

*SNUW'UYULH: FOSTERING AN UNDERSTANDING OF THE HUL'QUMI'NUM*  
LEGAL TRADITION

by

Sarah Noël Morales  
LL.M., University of Arizona, 2006  
J.D., University of Victoria, 2004

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of the Requirements for the Degree of

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in the Faculty of Law

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## **Supervisory Committee**

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Dr. James Tully, Department of Political Science  
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Prof. Hamar Foster, Faculty of Law  
**Member**

## Abstract

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One cannot begin to understand the nature of Hul'qmi'num legal tradition without first acknowledging and understanding the relationship between culture and law. The Coast Salish people have a vibrant culture, influenced heavily by the nature of their relationships with their ancestors, their kin and their lands. These relationships permeate their legal tradition. Influencing not only regulatory aspects of law, but also dispute resolution processes. Trying to understand and appreciate this tradition outside of this worldview would be detrimental to the tradition itself, as I believe it would result in a transformation of the laws and practices.

In thinking about the relationship between law and culture, this research has identified two fundamental categories of law within the Hul'qumi'num legal tradition: 1) *snuw'uyulh* and 2) family laws. *Snuw'uyulh* refers to a condition generated by the application of seven teachings: 1) *Sts'lhnuts'amat* ("Kinship/Family"); 2) *Si'emstuhw* ("Respect"); 3) *Nu stl'I ch* ("Love"); 4) *Hw'uywulh* ("Sharing/Support"); 5) *Sh-tiiwun* ("Responsibility"); 6) *Thu'it* ("Trust"); and 7) *Mel'qt* ("Forgiveness"). Accordingly, universal teachings seek to foster harmony, peacefulness, solidarity and kinship between all living beings and nature in the world. In a sense, *snuw'uyulh* is a state or condition

and Hul'qumi'num legal tradition encompasses all the animating norms, customs and traditions that produce or maintain that state. As a result, Hul'qumi'num law functions as the device that produces or maintains the state of *snuw'uyulh*. There is another fundamental category of law present within the Hul'qumi'num world – family laws. Family laws encompass the norms, customs and traditions, or customary laws, which produce or maintain the state of *snuw'uyulh*.

Law is a practice – an activity. Arguably, much of the practice of law takes places in the form of regulation and conflict and dispute resolution. Similar to how law cannot be separate from its surrounding culture, nor can the processes developed to resolve conflicts in the law. Since time immemorial the Hul'qumi'num Mustimuhw have utilized processes and practices to resolve conflicts and disputes both within their communities and with other communities in the Coast Salish world. Although the processes and practices have varied over time, it is possible to identify several inherent standards of conflict resolution which the Hul'qumi'num people continue to utilize in resolving their disputes.

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## **Dedication**

To Tony and my Parents,  
For giving me the strength, support and courage to complete this journey.

To all my family, for your love.

For Mylah,  
with the hope that you grow up in a world  
where the teachings of all your relations are respected and honoured.

## Glossary of Hu'q'umi'num Terms

*a'citibixw'* – us living here

*'a 'lha'tham* - treating you in a highly respectful way

*'A'lhut tute et Sulhween* – respecting the ancestors

*Hu'q'umi'num* – the language group of the *Hul'qumi'num Mustimuhw*

*Hul'qumi'num Mustimuhw* – Hul'qumi'num people comprised of Cowichan Tribes, Lake Cowichan First Nation, Penelakut Tribe, Halalt First Nation, Lyackson First Nation, and Stz'uminus First Nation

*Hwasalu'utsum* – Koksilah Ridge

*hwi neem stum'* – 'being called to witness'

*hwulunitum* – non-Indigenous settlers

*hw'uyuqun* – 'words are powerful'

*hw'uywulh* – sharing/support

*Kwu Yuweenulh Hwulmuhw* – The First Ancestors

*mel'qt* - forgiveness

*Mujw stem tsu' thu' thaam u tu suleluhwsts, ts'i ts'u watul ch* – 'everything they told us, the ancestors or elders, help each other'

*nil ow' sthuthi' ni' 'utun shqualuwun* – 'Is this okay with you personally?'

