's understanding of Tsilhqot'in governance, which is then used to determine whether title (or other rights) according to Canadian law may be proven.[569] If the clan system with their totems are evidence of complex

[565] "My dad said it's an old-time trail that they used a long time back. When he talk about those trails, he said there were some -- like between these villages like that, they said there were runners that used to run on these trails bringing messages back and forth to other communities," Gilbert Solomon, trial transcript, volume 77 at 13300, lines 24-29.

[566] "Among the stories I hear I know there's areas that our people sat, medicine people sat, to make sure nobody comes in our territory. I hear stories about runners, the people that check out the territory, make sure nobody else is coming in," David Setah, trial transcript, volume 75 at 12931, lines 39-43.

[567] "If there's anything that's going to happen like a gathering, some ceremony is going to happen or some kind of special events, they give a message to each -- between all these communities. They had runners. If they have messages, they bring messages to other communities to tell them what's happening, informing them of a plan," Gilbert Solomon, trial transcript, volume 77 at 13359, lines 1-7.

[568] Runners, those were -- it would be for the *deyens* [spiritual healer] or also for the chief. These runners would send messages. Sometimes a *deyen* would send a message to a different chief. There would be a *deyen* there, and they would send out their runners, send the message along," Harry Setah, trial transcript, volume 54 at 9098, lines 43-47.

[569] Reflecting on this statement from the trial decision, I cannot help but reel under the colonial hypocrisy. There is something fundamentally wrong with Canada's legal system when judges sit as the gatekeepers of Aboriginal rights under Canadian law, allowing access under rules they create themselves, while lacking, in large part, the competence required to understand entirely different worldviews and the legal systems they produce. I accept that Vickers recognized enough of the Tsilhqot'in political-legal system to rule in favour of a declaration of title to part of the claim area; however, had he been properly trained to recognize the unique structures of Tsilhqot'in political organization, he may have ruled in favour of the claimants for entire claim area. Judges know Canadian law. They do not know Indigenous laws or institutions. McLachlin CJ showed insight and humility when she held, "the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights," *Tsilhqot'in* SCC at para 32. Although recognizing this disjuncture, Courts continue to adjudicate matters in relation to the so-called Indigenous perspective without a proper understanding that would come from within an Indigenous world, rather than as a gloss on what a judge may think is an Indigenous perspective. Proper training is required (Lance Finch J openly acknowledged this in "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper presented at the Indigenous Legal Orders and the Common Law, Continuing Legal Education Society of British Columbia, 15 November, 2012) , without which, judge-made decisions on Aboriginal rights and title are little more than colonial violence perpetuated. The lawyer for the Tsilhqot'in during the trial has expressed to me on several occasions that the lawyers are responsible for adducing evidence in a manner that clearly articulates the Indigenous perspective, requiring lawyers to learn Indigenous laws and institutions as a part of our professional ethical obligations.

social organization on the coast, Tsilhqot'in runners facilitated an equivalent coordinated level of sophistication on the high plateau of the interior.

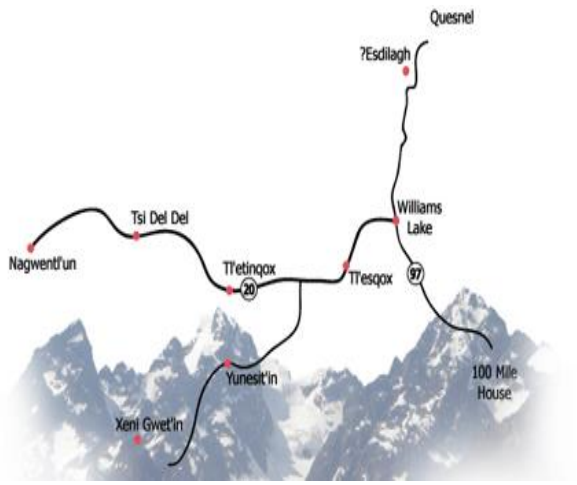
3. Socio-Political Organization: From Communities to Nationhood

Coastal nations have different systems of government and law than other nations who live in different geographic realities, such as Blackfoot in the flat, dry prairies or Dene in the cold barren lands to the north, and specifically the Tsilhqot'in, who live in mountain plateaus with different landscapes, climate, and sources of food. The coastal comparator is likely irresistible for Vickers contemplating organized society because of the relatability to the structures of Canadian society. The clan system has recognizable hierarchies invoking an assumption of ordered stratification familiar to Canadian structures of political organization.[570] Even his statement on binding social fabric being "oral traditions, stories and legends told from generation to generation" indicates a lack of understanding. [571] The binding social fabric for Tsilhqot'in is the law, *dechen ts'edilhtan*, as the main organizing institution governing relationships. The oral traditions, stories and legends only serve as a mechanism for transmitting that law through the generations.

Vickers had plenty of evidence placed before him of the political system which showed a complexity beyond what a reading of Lane's description of "a loosely associated group of families who wintered in the vicinity of a certain lake or group of lakes" depicts.[572] Further, Vickers used the evidence of "runners" to accept the plaintiff's conclusion, in part, "that

[570] For a description of the Gitxsan clan society, see Napoleon, *supra* note 10 at 296-321; and Richard Overstall, "Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order" in *Despotic Dominion: Property Rights in British Settler Societies*, John McLaren, AR Buck & Nancy Wright, eds, (Vancouver: UBC Press, 2005) 22.
[571] See discussion at *supra* note 562.
[572] *Tsilhqot'in* BCSC at para 358. Lane's description may be accurate, but is superficial and lacking a deeper analysis required to fully understand how the socio-political organization functions.

Tsilhqot'in people had vigorously defended their territory and had *closely monitored and controlled* its use by others".[573] Had he fully understood the role of runners in the evidence, Vickers may have found the control was effective and sufficient to prove title for the whole claim area. These runners, of which I located at least 15 accounts in the trial record signifying its importance to the Tsilhqot'in practice of governance, are precisely what elevated the complexity of governance from the individual band to the national level.[574] Elder William Billyboy explained to me the strategy deployed between communities which operated at a national level.[575] He said the communities always camped and lived at the fringes of the territory to monitor who may be approaching. ?Esdilah to the north, Xeni Gwet'in to the south, Tl'esqox to the east, Nagwenti'un (decimated by small pox making Tsi Del Del the current western-most community) to the west, surrounds the heart of the *nen*, as depicted in the map below:[576]



According to Billyboy, the reserve locations were based on the existence and relative locations of these communities. These communities were in constant communication through the

[573] *Tsilhqot'in* BCSC at para 427 [emphasis added].
[574] "Tsilhqot'in people living in bands had a chief. The presence of several bands meant there was more than one chief. They met together as a group for feasts, celebrations or annual gatherings and there was no single person who was the chief of the entire Tsilhqot'in people […]," *Tsilhqot'in* BCSC at para 363.
[575] Personal communication at Tl'etinqox 10 July 2012.
[576] Tsilhqot'in National Government, "Communities," online: http://www.tsilhqotin.ca/About/Communities.

use of their runners. The runners effectively provided the communication required for political cohesion at a national level. As Lane accurately described, "Among Chilcotin information was shared about intruders into their territory. There was likelihood of group action against such intruders if they were hostile. Chilcotin could call upon other Chilcotin for help in time of trouble."[577] There is no more striking example of this than the 1864 war with British Columbia's colonial imperialists.[578]

A new road was planned to connect the coast with the goldfields of the Cariboo. It was to enter the Tsilhqot'in *nen* from the west through Bute Inlet and the Homathco Valley. Several Tsilhqot'in people were working on the road, when a decision was made to remove all whites from the *nen*.[579] The war that ensued was carried out under the leadership of Lhatŝ'aŝʔin, a single chief who was responding on behalf of all Tsilhqot'in communities.[580] This action is evidence of a much more highly organized political structure than that of a loosely associated collection of families who gather around lakes. The violent conflict was, in Lhatŝ'aŝʔin's words, *war* on a national front for the protection of all Tsilhqot'in people.[581] Vickers was unable or unwilling to pull together the pieces of evidence to show the collective agency of the nation in its own right and not with reference to other Indigenous nations. Perhaps he did not have enough evidence to