*nu stl'i ch* - love

*Q'ulits'* – Chemainus Bay

*Quw'utsun* – Cowichan

*sh-tiiwun* - responsibility

*Skw'aakw'num* – Mt. Sicker

*si'em/siiem'* – respected person

*si'emstuhw* - respect

*siil't'uhw* – cedar board

*Silaqwa'ulh* – the mouth of the Chemainus River

*snuw'uyulh* – ‘our way of life’

*spaal'* - raven

*stihwum* – ruffed grouse

*sts'lhnuts'amat* – kinship/family

*Stuts'un* – one of the First Ancestors

*Swuq'us* – Mt. Prevost

*sxwi'em'* – myth stories

*Syalutsa'* – First Ancestor dropped in Cowichan area

*syuth* – true stories/First Ancestor stories

*thu'it* - trust

*ti'yu-xween* – ‘trouble/problems grow from small conflict’

*tun'ni' utunu kweyul 'i kwe't tst* – ‘from this day one we put this to rest’

*Uy'ye'thut ch 'u'suw ts'its'uwatul'ch* – ‘treat each other well and you will help each other’

*Xeel's/Hals* – The Transformer

## CHAPTER 1

### Introduction: Reflections on the Content and Character of “Aboriginal Law” in the Hul’qumi’num World

*Eenthu Su-taxwiye tun 'I tsun 'utl' Tl'ulp'a'lus. Hay tseep q'a' kwus ts'ewuthamsh 'u tun'a syaays. Hay tseep q'a' I tsun 'o' hwun eli' suli'slheni ta'ult tun'a shte' tse.*<sup>1</sup>

#### **“I Carry Two Names”**

*One of the fundamental principles of an Indigenous research methodology is the necessity for the researcher to locate oneself in relation to one's work.<sup>2</sup> The notion of relationality requires that you know about me before you can begin to understand my work. As Indigenous scholars, we write about ourselves and position ourselves at the outset of our work because the only thing we can write about with authority is our own experiences.<sup>3</sup> Locating yourself is an important way to gain trust in a community, whether it be an Indigenous community or a community of readers. Although I will go into a more detailed history of my life in later chapters, I would like to share a bit about myself at the beginning of our journey together.*

*I have two names. The name given to me by my parents is Sarah Noël Morales. The name given to me by my great-uncle and witnessed by my community is Su-taxwiye. I carry both names with a sense of pride. Both tell of my ancestry. Both tie me to people that I love. Both connect me to places that I consider home. One is no more important than the other.*

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<sup>1</sup> My name is *Su-taxwiye*. I am from Cowichan Bay. I want to thank all of you for helping me with this work. I am still learning, but this is my understanding at this point and time.

<sup>2</sup> Kathy Absolon & Cam Willnett, “Putting Ourselves Forward: Location in Aboriginal Research” in Leslie Brown & Susan Strega, eds, *Research As Resistance: critical, Indigenous & anti-oppressive approaches* (Toronto: Canadian Scholars Press, 2005) 97 at 97.

<sup>3</sup> *Ibid.*

*My father is Robert Ben Morales. His mother, my grandmother, was Della James. She was an Indigenous woman from the Cowichan community on southern Vancouver Island. His father, my grandfather, was Bernabe Morales. He was an Indigenous man from the Sonora region of Mexico. They met and married in Washington State. My father was born in Moses Lake, Washington. He and my grandmother moved back to their community in the Cowichan Valley when he was in his early teens, after my grandfather passed away.*

*My mother is Brenda Lea Morales. Her mother, my grandmother, is Frances Joyce Aldcroft (nee Ellis). Her family has roots in Scotland and England. Her father was William Glen Aldcroft. His family has roots in Maine, U.S.A. They met and married in Saskatchewan. They lived in Edmonton, where my mother was born. They later moved to Vancouver Island where my mother spent her late teenage years.*

*As you can see, my background is quite diverse. It's important to understand that I do not privilege any one particular line of my ancestry. All of my ancestral ties have influenced my research and methodology. You may presume that because I am writing about the Hul'qumi'num legal tradition, I would privilege my Cowichan heritage. However, this is not the case. In fact, it was through exploring the Hul'qumi'num legal tradition, that I gained a greater appreciation for "all my relations." What I have come to appreciate is that ancestry alone is not sufficient to define what I am discussing. Through this research, I have reached an understanding that politics and law takes one beyond ancestry in defining community and in defining one's own relationship with community. Similar to the classification by the United States Supreme Court in *Morton v. Mancarai*, the Hul'qumi'num Mustimuhw (Hul'qumi'num People) are more than just racial animates, they are a sovereign entity whose lives and activities*

*have been governed by the Canadian government in a unique fashion.<sup>4</sup> This history and resulting relationship, be it positive or negative, has influenced our legal tradition and politics. As a result, when I define myself as a Hul'qumi'num Mustimuhw, I am encompassing something much greater than what is recorded in the Cowichan membership records in the offices of Aboriginal Affairs and Northern Development Canada. I am defining myself by our own laws and politics. I am acknowledging and respecting "all my relations."*

*This research project represents a personal journey. I have often stated that I feel that I am the person who is going to benefit the most from my research. It was through examining Hul'qumi'num legal practices, in particular the practices of dispute resolution, that I discovered how to reconcile my own internal cross-cultural differences. This internal reconciliation has become a motivating factor for the external reconciliation that I hope to foster through my research.*

### **1.1 Shared Sovereignty – Reconciling Coast Salish Legal Traditions in Canada**

The overarching purpose of this research is to bring about a greater recognition and reconciliation of the Hul'qumi'num legal tradition with the Canadian legal system. As an Indigenous scholar of Hul'qumi'num descent residing in Canada, the question of "what is law?" is not something that I can answer simply by visiting a law school library. Neither is it something that I can answer simply by immersing myself in our traditional customs and practices. As I have discovered, law is not only a matter of ideas but rather a process – an activity.