[577] Lane, *supra* note 6 at 407.
[578] I will not recount the detailed events of the 1864 war here, but provide the following reference to give more information, see *Tsilhqot'in* at paras 265-286; Foster, supra note 150 at 26-31; Terry Glavin and the People of Nemiah *supra* note 35 at 94-98, 106-112. For a settler perspective, see Mel Rothenburger, *The Chilcotin War* (Langley, BC: Mr. Paperback, 1978).
[579] Foster, *supra* note 150 at 28.
[580] Lane presents a different image, "After a ludicrous 'campaign,' seven Chilcotin, who had been visiting the camp of the militia, were identified as the culprits, seized, and taken away. Five were hanged and two were released. This was the 'Chilcotin War,' *supra* note 6 at 411. This version does not align with what elders have shared with me that Lhatŝ'aŝʔin was a recognized war chief chosen to lead the insurrection against the whites.
[581] "We meant war, not murder" were Lhatŝ'aŝʔin's last words before being executed. He spoke them to Reverend Lundin Brown, and they are preserved on the memorial at the location of the hangings of the Chiefs, which is now the parking lot of the GR Baker Memorial Hospital at Quesnel, BC.

make such a finding, or his Canadian common law lens simply did not allow for the perspective he needed.

In sum, a lens honed in the European model of civilization, borne of a highly structured class system that kept the common hordes in their place and serving in the great manors of aristocratic peerage, distorts the view of structure and complexity in decentralized Indigenous societies. Western eyes and minds have long seen a "savage" society not far removed from a state of nature when looking at Indigenous communities, particularly for the purposes of determining rights within the Canadian legal system.[582] In this light, it is understandable how courts may struggle to see something that, although is there, is not familiar to their way of understanding the world. The structures of clan system governance with their houses and hereditary chiefs resonates with the hierarchies of western politics, making those societies appear more organized (or perhaps civilized) to Canadian judges. Vickers did a great job seeing through the fog of colonial supremacy to at least recognize that the Tsilhqot'in has a system of laws that allowed the people to prove Aboriginal title, even if he couldn't quite see a complex socio-political organization looking back 150 years.

The organized structures of communities with their heads of families, chiefs, councils of Elders, community members and spiritual leaders were local governments on the ground situated in strategic locations around the margins of the *nen*. Perhaps Lane's description of Tsilhqot'in political organization as being "not highly structured" is *de facto* accurate, but that does not mean it did not exist.[583] The numerous accounts of young, fast runners who could send all manner of messages between these communities provided the communication and intelligence

[582] Recall Justice Allen McEachern's reference to traditional Aboriginal life as being "at best, 'nasty, brutish and short'," citing Hobbes, in *Delgamuukw v. British Columbia* [1991] B.C.J. No. 525, 25; 1991 CarswellBC 805 at para 111.
[583] Lane, supra note 6 at 407.

that allowed Tsilhqot'in communities to provide national responses to outside threats. This reflects structured communication that allowed Tsilhqot'in to protect their "sense of common identity".[584] Granted, this may have been difficult to see, but the evidence was presented in court. The facts speak for themselves. The Tsilhqot'in people were and continue to be organized in a national political body. In recognition of this level of complexity, I continue my analysis of Tsilhqot'in governance into the 21st century.

4. Strategies for Contemporary Governance

The work thus far leads to contemporary governance. What does all this talk of *tradition* and *history* mean for Tsilhqot'in government and governance today? How may two sets of substantive and procedural knowledge bases, past and present, communicate across time to produce some useful, pragmatic understanding for contemporary governance as it relates to water? What do people need from the traditional to inform the present, and is there any consistency in Tsilhqot'in worldview that resonates across time and circumstance? Recalling anthropologist David Dinwoodie's appropriate guidance, "to approach the 'present' as it is understood locally at Nemiah Valley, one must become attuned to ideas that were generated in the past".[585] The logic system of the embedded worldview which existed and informed Tsilhqot'in ways of being existed long before Europeans imported and imposed new systems on the people. Working within the imposition of a western-rooted worldview, sense is only made with reference to the embedded logic Tsilhqot'in people knew and understood, know and understand.

[584] *Ibid* at 406.
[585] Dinwoodie, *Reserve Memories*, *supra* note 72 at 7.

The "rupture" in the Tsilhqot'in world brought about by these new systems of law and government created a gap which threatened to leave the old ways behind in the high Chilcotin meadows, made obsolete by difference coupled with contempt.[586] But the people have not surrendered to the rupture. They have made sense in the only way they know how, with a will to survive as a people, as Dinwoodie accurately describes:

> The Chilcotin people of the Nemiah Valley bridge this gap as a matter of course in the practice of their traditional culture according to the exigencies of the present. That they do so is not an insignificant fact – it just happens to be one to which they have become accustomed.[587]

What choice have they had? Make-do or die. Dinwoodie's observations led him to conclude that Tsilhqot'in people simply continue despite drastic rapid changes to their world brought on by colonialism—i.e. the rupture. Keeping this response in mind, two extremes on either end of a spectrum for contemporary governance become apparent: at one end, people may choose to live a traditional life according to and abiding *dechen ts'edilhtan* while ignoring the ways of imposing newcomers or, at the other end, fully adopt the ways of the imposing newcomers and consign the traditional ways to the dusty corners of memory. Of course, these are extremes, somewhere within which *hope* is most likely to be found.

The questions above only lead to more questions, specifically about identity. There are ample warnings about adopting the ways of others and losing oneself in the process.[588] Is the process of borrowing laws and law-ways from others possible without becoming the other? I believe this is possible, when done transparently and strategically.[589] Tsilhqot'in have a long

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[586] See Mills explanation of "settler supremacy," *supra* note 8 at 3-4.
[587] Dinwoodie, *Reserve Memories*, *supra* note 72 at 7.
[588] See for example, Coulthard, *supra* note 63; Jennifer Simpson , Carl James & Johnny Mack, "Multiculturalism, Colonialism, and Racialization: Conceptual Starting Points" (2011) 33:4 Review of Education, Pedagogy, and Cultural Studies 285; Eva Mackey, *House of Difference Cultural Politics and National Identity in Canada* (London: Routledge, 1999); and Franz Fanon *White Skin, Black Masks* (New York: Grove Press, 2008).
[589] "If you know the enemy and know yourself, you need not fear the result of a hundred battles." [Oh, yes it is] Sun Tzu, *The Art of War* (New York: Barnes and Noble, 2003) at 17.

history of strategic borrowing from others which is captured in the oral tradition and lived experience of the Nation. This section sets out justification for using western political-legal tools to benefit the people without fear of identity loss or becoming the other.

a. Borrowing without Becoming

Humans have existed for a long time on the basis of borrowing, as no one (human) person created everything. Our shrewd abilities to learn, borrow, and adapt are among key reasons for the success of our species. There should be little difficulty in accepting that Indigenous peoples have improved our lives and societies based on these general principles and techniques. After all, why create everything anew when there are already things (objects, models, concepts) to take and adapt to serve specific needs? The historical record and oral traditions are rife with examples where Tsilhqot'in people have borrowed from others to improve their society, and they have not ceased to be Tsilhqot'in.[590]

Two central activities in relationships where the opportunity arises to exchange or borrow knowledge and practices with neighbours is through trade and marriage. Tsilhqot'in have always had these relationships to various extents with their neighbours on all sides.[591] One of the early recorded examples of interrelationships with neighbours is found in James Teit's work, where he

[590] An Elder at their Chejaghetadelh Governance Gathering in 2018 stated publically to the crowd that Tsilhqot'in people had no laws of their own making. All of their laws were borrowed from somewhere else. And yet, they are still Tsilhqot'in. Chejaghetadelh at ?Esdilagh 11 June 2018.