But how does one describe this process? How does one reconcile the differences that may exist between the laws found in the law school library and the laws practiced in the traditional big houses of my people? What law prevails when a provincial statute allows for the

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<sup>4</sup> *Morton v Mancari*, 417 US 535 at 554 (1974).

desecration of an ancient Hul'qumi'num burial ground and a Hul'qumi'num law of non-avoidance prohibits it? In pondering these questions, I have found solace in the writings of Vine Deloria, the great American Indian theologian, author, historian and activist. When he published *Custer Died for Your Sins* in 1969, Deloria believed that “Indian people ... have a chance to re-create a type of society for themselves that can defy, mystify, and educate the rest of American society.”<sup>5</sup> His hope, he says, was not so much to be right or wrong, but to give a “new sense of conflict to Indian affairs” and to “bring ... to the surface the greatness that is in” American Indian people and cultures.<sup>6</sup>

The questions that guided this research revolved around the nature and characteristics of the Hul'qumi'num legal tradition. What are the fundamental categories of law that comprise the Hul'qumi'num legal tradition? What are the sources of those categories of law? Finally, what are the major teachings or standards that emanate from those categories of law? Accordingly, the first part of my research project aims to broaden our understanding of law by examining the two fundamental legal categories of the Hul'qumi'num legal tradition – *snuw'uyulh* and family laws. I hope to reinforce the notion that Canadian society is not “merely a conglomerate of individuals who fall under the same laws.”<sup>7</sup> In this sense, I aim to “educate” both Hul'qumi'num and non-Hul'qumi'num societies about the pluralistic nature of law.

In working to adequately decipher and illustrate these Hul'qumi'num legal categories, I have often found myself confronted with the notion of “tradition.” I have chosen to utilize the language of a Hul'qumi'num legal tradition to describe not only the system of law, but also the way in which law is studied and taught within these six Hul'qumi'num communities.

Furthermore, I have questioned what are the “best” sources of the Hul'qumi'num legal tradition?

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<sup>5</sup> Vine Deloria Jr, *Custer Died for Your Sins* (New York: Macmillan, 1969) at 268.

<sup>6</sup> *Ibid* at 268-269.

<sup>7</sup> Vine Deloria Jr, *We Talk, You Listen* (New York: Macmillan, 1970) at 106.

Are they the writings of the early ethnographers and anthropologists who observed and wrote about the customs, practices and traditions of my ancestors in the 19<sup>th</sup> century?<sup>8</sup> Or are the Elders, many of whom have been affected by a colonial past, the best source of Hul'qumi'num laws?<sup>9</sup> I am cautious about focusing too much on an antiquated notion of "tradition." Because the Hul'qumi'num legal tradition is a living tradition, I have often wondered how much time should be spent focusing on trying to unearth the legal traditions that governed my communities prior to contact. Furthermore, as Keith Thor Carlson so aptly describes in his work, *The Power of Place The Problem of Time*,<sup>10</sup> Coast Salish identities and politics have never been static, neither prior to nor after contact.

This is not to say that I do not value the role tradition can and should play in the development of a new relationship between the Hul'qumi'num legal tradition and the Canadian legal system. The affirmation of tradition provides the necessary raising of consciousness among those who have been taught that our ancestors' ways were barbaric, pagan, and uncivilized.<sup>11</sup> Furthermore, tradition can provide the critical constructive material upon which a community rebuilds itself.<sup>12</sup> However, within this process, tradition cannot be placed upon a pedestal. Furthermore, the influence of colonial practices and oppression upon these traditions must be

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<sup>8</sup> See generally Franz Boas, *Indian Myths & Legends from the North Pacific Coast of America* (Vancouver: Talonbooks, 2002)[Boas, *Indian Myths*]; Edward Curtis, *The North American Indian* (Charleston: BiblioLife, 2008); Charles Hill-Tout, *The Salish People, Volume IV: The Sechelt and the South-Eastern Tribes of Vancouver Island* (Vancouver: Talonbooks, 1978).

<sup>9</sup> See generally Alexandra Harmon, "Coast Salish History" in Bruce Miller, ed, *Be of Good Mind: Essays on the Coast Salish* (Vancouver: UBC Press, 2007) 30 at 30; Daniel Marshall, *Those Who Fell From The Sky: A History of the Cowichan Peoples* (Duncan: Cowichan Tribes, 1999); Bruce Miller, *Be of Good Mind: Essays of the Coast Salish* (Vancouver: UBC Press, 2007); Brian Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property, and Territory in the Coast Salish World* (PhD, McGill University Department of Anthropology, 2005) [unpublished]; Wayne Suttles, *Coast Salish Essays* (Seattle: University of Washington Press, 1987) [Suttles, *Coast Salish Essays*].

<sup>10</sup> Keith Thor Carlson, *Aboriginal Identity And Historical Consciousness In The Cauldron Of Colonialism: The Power of Place The Problem Of Time* (Toronto: University of Toronto Press, 2010).

<sup>11</sup> Robert Allen Warrior, "Intellectual Sovereignty and The Struggle for An American Indian Future" (1992) 8:1 *Wicazo Sa Review* 1 at 5.

<sup>12</sup> *Ibid.*

taken into consideration in determining the best path towards reconciliation. In order to understand the “real meaning” of tradition, Indigenous peoples must recognize that the strength of these traditions is not in their formal superiority, but rather within their adaptability to respond to new challenges.<sup>13</sup>

Accordingly, as you read through this dissertation, you will discover that the legal “data” derives not only from the Elders in my community whom I have interviewed, but also from my own reflexivity upon the subject matter. In addition to being an academic, researcher and student, I am also a practitioner of Hul’qumi’num law. I am involved in the continuing development of Hul’qumi’num law as a living tradition. Thus, where appropriate, I add my own interpretive voice to the “data” provided by my Elders. As stated at the outset of this chapter, I have been shaped by at least two legal cultures growing up in the Coast Salish World. I not only have obligations to follow the laws of Canada, but also to follow our *snuw’uyulh*. *Snuw’uyulh* is a Hul’qumi’num word translated roughly into English as “our way of life,” or “our way of being on Mother Earth.” Receiving the teachings about our *snuw’uyulh* and attempting to apply them in my own daily life has been a transformative experience – one vital to this research project. The relevance and adaptability of the Hul’qumi’num legal tradition to a modern and legally pluralistic society is apparent through my own experiences in my daily life. Accordingly, as I will describe in more detail in the methodology chapter of this research, an auto-ethnographical and Hul’qumi’num legal approach is utilized in at the beginning of every chapter of my dissertation.

Robert Warrior describes this approach as an exercise in intellectual sovereignty.<sup>14</sup> As he so aptly describes:

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<sup>13</sup> *Ibid.*

<sup>14</sup> See generally Warrior, *supra* note 11.

If our struggle is anything it is the struggle for sovereignty and if sovereignty is anything it is a way of life. That way of life is not a matter of defining a political ideology or having a detached discussion about the unifying structures and essences of American Indian traditions. It is a decision, a decision we make in our minds, in our hearts, and in our bodies to be sovereign and to find out what that means in the process.

Such praxis leads us into life in the face of death and teaches us that our knowledge can never predict the future nor ossify the past. The value of our work then expresses itself in the constant struggle to understand what it is we can do rather than in telling people what they should do.<sup>15</sup>

Accordingly, in the application and analysis sections of my dissertation, my research describes how the Hul'qumi'num legal tradition influences my relations with those around me and how I order my life accordingly; rather than simply prescribing a set of positivistic Coast Salish laws.<sup>16</sup>

I believe that this reflective process will enhance the recognition of the Hul'qumi'num legal tradition within Hul'qumi'num and non-Hul'qumi'num communities. I am a member of a community and as such, my research flows from a legal landscape similar to that of other community members. As readers compare their own personal legal experiences with the ones I share in this dissertation, my hope is that they will explore their own personal interpretations of this legal tradition with me. As my own learning journey has taught me, personal interaction and reflection on these concepts is one of the greatest means to achieve greater recognition of Indigenous legal traditions.

However, this is not to suggest that this dissertation is not also aimed at recognition and shared sovereignty within the Canadian state. This research also has relevance to those seeking to reconcile these different and sometimes competing legal traditions. This process of reconciliation is not simply a struggle by the Hul'qumi'num communities to be free from the

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<sup>15</sup> *Ibid* at 18.