[591] There are accounts of interactions with Homalco to the west in Terry Glavin and the People of Nemiah, *supra* note 35 at 93. See also the Interview of Marion William at Xeni Gwet'in (5 July 2017), talking about trade with "friends" at 9. The relationship with Carrier to the north was tense, often defined by violent interactions. For example, Thomas Billyboy explained "Carrier and Chilcotin don't like each other, that's the way (inaudible 27:08) spiritual things. You sit there and maybe you'll just and never move the rest of your life, that's what's going to happen. That's why we're all feared. If I go some places, I still cut, I'm very careful. Like what you're saying there is a, the law, the law was good [….] There's peace in away but we don't like each other in away because of what happened years ago." Interview of Thomas Billyboy at ?Esdilah (31 July 2012) at 9, 14.

commented on the interaction between Tsilhqot'in and Secwepemc people in the Canyon area of the Fraser River for the benefit of maintaining safe, successful trade relations:

> The Cañon division [a group of Secwepemc communities along the Fraser River], about fifty years ago, were strongly mixed with Chilcotin, so much so that the people of the North Cañon band spoke chiefly Chilcotin in many houses; and the other bands had also a considerable amount of Chilcotin admixture. Before these people were practically exterminated by small-pox, they used to intermarry frequently with all the neighbouring bands of the Fraser River […] The Cañon division were the greatest traders, and acted as middlemen between the other Shuswap bands and the Chilcotin, whom they would not allow to trade directly with one another.[592]

Teit refers to these communities as Secwepemc, which may be accurate, but the prevalence of the Tsilhqot'in language in these Secwepemc households is interesting, particularly considering Teit also mentions that the Secwepemc had a significantly larger population that Tsilhqot'in. Why would Tsilhqot'in be the common language rather than Secwepemctsin?

To me, these communities of intermarriage along the fringes between Secwepemulucw (Secwepemc land) and Tsilhqot'in *nen* likely comprised people who retained identities of both nations, with people speaking both languages. Bilingualism would have facilitated trade among people with different languages, meaning the loss of one to the preference of the other would have placed these "greatest" of traders who wanted to control the trade between both groups at a disadvantage. Sharing stories, songs, dances, laws, and other knowledge in intermixed families is a reasonable assumption.

Vickers found sufficient evidence to include the concept of borrowing in his decision. Although he judicially recognizes borrowing, he does not suggest that borrowing from neighbours made Tsilhqot'in any less Tsilhqot'in. In the first excerpt from the decision, Vickers

[592] James Teit, "The Shuswap" *Publications of the Jessup North Pacific Expedition* (Washington, DC: Smithsonian Institute, 1909) at 469, 535.

holds that legends (as distinguished from stories, which were "recordings of actual events in an historical period of time") carry aspects of the legal order (short of saying it explicitly):

> Each [legend] carries with it an underlying message or moral that is intended to instruct and inform Tsilhqot'in people in the way they are to lead their lives. They set out the rules of conduct, a value system passed from generation to generation.[593]

Then, later in the decision, Vickers acknowledges that legends were shared among different Indigenous nations.

> I acknowledge that many of the legends that form the oral traditions of Tsilhqot'in people are not unique. Many legends are found in the oral traditions of other Aboriginal people. The names of the geographic locations are adapted to their particular circumstances. The fact that others have similar oral traditions does not reduce the cultural significance of Tsilhqot'in oral traditions to Tsilhqot'in people.[594]

What these two passages represent is a judicially recognized acceptance of borrowing legends, the vessels containing and transmitting law, which does not call into question the authority or identity of the recipient people. After all, it would be difficult if not impossible to determine with any level of certainty with whom a legend originated.[595] The idea that a Canadian court recognizes borrowing across legal orders alleviates the potential risk of undermining the identity of the Aboriginal group in rights and title litigation. Borrowing is both a logical practice, utilizing the knowledge of others to adapt to one's own circumstances, and it is a strategy for advancing the on-going well-being of a people. Not only did Tsilhqot'in borrow from others (and received, as part of reciprocal relationships), they employed strategy when engaging with others, such as infiltrating others to succeed in carrying out a plan.

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[593] *Tsilhqot'in* BCSC at para 434.
[594] *Ibid* at para 665.
[595] Determining origins of stories, languages or other cultural 'traits' (referred to as diffusion) was a pursuit by many early anthropologists such as Franz Boas and James Teit. One only need look to the margin notes in Boas' or Teit's work to see references to where they had heard other similar stories. See for example the footnotes in Farrand, *supra* note 49 for references to Boas and Teit.

b. Strategic Engagement

Strategic engagement tends to follow a threat to a family or the community in general. The oral tradition contains examples of strategic engagement with others who are outside the central group featured in the story, usually the family. The first story of strategic engagement is *Raven obtains Daylight*.[596] In the story, Raven knows that a man keeps daylight in a box, while the rest of the world exists in darkness. The way he chooses to gain access to this important prize is to infiltrate the family. In other words, to don the form of the *other*, at least long enough to achieve his objective.[597] Raven turns himself into a fir needle and drops into the drinking water when the man's wife comes out to fetch water. When she drinks the water, she swallows the fir needle and becomes pregnant. Eventually, Raven is born as a human baby to the family. He is a raucous baby, who only quiets down when the man gives him the box containing daylight to play with. One day, when the man is not paying attention, Raven turns back into Raven and flies off with the daylight, later exchanging it with a group of woman (arguably representing all people) for berries.

Raven saw that one person should not solely possess such an important element as daylight. In his strategic ruse, he went inside the family by appearing as one of them. His fee for such a significant act of change and rebirth was to be fed (he was given berries in exchange for the daylight). The result is the whole community (nation, world) benefits from his actions. Although Raven transformed himself and physically became one of the family members through the process of being born a human, he never lost his identity as Raven. Nor did he cease to be Raven, even as a human, as he was able to return to his bird form at will. Raven could never be anyone other than Raven. The same may be said of Tsilhqot'in people.

[596] Farrand, *supra* note 49 at 14.
[597] I italicized *other* to denote an individual or group who is not Tsilhqot'in.

Going to live in the town of Williams Lake does not make a person any less Tsilhqot'in – nor would using silverware, driving a truck, or eating pizza make a person any less Tsilhqot'in.[598] The same, then also applies for the manner and form of how the people govern their nation. If they choose to use western instruments such as drafting laws and bylaws, holding elections, or having Tsilhqot'in National Government offices in Williams Lake, their identity as Tsilhqot'in remain unaltered. There are two additional examples of strategic engagement with the *other* which are worthy of discussion for the insight they provide about utilizing the means available for the benefit of the people.

The first example is in the origin story of *Lendix'tcux*, when the father and his sons enter the *nen* and are met with the dangerous moose who stands in the middle of the river and kills people who try to cross.[599] The boys' mother had warned them of this danger. Lendix'tcux devises and implements a plan to eliminate the danger. He drifts down the river toward the moose, who swallows Lendix'tcux whole. Once inside, Lendix'tcux builds a fire and cooks the heart, killing the moose. Seeing the moose topple, the boys go to the carcass and cut it open, freeing their dad. This is another example of a strategic decision to enter inside the *other*. The difference between this story and *Raven obtains Daylight* is the family is responding to a threat to their lives and to their access to the *nen*. When the family is under threat, becoming the *other* in a temporary ruse to disarm the threat is a risky plan (being consumed by the adversary), but warranted in the circumstance.[600] Threats to Tsilhqot'in people appear to justify dangerous responses that pose risks.