<sup>16</sup> By positivistic legal principles, I am referring to a set of definitive, enforceable, written laws.

influence of the Canadian legal system. It is also a process of asserting the power we possess as communities and individuals to make legal decisions that affect our lives. As political theorist, James Tully, stated “Indigenous peoples resist colonization in two distinct ways”: “First, they struggle against the structure of domination as a whole and for the sake of their freedom as peoples. Second, they struggle within the structure of domination vis-à-vis techniques of government by exercising their freedom of thought and action with the aim of modifying the system in the short term and transforming it from within in the long term.”<sup>17</sup> Accordingly, a discussion of the recognition of Indigenous legal traditions cannot be characterized by the “boundaries” of the Canadian political system, i.e. progressive-backward (temporal); inside-outside (space); and independent-dependent (self-other).<sup>18</sup> Kevin Bruyneel describes this supplementary strategy as the “third space of sovereignty” and states:

The indigenous political effort to construct and maintain the coherence of community is premised on straddling and thus re-marking the boundaries that purport to secure the coherence of American community. This does not mean that indigenous political actors can deny the real power inequity between their communities and the American nation. Rather, the lesson here is that in generating political claims indigenous people do not simply adhere to the options set out by the American political framework. By refusing the imperial binary through politics on the boundaries, indigenous people give their political identity, agency, and autonomy fuller expression, one that is less constrained by colonial impositions.<sup>19</sup>

For the purposes of my work, I tend to understand this “space” as a space of “shared sovereignty” by which Indigenous groups can operate both within and outside the Canadian legal system at the same time.

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<sup>17</sup> James Tully, “The Struggles of Indigenous Peoples for and of Freedom” in Duncan Ivison, Paul Patton, & Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 36 at 50.

<sup>18</sup> Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S. – Indigenous Relations* (Minneapolis: University of Minnesota Press, 2007) at 7.

<sup>19</sup> *Ibid* at 21.

This research project seeks to transform the Canadian legal system in the long term by advocating for true legal pluralism – one that will see Indigenous law, in particular Hul’qumi’num law, as an integral and important part of the total legal framework of the Canadian State. Rather than the paternalism that tolerated marginal differences, Indigenous groups, such as the Hul’qumi’num Mustimuhw, are seeking a vibrant pluralism that will actively seek out a viable partnership with the Canadian legal system. This shouldn’t be hard to imagine, given that the common law itself is the end product of a long historical process which saw parallel systems of law developing, often initially in conflict and rivalry, while carving out its sphere of influence.<sup>20</sup>

The issue thus becomes one of establishing the proper intercultural dispute resolution processes so as to enable a cross-cultural dialogue to occur. These processes should be designed to meet the needs, capacities and sensibility of those they serve. Although I am not suggesting that the Hul’qumi’num legal tradition holds all the answers to the resolution of conflicts between Hul’qumi’num and non-Hul’qumi’num legal traditions, I am suggesting that the incorporation of their principles of dispute resolution into the larger process of reconciliation could prove to be very fruitful, especially given the pluralistic nature of the Hul’qumi’num legal tradition.

Just as this section has introduced you to the purpose of my research more generally, in the next section of this chapter I aim to introduce you to my community – the Hul’qumi’num peoples of south-east Vancouver Island. An exploration of the legal traditions existing within the entire Coast Salish World is beyond the scope of this project. As such, I have chosen to focus the majority of my primary research on the legal tradition and fundamental legal categories of my own community. This is in keeping with the recognition that law is lived by communities

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<sup>20</sup> See generally John Borrows, “Chapter 1: With or Without You: First Nations Law in Canada” in John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Inc., 2002) 29 at 29 – 55 [Borrows, *Recovering Canada*].

and individuals in particular contexts. Law is not an abstraction; it is experienced. Thus, even in describing Hul'qumi'num history and culture, my own legal experiences will never be far from the surface.

## 1.2 The Culture, Customs and Way of Life of the Hul'qumi'num Peoples

The Coast Salish world is expansive. It stretches from the coastal areas of Puget Sound in Washington State, to southern Vancouver Island in British Columbia and across the Salish Sea to the valleys of the Fraser River.<sup>21</sup>



This is a world rich in natural beauty and resources. Snow-capped mountains tower above river valleys that provide shelter to the elk, deer, bear and other species that share this territory. Rivers meander through the valley floor, carrying salmon, trout and steelhead. Eagles fly overhead, eager to partake in the ocean delights that surround the territory. Cedar and Douglas fir trees, their roots planted firmly in the territory cast large shadows over the ferns and berry bushes on the forest floor. The bright blues of the river and oceans, the deep greens of the

<sup>21</sup> The map below was created by the Hul'qumi'num Treaty Group. It depicts the Coast Salish World as described to them by their member First Nations.

mountains and valleys, the smell of cedar and the winds that carry the scent of the ocean's salt. These are the sights, sounds and smells that characterize my home – my sense of place.

But the landscape of the Coast Salish world also reflects the overlay of settler colonialism – objects which threaten my sense of place. Today, as you travel through the territory, many of the mountains remain bare. Old growth cedar and fir trees, their deep roots ripped from the ground, are visible only on the backs of logging trucks as they cut across the territory on paved highways. Highways criss-cross through the land like stitches marking the wounds of contact. Deer, elk and bear are seen walking through subdivisions, scrounging for food in dumpsters, their natural habitats encroached upon by eager developers. Ocean winds bring with them the stench of oil and sewage, their harbours housing commercial docks and treatment plants. Once mighty rivers have been replaced by shallow waters, filled with debris and rocks instead of spawning salmon species. Big box stores stand in contrast to reserve homes, signifying the different lived experiences of the occupants of the Coast Salish world. It is somewhere between these two realities that I experience my territory today.

The core territory of my people, the Hul'qumi'num Mustimuhw, includes southeastern Vancouver Island, the Gulf Islands and the lower Fraser River. It encompasses the land and waters in and around the watersheds of the Cowichan, Koksilah, Goldstream, Chemainus and south Nanaimo river systems on Vancouver Island, the Gulf Islands and the mouth and the south arm of the Fraser River to Douglas Island. The marine territory includes all the waters of the Strait of Georgia, the Fraser River south of Yale, Juan de Fuca Strait and upper Puget Sound.<sup>22</sup>

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<sup>22</sup> The map below was provided by the Hul'qumi'num Treaty Group. It is their Statement of Intent Map, drawn from data collected through a traditional use study. It is important to note that other Coast Salish First Nations, such as the Tsawwassen First Nation, have overlapping claims to some of the territory. The issues surrounding the use of Statement of Intent Maps were discussed by Brian Thom in "The paradox of boundaries in Coast Salish territories" (2009) 16 Cultural Geographies 179.



My community, the Hul'qumi'num Mustimihw, is part of the larger central Coast Salish peoples. Wayne Suttles, a leading authority on the ethnology and linguistics of the Coast Salish people of the Northwest Coast maintains that Central Coast Salish refers to the speakers of five languages: Squamish, Halkomelem, Nooksack, northern Straits and Clallam.<sup>23</sup> Prior to contact, the Central Coast Salish occupied the southern end of the Strait of Georgia, most of the Strait of Juan de Fuca, the Lower Fraser Valley, and some adjacent areas.<sup>24</sup>

The Halkomelem language is spoken along the eastern shore of Vancouver Island and on the mainland from the mouth of the Fraser eastward to Harrison Lake and the lower end of the

<sup>23</sup> Wayne Suttles, ed, *Handbook of North American Indians, Volume 7, Northwest Coast* (Washington: Smithsonian Institution, 1990) at 453 [Suttles, *Handbook of North American*].

<sup>24</sup> *Ibid*

Fraser canyon.<sup>25</sup> Three main dialect groups are distinguishable: an Island group, spoken by the people whose winter villages were located on Vancouver Island; a Downriver group, spoken by those people whose winter villages were on the mainland around the mouth of the Fraser River and upstream to the Stave River; and an Upriver group, spoken by those who lived above the Stave River.<sup>26</sup> According to Suttles, the Island Halkomelem were: the Nanoose, in a single village on Nanoose Harbour; the Nanaimo, consisting of five named groups, one with its winter village on Nanaimo Harbour and the other four in a joint winter village on Departure Bay; the Chemainus, with at least ten villages on Stuart Channel, the best known being Penelekut on Kuper Island; the Cowichan, with at least six villages on the lower course of the Cowichan River; and the Malahat, in a single village on Saanich Inlet.<sup>27</sup>

According to University of Washington historian Alexandra Harmon, there does not appear to be a unitary Coast Salish ethnic group.<sup>28</sup> In fact, she argues that Suttles himself, in his essays, does not even define “Coast Salish” as an all-inclusive term. Instead, he states that his essays are concerned with individual communities or groups of the “Central Coast Salish of southwestern British Columbia and northwestern Washington, the wider Coast Salish region, the whole Northwest Coast of North America, or in one instance, the Interior Salish of the Plateau.”<sup>29</sup> Although there are individuals today who identify themselves in certain contexts as Coast Salish, Harmon argues that the term more reflects what anthropologists and linguists created for the purpose of denoting a more widely distributed set of Indigenous North American peoples who spoke or speak related languages.<sup>30</sup> As such, she argues that a more appropriate

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid* at 455.

<sup>28</sup> Harmon, *supra* note 9 at 30.

<sup>29</sup> Suttles, *Coast Salish Essays*, *supra* note 9 at xi.