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[598] This is a reference to the James Bay hearings in 1973 when lawyers tried to suggest that Cree people were not real "Indians" if they ate pizza or Chinese food. Sally Weaver, "Federal Difficulties with Aboriginal Rights Demands," in Menno Bolt and Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 139 at 143.
[599] Farrand, *supra* note 49 at 10.
[600] See also *Fisher and Marten*, where Fisher and Marten kill two family members and wear their skins to gain access to the house of the man who kidnapped Fisher's wife, in Farrand, *supra* note 49 at 41.

The Tsilhqot'in war was a dangerous response that led to the death of several people, Tsilhqot'in and European. Although the warriors did not employ a ruse to appear as a member of the other group, they were employed to build the road, and responded from their position within the work crew. The response was risky, as it brought the force of British authority to bear on the people, leading to the hanging of six chiefs. Some 140 years later, the Nation deploys another strategic engagement to infiltrate the *other* in response to another threat to the people, when they took legal action against the Province over forestry licences in the Xeni Valley.

The second striking example of infiltration is the Aboriginal title trial. The use of a Canadian court to pursue a claim in a foreign legal system offers another variation of entry into the *other's* world containing its own risks. Seeing few options after blockading the road at Henry's Crossing to prevent logging crews into the Nemiah Valley, the Nation hired lawyers to file a claim seeking a declaration of Aboriginal title.[601] This was a strategic decision to use the tools of the Canadian system in an effort to stop the Provincial government from authorizing the deforestation of an ecologically rich valley that had been previously left untouched by outsiders. This decision was risky considering Aboriginal title had never been proven in a Canadian court, and the Nation was seeking justice in a court created within the very society that was threatening the land. Additionally, a loss would have set another precedent against the possibility of anyone ever successfully proving Aboriginal title.

The Nation's success showed how the use of the *other's* tools can be effective in protecting the Nation, thus serving Tsilhqot'in law's fundamental principle of protection. Going through the 20-year process of proving title did not make the people any less Tsilhqot'in. It did not make them more western by using the Canadian common law system. But the question

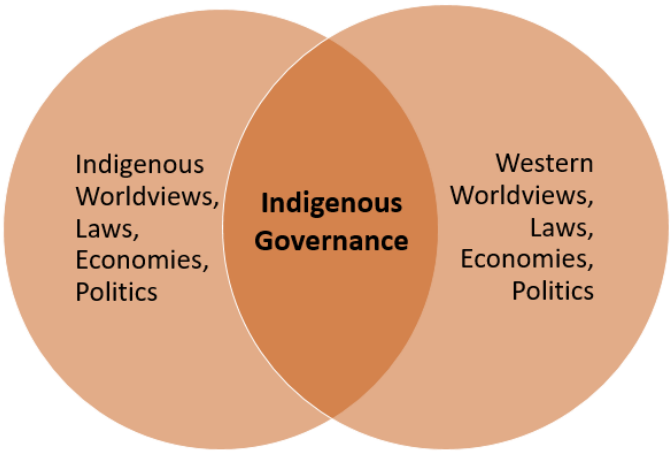
[601] *Tsilhqot'in* BCSC at para 70.

remains a live one: Does using western methods of governance threaten the identity of the people? More specifically focussed, if a contemporary law is drafted in a piece of legislation, is it no longer Indigenous law? The examples given above in the oral tradition and in practice (i.e. using a Canadian court) provide powerful reasons for utilizing Canadian legal methods.

I do not believe borrowing tools for strategic purposes (primarily to engage the outside world) threaten Tsilhqot'in identity.[602] The people are too strong for this to happen; they have endured a sustained onslaught of colonial oppression and imperialism. They remain vigilant about their world and their place in it. If the Tsilhqot'in government passes a law in draft legislative form, they are not abandoning the legal order that as served the interests of the people for generations, they are merely doing what the legal order has provided: borrow from and, if necessary, infiltrate the *other* for the strategic purpose of protecting families, communities and the Nation. In other words, the legal order and practice seems to permit doing whatever it takes to protect the people and the Nation's longevity. Passing laws, regardless of form, are a contemporary expression of Tsilhqot'in law, provided they remain consistent, at least for the time being, with *dechen ts'edilhtan*.[603] The following graphic is borrowed from The Australian Indigenous Governance Institute, which I have adapted to reflect the position in which many Indigenous groups in Canada find themselves, trying to find balance amid the tension of entirely different worldviews and their social, political, economic, and legal systems:

[602] Some scholars have openly contested this position. For example, Gordon Christie, *supra* note 61, expresses concerns about Indigenous scholars looking to legal theories from non-Indigenous theorists: "Over-swift adoption of a theory with roots in another context may lead to numerous implications not as immediately obvious to the eye as those of an overtly political nature." Although not completely rejecting the possibility, Christie prefers Indigenous-based theories. This is not detrimental to my argument. On the contrary, his caution suggests borrowing outsider theories is plausible if done with an eyes-open approach, at 213.

[603] The laws of the ancestors will likely remain the driving influence behind the contemporary expression of law. Over time, the people may invoke reasoned shifts from the foundational laws as may be necessary from time to time based on changing societal needs. Yet, imagining a shift from the need to protect the people and Nation as underpinning Tsilhqot'in law is difficult if not impossible, as the sift would require a dramatic change in the logic rooted in the worldview.



Tsilhqot'in find themselves caught up somewhere between disparate worlds of disparate peoples. They were not asked to engage with the imposing forces of colonialism, but they had to if they wanted to resist annihilation.[604] Resisting assimilation while engaging with the outside world reinforces my argument for the deployment of strategic practices that are informed by the knowledge and practice inherent in the worldview and legal order. The next section considers contemporary Tsilhqot'in governance responding to two broad questions: How should the government be constituted to keep it rooted in the legal order? and: What is required to ensure contemporary laws relating to water are grounded in *dechen ts'edilhtan*?

5. Contemporary Tsilhqot'in Governance and Water

The anthropological and ethnographic record does not show a clearly established national representation of the Tsilhqot'in people, although I have argued that a failure to

[604] Taiaiake Alfred & Jeff Corntassel refer to colonialism imposed on First Nations as involving "demeaning processes of annihilation." Although I agree with this point for reasons set out in this chapter, namely that ignoring the relationships and laws related to the people and the land and water and authorizing massive resource extraction projects, is an effort to annihilate people as they understand themselves, I disagree that resistance begins with the individual. I believe these are communal and national processes that begin with the family. See Taiaiake Alfred & Jeff Corntassel, "Being Indigenous: Resurgences Against Contemporary Colonialism" (2005) 40:4 Government & Opposition 597 at 612, cited at footnote 28 in Clifford at 764.

recognize nationhood does not prove its absence.[605] Besides, the validity of contemporary government does not rely on whether one existed in the past. The Nation's inherent jurisdiction gives it the authority to choose its manner and style of government. There is no requirement that a modern government is limited by the composition of its past government. The Tsilhqot'in government of today is whatever the people say it is.[606] Today's Tsilhqot'in National Government is comprised as follows:

> The Tŝilhqot'in National Government was established in 1989 to meet the needs and represent the Tŝilhqot'in Nation and Tŝilhqot'in communities of Tl'etinqox, ʔEsdilagh, Yuneŝit'in, Tŝi Deldel, Tl'esqox and Xeni Gwet'in in their strive to re-establish a strong political government structure.
>
> The communities work as a Nation to continue the fight of our six war Chiefs of 1864. The war Chiefs stood against the Canadian Government in an effort to gain Tŝilhqot'in Aboriginal Rights and Title to the lands we call Tŝilhqot'in.
>
> TNG has a dedicated obligation to its people to establish programs that reflect Tŝilhqot'in culture and customs in every aspect of governance.

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[605] As mentioned elsewhere, Lane described Tsilhqot'in social organization as "a loosely associated group of families who wintered in the vicinity of a certain lake or group of lakes," *supra* note 45 at 166. Farrand stated, "the centre of the territory and population of the Chilcotin was Anahem (sic) Lake; and from there covered a considerable extent of country," *supra* note 49 at 3. Father AG Morice wrote, "From a sociological standpoint they might be divided into the quasi-sedentary and the nomadic TsilKoh'tin. The former dwell on the north banks of the TsilKoh, called by the whites Chilcotin River. They are divided into two groups, viz.: the Tles-Koh-tin (people of the Splint River) with one village on that creek close by the Fraser, population about 75 ; and the T'lâ-theñ-Koh'tin (people of the river that trails through the grass) who have two villages near the Chilcotin 35 and 45 miles respectively west of the Fraser. Total population 190. An independent band of some 35 individuals, an offshoot of the same sub-division, has established itself near the Fraser facing Fort Alexander. AG Morice, Notes, Archaeological, Industrial and Sociological on the Western Déné: With an Ethnographical Sketch of the Same (Toronto: Copp, Clark, 1894) at 23, online: https://ia600204.us.archive.org/22/items/cihm_15680/cihm_15680.pdf. James Teit acknowledges not having spent much time with Tsilhqot'in people, wrote, "The Chilcotin are, or were formerly, divided into three or four septs […]. Until about thirty-five or forty years ago, nearly two thirds of the whole tribe lived in the valley which skirts the eastern flanks of the Coast Range from Chilko Lake to Salmon River. Most of them were located in the northern part of the valley, at Anahem or Nacoontloon Lake, just east of the territory of the Bella Coola […]. Smaller bands had headquarters around Chilko and Tatla Lakes, and some families wintered along Chilko and Chilanko Rivers. James Teit, "Notes on the Chilcotin Indians" in *The Shuswap, Memoirs of the American Museum of Natural History* (New York: Stechert, 1909) at 760-761. These excerpts produce a superficial sketch of the people based on observations from particular outsider perspectives, that gives Canadian courts the concepts of social organization based on families and nomadic bands (or septs) of people.

[606] Locating validity in the recognition of the people is consistent with the traditional practice, as Lane, *supra* note 6, described, "Leaders existed only by virtue of a voluntary following. Loss of confidence in a political leader resulted in individuals joining other bands, or in the band splitting with some following the old leader and others a new leader, or replacement of the old leader by a new one," at 408.

> The role of TNG administration is to carry out the wishes of Tŝilhqot'in citizens through their respected Chieftainship. The TNG continues to advocate on behalf of all Tŝilhqot'in citizens regardless of the many labels Foreign Governments place on its membership.[607]

To me, this reflects Lane's anthropological description quite squarely:

> The Chilcotin shared a common language, culture, and territory. They had a sense of common identity and expectations of aid and cooperation from fellow Chilcotin. […] Among Chilcotin information was shared about intruders into their territory. There was likelihood of group action against such intruders if they were hostile. Chilcotin could call upon other Chilcotin for help in time of trouble.[608]

In other words, the contemporary system of governance already flows from traditional practice, and the threats are not significantly different. The government, comprised of community governments, are still battling the intrusion of outsiders who threaten the safety of the people. Only now, instead of a road that carried the poisons of western civilization, today's threats involves large resource extraction projects. The government cannot wait for imposing governments to take training in Tsilhqot'in law to learn how to co-exist with and within the Tsilhqot'in world and law-ways (although this task should be present and ongoing). The government necessarily should act strategically, and govern in a manner and form intelligible to municipal, provincial, and federal governments. All the while, people continue to live according to *dechen ts'edilhtan* in the hopes that the two systems and their disparate methods will resonate to provide an effective and meaningful outcome.

Today's Tsilhqot'in government will continue to be comprised of decision-makers recognized and chosen by the people, thus validating their authority. Decision-makers, *nits'il/in*, work collaboratively at the national level, while continuing to govern at the community level.[609]

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[607] TNG, *Our National Government*, online: http://www.tsilhqotin.ca/.
[608] Lane, *supra* note 6 at 406-407.
[609] TNG, *About*, "The Tsilhqot'in National Government (founded by the Chiefs of the Tsilhqot'in Communities) is an association of autonomous member bands. All member bands retain their individuality and freedom of action when joining the Tsilhqot'in National Government," online: http://www.tsilhqotin.ca/About.

The roles Elders played in the past, and continue to play in the present, make them important in the contemporary decision-making process. An official and funded council of Elders would be an asset for the government as a source of knowledge and insight as advisors informing decisions. Likewise, an official and funded council of women would be an asset for the specialized knowledge and insight women bring to matters facing the Nation, particularly those involving water. Water and women's sacred role in the relationship with water means any decision-making process should include the advice of a women's council at some stage of the process. Advisory councils of women and Elders would be rounded out by a council of youth to add their perspectives as the future of the Nation. These councils would provide important and helpful insight to a contemporary government who are positioned to exercise the collective inherent jurisdiction of the people through processes such as policy and law making.

Some laws today are drafted in writing under collaborative jurisdiction, as indicated in the affirmation of the Nemiah declaration:

> This law is enacted pursuant to the inherent jurisdiction and law-making authority of the Tsilhqot'in Nation, and the declaration of Aboriginal title granted by the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.[610]

The passage is indicative of two strategic activities in play. The first is the drafting of laws in written form.[611] The second is the use of multiple sources of authority to validate jurisdiction. This is particularly strategic after 150 years of Canada's denial of Tsilhqot'in jurisdictional authority.[612] Tsilhqot'in people recognise the authority of their government and the laws they produce, but asserting valid authority to an outside population is much more difficult.

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[610] TNG, *Affirmation of the Nemiah Declaration* (19 March 2015), online: http://www.tsilhqotin.ca/Portals/0/PDFs/Nemiah_Declaration.pdf.
[611] For example, the TNG recently enacted their *Nulh Ghah Dechen Ts'edilhtan* (Wildlife Law) on 16 July 2019, which applies to the title lands, *supra* note 19.
[612] Beyond that which is delegated through section 81 of the *Indian Act*.

Unfortunately (as it should not and does not have to be this way) it seems TNG has to utilize every strategic measure necessary to assert valid authority over their own lands, and this following the title decision![613] First I will address drafting laws in the written form, suggesting how this may be done in a manner that inheres from within the legal order. Second, I will address how TNG and the Province may balance competing authorities.

a. Drafting Laws

The practice of drafting laws is better left to people who work in the area of legislative drafting. However, these lawyers struggle to respond effectively to Indigenous legal orders when drafting law, whether they are bylaws, contracts, or otherwise.[614] I have given the exercise of drafting much thought.[615] The information I provide by way of suggestion stands to underscore the proposition that there is much more work to be done in this area. The detailed roadmap for carrying out a project of such depth and scope is food for someone else's dissertation.

Drafting contemporary laws is a function of governance, particularly of those governments deeply entangled in the colonial web. There is no reason these laws cannot be informed by an older non-western legal order, which likely includes some writing down of Indigenous laws.[616] The law-base in communities remains in the minds, lives, languages, and

[613] Only because non-Tsilhqot'in choose to acknowledge and accept whosever laws will serve their personal or corporate interests. If TNG passed laws to approve the Prosperity Mine, Taseko Mines Ltd. would be the first to endorse them. Ranchers have a fiscal bottom line, as do other corporations, which compels them to hold up their water licences as the ultimate authority to divert water over the needs of communities.
[614] See Murray Browne, *supra* note 24.
[615] After working with the Northern Secwepemc community of T'exelc, the community coordinator asked me what they can do with the completed report of articulated laws. I had no answer for him at the time, which sparked my interest in the, *what now?* question.
[616] By writing, I mean writing in black and white using text. Many Indigenous laws are written in other ways, such as on the land, as when Lendix'tcux and his sons were turned into stones. See also, Morales, *supra note* 84 at 41-42. Indigenous laws and the many principles and norms they contain are necessarily fluid, and must remain so to remain coherent and responsive to a wide, unpredictable range of circumstances, which is why I argue in this dissertation for the strategic drafting of laws as necessary to benefit the Tsilhqot'in Nation.

spirit of the people. That is, the legal order is lived and practiced internally, which is where I propose that system remain.[617] The strategic deployment of law is an act of expressing law outward to provide notice and knowledge of laws to the outside world. These two facets of law-ways are at either end of the spectrum – internal and external expressions of law. Therefore, drafting laws only need reflect and honour the core principles of the internal law knowledge. For example, when drafting a law about access and use of a particular watercourse, such as a river, the paragraphs must reflect core principles. A lawyer should be able to go through each section and link it back to a principle, as I demonstrate with a hypothetical Tsilhqot'in-specific example relating to water use for industrial purposes, specifically mining.