<sup>30</sup> Harmon, *supra* note 9 at 30.

way to understand the broad Coast Salish classification is to focus on the smallest possible unit of analysis: the Coast Salish individual.<sup>31</sup> Wayne Suttles summarized his and his colleagues' views on this in the following way: "Networks of intermarriage and cooperation in economic and ceremonial activities among neighbouring tribes regardless of language made the whole Coast Salish region a kind of social continuum."<sup>32</sup> These interconnections did not disintegrate when foreign trading ships and colonists arrived in the eighteenth and nineteenth centuries, therefore, there is reason to believe that so-called Coast Salish peoples do indeed have a shared history.

While I think that Suttles and Harmon may have a point when discussing our historic circumstances, I would resist the idea that the Coast Salish exist only within a social continuum. History is not the only lens through which we can be viewed. It is just as possible that the social continuum to which Suttles refers embodies some decentralizing features of Coast Salish law. In fact, Carlson does an excellent job of demonstrating how Coast Salish communities "reinvented" their identities as they responded to conflict (both pre- and post-contact); disease, economics, missionaries etc. in a manner which, I would argue, honours our *snuw'uyulh*.<sup>33</sup> Nevertheless, following their cautions concerning categorization, I have chosen to focus my research on six individual First Nations who comprise the Hul'qumi'num Treaty Group: Cowichan Tribes; Stz'uminus First Nation; Penelakut Tribe; Halalt First Nation; Lyackson First Nation; and Lake Cowichan First Nation.<sup>34</sup> The Treaty Group was established in 1993 to achieve just resolution of land claims and Indigenous rights issues. The Hul'qumi'num Treaty Group's constituency

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<sup>31</sup> *Ibid.*

<sup>32</sup> Suttles, ed, *Handbook of North American*, *supra* note 23 at 15.

<sup>33</sup> Carlson, *supra* note 10.

<sup>34</sup> In early 2014, the Stz'uminus First Nation decided to withdraw from the B.C. Treaty Process and the Hul'qumi'num Treaty Group subsequently. However, because they were still an active member of HTG at the time this research was undertaken, the research derived from their community is still reflected in this dissertation.

includes all the Hul'qumi'num Indigenous peoples of the six First Nations, approximately 6,400 individuals.

The Hul'qumi'num Treaty Group's member-First Nations are socially, culturally, and economically inter-connected by marriage, travel, trade, ceremony and sacred beliefs, similar to Suttles' findings in other Coast Salish communities. There are many ties of kinship and connection that weave throughout the Coast Salish world of the Hul'qumi'num communities represented by the Hul'qumi'num Treaty Group. There are also vitally important, life-giving and ongoing ties to the land that have sustained these Indigenous peoples, their unique culture and their way of life since time immemorial.

From time immemorial, the Hul'qumi'num Mustimuhw and their ancestors have lived and prospered as self-sustaining societies inhabiting a traditional territory stretching from southeast Vancouver Island to the Fraser River on the lower mainland of British Columbia.<sup>35</sup> Oral tradition links the Hul'qumi'num peoples to their territory from the beginning of time. Archaeological evidence supports the continuous occupancy of their ancestral lands.

According to the Hul'qumi'num peoples' creation stories, those they call the "First Ancestors" were the original occupants of our traditional territory. These First Ancestors descended from the sky or emerged from the land or sea at various locations within the Hul'qumi'num traditional territory – places like *Hwasalu'utsum* (Koksilah Ridge), *Skw'aakw'num* (Mount Sicker), *Swuq'us* (Mt. Prevost)<sup>36</sup> and *Silaqwa'ulh* (the mouth of the Chemainus River).

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<sup>35</sup> See footnote 22, "Hul'qumi'num Treaty Group: Core Traditional Territory"

<sup>36</sup> See Figure below. If you look closely, you can see the profile of the face of *Swuq'us*; thought to have been left behind as he fell from the sky.



There are also many intangible cultural landscapes and places that, according to Hul'qumi'num traditions, law and oral history, hold symbolic and sacred significance for the Hul'qumi'num peoples. Cultural landscapes are places where the Hul'qumi'num First Ancestors descended from the sky or where *Xeel's* (the “transformer”) marked the land. These cultural landscapes are honoured today by Hul'qumi'num peoples as sacred heritage sites due to their unique spiritual significance.

Primary and secondary research has led me to identify two fundamental categories of law that comprise the Hul'qumi'num legal tradition and each finds its source in the two types of creation stories outlined above. First, *snuw'uyulh* is a Hul'qumi'num word that means “our way

of life.” It includes our language, our governance, our culture and traditions, our sacred bathing holes; it also embraces our spirituality and all the teachings. *Snuw’uyulh* helps regulate our relationships and resolve our disputes. It contains standards and practices for judgment and decision-making. It touches on all aspects of life and cannot be separated from our relations to each other, to the natural world or to the spiritual world.