In the matter of TNG governance, each paragraph should in some way support the protection of the people and respond to the principles and laws of the tradition. Activity that could jeopardize or threaten Tsilhqot'in communities should only be found in the drafted law to expressly prohibit such activities. Likewise, nothing in the law should authorize wanton waste of water, or produce unnecessary disturbance of the land, water, or communities. Some may ask whether using water to wash away chemicals used in mineral separation processes may be considered waste or an unnecessary disturbance of water? While it may not be defined as waste in that sense (using water for a useful purpose such as a mining process is arguably not waste, although, the process itself may not be efficient), it likely violates other principles, such as the

[617] For the purpose of this dissertation, I leave the discussion of strengthening Indigenous legal orders in communities to resurgence theorists, many of whom Clifford notes in his paper, "WSÁNEĆ Legal Theory and the Fuel Spill at SELEKTEL (Goldstream River)," *supra* note 94 at 763, such as John Borrows, Leanne Simpson, Glen Coulthard, and Dale Turner. I also include Aaron Mills in this scholarship for his work with internalized Anishinaabe rooted constitutionalism. A significant practical aspect of this work happens in communities, as they try to engage youth in learning from their Elders in areas such as oral traditions, living on the land, and sacred teachings through culture camps and other similar programs. Although much resurgence theory involves communities working away from the state's scrutinizing gaze, which is where the internal work should be done, resurgence cannot happen in a vacuum. A pragmatist, I am compelled to focus my energy on how First Nations may best serve their people within the colonial world in which we find ourselves thoroughly entangled.

principle against disturbances because it contaminates the water. Disturbance through contamination violates the principle of respect, and threatens the health of communities. Lawyers will require a deep knowledge of the legal order to know how laws work together, to know the holistic setting within which the law operates.

Does this mean (using the above example) that mining could never be authorized under laws that reflect the legal order? No, I do not believe that is the case. A properly drafted law would show how a mine may be subject to Tsilhqot'in approval with compliance of Tsilhqot'in law. The operation would have to be quite different than operations today, which use profit/loss analyses to determine whether an aspect of their licence could be selectively ignored against the cost of penalty for violation of law.[618] Water could be used to extract valuable minerals for example, provided what is used is only what is needed in the process – an efficient process. Any diversion of water would be subject to the law against unnecessary disturbance; although, the disturbance may be considered necessary for the successful operation of the project. Ultimately, any use of water would have to comply with the rule that diversion does not adversely impact downstream users, including fish, plants, and wildlife (all reasons supporting an efficient process). Water that is used would have to be decontaminated and returned to the earth in a clean state, ensuring the cycle of reciprocity is maintained to ensure sustainability into the future. These processes would be under the scrutiny of modern watchers, people trained to monitor compliance.

The entire operation would be held to a standard of minimal disturbance (not allowed to crash rock down hills or otherwise disturb the surrounding inhabitants). Reciprocity is always at play to maintain balance. The people of the Tsilhqot'in Nation would have to be protected

[618] For a general discussion on choosing compliance based on a cost/benefit analysis see Marc Galanter, *Why the Haves Come Out Ahead: The Classic Essay and New Observations* (New Orleans: Quid Pro LLC, 2014).

against loss or contamination of water, land, and species, meaning there would have to be positive plans to ensure fish, animals, and plants not only continue to thrive, but improve. Inhabitants, human and non-human, potentially displaced by the project would have to be accommodated, and their sustainability ensured through whatever rehabilitation means necessary. Ultimately, Tsilhqot'in people would have to be protected, and would have to benefit from any works. Only Tsilhqot'in people have the authority to establish exceptions to their laws and to create new ones.

The laws of the ancestors establish principles that are meant to be flexible and responsive to society's changing needs. The *?esggidam*, who lived in the *sadanx*, could not have contemplated the possible uses of water in a contemporary global industrial society. Through the application of a reasoned approach, I suggest that water may be used in large quantities provided its use is required for the continued survival of the community or nation (law of protection), or if it provides benefits to the community or nation with negligible impact to the water source (relying on the practice of utilizing the land and its inhabitants to sustain the people, and their inherent jurisdiction to make such decisions). These would be valid reasons for creating new laws that accommodate contemporary Tsilhqot'in needs while remaining true to the principles of *dechen ts'edilhtan*. The reason behind this thought experiment is to show that the legal order can inform the present generations and not merely be a relic of the past.

Ultimately, the people would have to be the real beneficiaries of such a project, with their relationship and authority of the *nen*, *tu*, and all its relations acknowledged, memorialized and honoured. A piece of legislation would have to reflect these principles through-and-through. This is how the legal order would inform draft legislation, which does not codify the traditional laws

itself. Anything short of meeting the principles of the legal order would just be more of the *status quo*, using Canadian law to justify dispossession. Drafting in this manner is possible.

Drafting contemporary laws based on the legal order requires a knowledge of the worldview logics and its embedded legal order, knowledge of drafting law, patience, skill and a little ingenuity. That said, Murray Browne's concern over relegating the Indigenous law principles his clients share with him to the preamble before returning to common law content in the body of the legislation is, in a practical sense, not a terrible approach, provided the two are linked throughout the body. To re-iterate, Indigenous legal principles and other aspects of the known and lived legal order belongs with the people. The outward expression for the purpose of strategic engagement will necessarily be western-appearing (for the time being), or as Murray puts it, "white folks" law. Thus, keeping the core principles in the preamble, and ensuring the drafting in the body of the legislation loops back to align with the principles offers a workable start. Enforcement and adjudication are additional aspects that require attention to maintain a high standard related to the drafted text. Perhaps (and hopefully) keen young lawyers will develop other more innovative methods and practices which intuitively and seamlessly bring Indigenous laws into legislative drafting.

b. Gaining Recognized Authority

From somewhere deep inside I want to argue that a First Nation does not need recognition from external governments to gain valid jurisdiction over their lands and waters, as their people provide validation, but this would be naïve. Trying to convince a First Nation that the provincial government has no authority over the water in their traditional territory would be foolish and erroneous. Accepting Tsilhqot'in inherent jurisdiction over water is as much a

historical reality as it is a legal fiction given the present state of provincial authority and the Province's claimed exclusive jurisdiction over water. Therefore, the TNG seeks to anchor its authority wherever it can, in multiple sources, as indicated in the *Nemiah Declaration* cited above.[619]

One option for Tsilhqot'in is to assert its jurisdiction over water, provincial law be damned. This option is preferred for a number of reasons, including that Tsilhqot'in have never ceded or surrendered its lands including water to any other government. The Province should come to the Tsilhqot'in Nation hat-in-hand to learn about Tsilhqot'in law and negotiate how they may share in the benefits of Tsilhqot'in water. Along those lines, but jurisdictionally very different, another option is to work with the Province to created shared jurisdiction under Provincial authority.[620] I caution against working on a shared model under Provincial authority, as it serves to recognize and acknowledge that authority. That said, refusing to acknowledge the existence of Provincial authority is foolish, as its presence is undeniable. On the basis of the persistence of Provincial authority, and as a secondary option to my preference of asserting the inherent right independent of recognition, I will discuss two possibilities through enlisting Provincial legislation. The first is under BC's Water Sustainability Plans under the *Water Sustainability Act* (WSA),[621] and the second is through Bilateral Water Management Agreements (BWMA).

[619] See footnote 610.
[620] By shared jurisdiction, I mean truly shared, each requiring the other's approval for final approval, not the shared jurisdiction within the unchecked ultimate authority of the provincial government. For one model of shared decision-making between First Nations and the Province, see SFU Centre for Dialogue, *Step by Step: Final Report for the Shared Decision Making in BC Project*, online: https://www.sfu.ca/content/dam/sfu/centre-for-dialogue/Watch-and-Discover/SDM/SDM_Final_Report.pdf.
[621] [SBC 2014] c 15.

i. *Water Sustainability Act*: Water Sustainability Plans

Provincial legislation offers opportunities for recognizing shared authority regarding water. I realize as I suggest this, the Province has a long way to go before it will consider sharing jurisdiction over water; however, the uncertainty surrounding Tsilhqot'in title may offer incentive for the Provincial government to try something new. One piece of legislation that offers possibility is the *Water Sustainability Act*. The WSA replaces BC's archaic and outdated *Water Act*.[622] While long overdue, some changes hit the mark for modernizing the law and some fail miserably.

Groundwater legislation (new to BC's water law) helps make the new WSA responsive to the increasing demands placed on groundwater, while simultaneously highlighting how little knowledge the Province has gained over the years.[623] On the downside, the new Act re-entrenches the old FITFOR (first in time, first in right) licencing regime, maintaining user hierarchies that have historically left First Nations out of the picture in the face of settler priorities (particularly agricultural and corporate).[624] The hope glimmering from the recesses of the Act shines from Division 4 – Water Sustainability Plans.

Division 4 creates the legislative space for various entities including First Nations to propose a water sustainability plan to the minister for approval.[625] In broad strokes, a water sustainability plan provides for the management of a watercourse, including groundwater, with respect to its use and diversion. A plan may address issues around "water in a stream, groundwater and surface water runoff not in a stream" by providing details to the minister, who

[622] [RSBC 1979] c 429.
[623] Oliver Brandes, & Deborah Curran, "Changing Currents: A Case Study in the Evolution of Water Law in Western Canada" in Steven Renzetti & Diane Dupont, eds. *Water Policy and Governance in Canada* (Springer Publishing, 2016) 45 at 56.
[624] *Ibid* at 52.
[625] Section 74.

may then forward any approved plan to the Lieutenant Governor in Council, who in turn may implement aspects of the plan by regulation.[626] The LG-in-C has broad powers to restrict or prohibit use of land or resources,[627] reduce water rights of existing licencees,[628] or provide direction on water works or operations to reduce the rate of diversion, alter the timing or otherwise improve efficiency.[629] Although this places previously unheard of control in hands of groups outside of the Provincial government, it does so within a deeply entrenched power regime wielded by the same.

This is a far cry from sharing authority over water. At best, the TNG could propose a plan to manage water in a particular area, implicitly acknowledging the full authority of the Provincial government, who may accept the plan, and may even carry out aspects of it. However, agricultural use is prioritized, and the LG-in-C has significant discretion which would likely be exercised in favour of operations that proposed economic benefits (such as mining).[630] I cannot image the TNG subsuming its authority under the WSA as a "local authority" subject to the Province's contested authority over Tsilhqot'in water given the position that they have never ceded or surrendered their land to any other government.[631]

Not only does the WSA water sustainability plan come up short on recognizing any real authority (decision-making or otherwise) of the local First Nation authority, it fails to provide Tsilhqot'in the ability to control water-related activities or give assurances that their laws will be

[626] Sections 68(2), 76.
[627] Section 78.
[628] Section 79.
[629] Section 80.
[630] Section 82 for dedicated agricultural uses. All of the sections reflect the deference of the government in the use of the word *may*, meaning the LG-in-C is not required to impose any restrictions whatsoever.
[631] TNG, *General Assembly of the Chilcotin Nation: A Declaration of Sovereignty, 1998*, online: http://www.tsilhqotin.ca/Portals/0/PDFs/98DeclarationSovereignty.pdf, "by including our territory in the colony of British Columbia in 1858, she [the Queen] did so without our knowledge or consent. […] The Tsilhqot'in Nation affirms, asserts, and strives to exercise full control over our traditional territories and over the government within our lands."

learned, protected, and respected. A better shared jurisdiction, or decision making model is required to strive toward some form of respectful engagement between governments. I believe the Province would be well-served to stop denying Tsilhqot'in authority, and approach a model that recognizes the dual authorities. As such, the Province is party to trans-boundary BWMAs that serve the purpose of multiple jurisdictions.

ii. Bilateral Water Management Agreements

BWMAs are a set of agreements between BC, Canada, Yukon, Northwest Territories, Alberta and Saskatchewan governments "to manage and protect common water resources".[632] A master agreement sets out the terms of the relationship and serves to enable subsequent BWMAs, of which BC is a party to three: with NWT, Liard and Petitot River Basins; Yukon, Liard River Basin; and Alberta, Peace River Basin (currently incomplete). My aim is not to go beyond the main functionality of these agreements, as I only intend to suggest them as a better model for recognizing shared authority between BC and the TNG than what is available under the WSA. The main agreement establishes a board representing all of the parties. Canada may have up to three members, and one member each for the provinces and territories. In addition, the board is also to have five "Aboriginal" representatives, one from each of the provinces and territories. More details regarding how inter-jurisdictional relationships are managed are embedded in the individual BWMAs.

The BWMA between BC and the Yukon Government sets out their jurisdictional relationship as follows:

[632] Government of British Columbia, *Water Management Agreements*, online: https://www2.gov.bc.ca/gov/content/environment/air-land-water/water/water-planning-strategies/water-management-agreements.

a) Each Party is responsible for decision making related to Developments and Activities in its jurisdiction, subject to specific limitations in this Agreement.

b) Each Party will undertake its jurisdictional water management in a manner that accords with the purpose and principles of the Master Agreement.[633]

The BWMA is careful to recognize the autonomous authority of each party. Shared jurisdictional authority is defined as follows: "'Jurisdictional Water Management'' means actions undertaken unilaterally according to a Party's own Internal laws, regulations, policies, plans and programs".[634] These agreements are structured to facilitate collaborative governance on matters that involve all parties to a common watershed, such as groundwater, water quality, quantity, and preventing the spread of invasive species.[635] There is little mention of First Nations' involvement in this particular BWMA with the Yukon.

The BC – Yukon BMWA only acknowledges that the Parties *may* invite First Nations' research, and that individuals from First Nations and Aboriginal organizations *may* be invited to Bilateral Management Committee meetings held monthly.[636] Appendix C under the agreement discusses the importance of Traditional Ecological Knowledge (TEK) to Indigenous communities, but the Parties themselves do not appear convinced that this knowledge is important:

> Traditional and local knowledge are of critical importance to many Aboriginal and/or local communities. When peer reviewed by knowledge holders, traditional knowledge and local knowledge contribute to a greater understanding and more comprehensive analysis of the environment. Traditional knowledge has been considered as evidence under Canadian law.[637]

[633] BC and Yukon Governments, *Mackenzie River Basin Bilateral Water Management Agreement, 2017-07-08*, section 3: Jurisdictional Water Management at 4. [BC – Yukon BWMA]
[634] *Ibid* at 3.
[635] *Ibid* sections 6, 7, 8, 9.
[636] *Ibid* sections 11 and 13.
[637] BC-Yukon BWMA at 10.

First, the importance of TEK is linked to Aboriginal and/or local governments, while not openly stating its importance to the territorial and provincial governments. Second, it seems that TEK could only "contribute to a greater understanding and more comprehensive analysis of the environment" if it is peer reviewed, rather than standing on its own as valid knowledge of the people. Third, it seems the drafters are trying to convince the reader that TEK must be important because it has been used as evidence in court. Otherwise, why would that statement have to be included? Based on this reading, the parties appear to have to be convincing about the importance of TEK.

The dialogue gives the appearance that the Parties are trying to convince themselves of the need for TEK because it is part of the Master Agreement. It also reflects the intransigence First Nations face when trying to work with provincial and territorial governments. That said, having a First Nation as a party to an agreement of this type would recognize the authority or jurisdiction of the First Nation to govern their waters. For this very reason, I believe the Province is a long way from reaching such laudable heights, despite the present state of decay in the foundation of the Crown's assertion of sovereignty over the lands comprising BC.

These latter two options, utilizing the WSA or BMWAs as grounding a legal relation recognizing shared authority over water in the *nen* in decidedly thin, as it encompasses the warnings of many current Indigenous scholars who caution against relying on colonial authority (legislative or otherwise) to seek recognition of inherent authority.[638] My preference is to urge the Province to seek a relationship under Tsilhqot'in law. This would consist of accepting an invitation to enter a relationship based on respect, reciprocity, and gifting. It would also require

[638] See Mills, Clifford, and Coulthard among others throughout this dissertation.

the Province to act with humility and learn Tsilhqot'in laws about water (some of which are set out in this dissertation) and engaging in relationship in compliance to those laws.

The TNG's inherent authority would provide the grounds for how water is managed on their *nen*, which could hold out some relational authority for the Province, for example, to provide joint research on water, funding for governance, and liaison for and management of third parties under Provincial jurisdiction who wish to enter their own relationships with the Nation for potential projects. The question is, would the Provincial government have the fortitude and integrity to accept that Tsilhqot'in *nen* and *tu* was never surrendered to any other government, meaning any authority the Province currently attempts to wield over Tsilhqot'in property is unlawful?[639]

Chapter Conclusion

Governance is a multi-layered activity. Safety and protection of the people is a foundational principle underpinning the legal order, upon which governance is founded. Governance pertaining to water begins with the individual and family ensuring compliance with the laws. Activities that may interfere with other water users, disruption to water, waste or contamination violate Tsilhqot'in laws applied to water. Once this occurs, governance is elevated to the community for deliberation, adjudication and decision.[640] If the activity is too large or significant for one community to handle, Tsilhqot'in gather and respond as a Nation.[641]

Conceivably, most outside threats to water security will be of a significant scope. As there appears to be no mechanism for determining if or which watercourses could be sacrificed

[639] According to English and Tsilhqot'in Law. See Alan Hanna, "Spaces for Sharing: Searching for indigenous Law on the Canadian Legal Landscape (2017) 51:1 UBC L Rev 106 at 116-119.
[640] Interview of James Lulua and Alex Lulua at Xeni Gwet'in (4 July 2017) at 9, 10.
[641] Forestry in the 1980s and 90s. More recently, Taseko for example.

in the name of jobs and prosperity (for fear of opening the floodgates to wanton development involving any watercourse in the future), no contemporary large-scale uses that violate Tsilhqot'in laws will be permitted. Likewise, most contemporary governance regarding water will involve the Nation. This does not mean individuals and families no longer contribute to governance. With specific knowledge of the internal laws and worldview, the Tsilhqot'in way of life and legal order will continue, as it always has, in daily lives to the benefit and protection of the people. At the national level, however, engagement with the outside world should be strategic, making use of the tools and processes with which the outside world is familiar, at least until the outside world begins to learn the Nation's laws and the reasons for their existence.

Conclusion

I have returned to Xeni Gwet'in to complete this journey into Tsilhqot'in law involving water. On my way to Dinah and James Lulua's place, I stopped at Tatlow creek to fill my water jugs from the icy mountain fed stream, hoping Tŝil?os will sanction this visit in a good way. I wonder as I am driving, what the Nation should do to govern its water. As I passed alongside the mineral blue-green waters of Taseko River, the answer strikes me as plain and obvious: do what they've always done. They have always known the *nen* and the *tu* to be theirs; to be inextricably a part of who they are as Tsilhqot'in people. Although the legal order permits borrowing from outsiders to make laws and govern using newly acquired instruments and practices, particularly when those methods provide clarity to outsiders who wish (or attempt) to appropriate the *nen*, their assertions have not changed over time.

Methods rooted within the Nation combined with those borrowed from Canadian society may help provide intelligibility to the Province and Canada, but it will do little to help Canadians understand why their position is entrenched. For a better understanding, Canadians should walk

along the Tsilhqot'in path to understand the world from their perspective. Simply implementing or acting with legislative tools made available by the Province will not help alleviate the tension between inherent Tsilhqot'in authority over *tu* and the Province's asserted authority over water. To settle on some form of shared jurisdiction with the Province seems to invoke the language of surrender, a position the Nation has yet to, and likely never will, support.

Tsilhqot'in laws apply to *tu* on the *nen*, as they always have and always will. Third parties such as Taseko Mines prefer to only acknowledge provincial legislation, as it favours their corporate interests. As to whose laws should be in force, one only need to look to who pays when enforcement breaks down. Corporations pay fines as a cost of doing business for the contamination and destruction they cause to the environment while extracting resources. At the end of the day the corporate officials and their shareholders get to retire to their affluent lifestyles in their own towns and cities, while Tsilhqot'in people are left suffering the consequences with polluted waters and toxic fish and animals as a result of others' blindness to Tsilhqot'in enforcement.

Recall that Tsilhqot'in laws are in place to protect the family, communities, and nation in the present and for future generations. The laws are enforced by the potential loss of health and availability of various relations such as fish, animals, and plants through contamination or loss of water and land. So I ask again, whose laws should apply on the *nen*? Again, the laws of those who bear the burden of the breakdown of those laws. The application of Provincial laws to the detriment of First Nations people is a continued effort to exterminate the identities and ways of life of distinct peoples who are indigenous to this continent.

This dissertation and the analysis and conclusions it contains show that an outsider to the Nation *can* learn about laws from the worldview, however tempered for the outsider, when an

effort is made. Knowledge may come from any sources the people make available (stories, the land, elders, ceremonies, feasts, songs). Properly understanding the inextricable relationship between people, land, and the surrounding environment, which are all linked through uptake of water, shows how the people are constituted of the place where they have lived since before the arrival of Europeans. Possessing this knowledge, and continuing to usurp authority to prioritize benefits to outsiders, while saddling Tsilhqot'in people with the consequences, is nothing short of attempted and willful elimination of a distinct Indigenous people. Lawyers and judges are in positions to intervene this ongoing injustice. Lawyers, in particular in their positions as officers of the Court, bear an ethical duty to our clients to be able to practice law in a transsystemic manner. This means knowing how to learn the client's worldview, and the laws that emerge from within in their own particular foundations of logic and reason.

A lawyer representing First Nations should know how to do the *white folk thing* of law while always remaining vigilant that that *thing* is informed by and responsive to the client's Indigenous legal order. A real challenge to this is figuring out how to gain legal competency in a client's legal order without billing them for every hour spent learning what they should already know. Firms need to bear some of this burden if they want their lawyers to possess competence in this area. Additionally, spending time learning Indigenous laws is a part of reviewing Canadian law for a specific legal service, whether litigation, drafting laws, drafting contracts, or various policies. I am not suggesting taking a middle path here, rather being properly schooled on the path First Nations find themselves, locked between the lived existence of law and the strategic deployment of that knowledge for the purpose of engaging the foreign system imposed upon people. The question that arises from my work is: how will Canadians respond to this knowledge and the conclusion which flows from it?