There are seven key Hul’qumi’num teachings that have been identified to me as providing the foundation for our *snuw’uyulh*. These teachings are: 1) *sts’lunuts’amat* (kinship); 2) *si’emstuhw* (respect); 3) *thu’it* (trust); 4) *hw’uywulh* (sharing); 5) *nu stl’l ch* (love); 6) *mel’qt* (forgiveness); and 7) *sh’tiiwun* (responsibility). While not exhaustive, these are key Hul’qumi’num teachings which provide a foundation for the development of other laws with deep roots in Hul’qumi’num custom and tradition. As such, I understand them to be teachings, similar to the implicit rules described in Lon Fuller’s social interaction theory of law.<sup>37</sup> Fuller argues that law lays down general rules – in this case implicit rules:<sup>38</sup> “The Law does not tell a man what he should do to accomplish specific ends set by the lawgiver; it furnishes him with baselines against which to organize his life with his fellows.”<sup>39</sup> Accordingly, these seven teachings seek to foster harmony, peacefulness, solidarity and kinship between all living beings and nature in the world.

The second category of law is that of family laws. These laws encompass the norms, customs and traditions, or customary laws, which produce or maintain the state of *snuw’uyulh*. Hul’qumi’num family laws are potentially more fluid than those outlined above. While this category is also very much tied to the notion of *snuw’uyulh* and cannot be separated from the

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<sup>37</sup> Lon L Fuller, “Human Interaction and the Law” in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, revised ed, (Portland: Hart Publishing, 2001) 231.

<sup>38</sup> *Ibid* at 254.

<sup>39</sup> *Ibid*.

seven teachings outlined above, the family laws are more open to change and adaptation within family units. One of the most important characteristics of the Hul'qumi'num legal tradition is the acceptance of difference in Hul'qumi'num family laws. I view this as an internal legal pluralism within the Hul'qumi'num legal tradition itself.

The existence of pluralism within the legal tradition is significant because it demonstrates that the Hul'qumi'num Mustimuhw had, and continue to have, experiences in dealing with competing systems of law. Although notions of community and consensus-building permeate the culture, this acceptance of familial difference indicates to me that individual application of Hul'qumi'num laws and tradition is also an important aspect of the culture. The transformative nature of Hul'qumi'num legal practices is also important to my research. It indicates to me that although there are universal teachings within *snuw'uyulh*, how those teachings operate within the legal system is contingent on circumstance and family custom. As such, the Hul'qumi'num legal tradition is not static but rather capable of change when needed

In the next section I will introduce you to the concept of “Aboriginal law” as it is viewed today in the Canadian legal system. This is a body of law which broadly articulates how Western legal traditions apply to Indigenous peoples. This discussion is meant to introduce the courts' current gap in understanding of what constitutes Aboriginal law in Canada. On the one hand, Indigenous groups are pushing for recognition of their own legal traditions, but Canadian law still has some blind-spots in this regard. I want to help transform this situation. My own involvement with the *snuw'uyulh* of the Hul'qumi'num Mustimuhw is part of this work.

### **1.3 Introduction to ‘Aboriginal Law’**

Some of the most intense political and legal disputes in multicultural societies centre not only on struggles over scarce resources, but on deep conflicts of cultural values and

understandings. In addition to Canada's appropriation of scarce Hul'qumi'num resources these deep cultural conflicts have resulted in the marginalization of the Hul'qumi'num people's legal tradition. The issue of "self-governance" or "self-determination" of Aboriginal peoples has immense social significance in Canada. However, few issues in Canada with such social significance have resulted in such a widespread gap in understanding. There are many definitions and disagreements about what constitutes "self-determination" and "Aboriginal law" in Canada.<sup>40</sup> As M. Hooker summarizes,

It is fundamental to the idea of the state that its institutions alone can be the source of law. Laws are valid only in so far as they are acknowledged in some way by the organs of the state. The law is defined, in other words, as a set of consistent principles, valid for and binding upon the whole population and emanating from a single source. The written, national state system is the only one which is 'properly' law.<sup>41</sup>

However, as Hooker points out, this ideology may be the widely held view in culturally and economically homogeneous societies, but such societies are the exception rather than the rule and arguably Canada is not one of these homogenous societies. Rather, as John Borrows argues, Canada is a legally pluralistic state in which common law, civil law and Indigenous legal traditions co-exist and organize dispute resolution within our country in different ways.<sup>42</sup>

Indigenous peoples have developed systems to maintain and regulate their relations since time immemorial. Living in independent communities and nations across the land, they developed norms and practices to govern their societal relations, management of territories,

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<sup>40</sup> See generally S James Anaya, *International Human Rights and Indigenous Peoples* (New York: Aspen Publishers, 2009) at 76-86. In voting against the *United Nations Declaration on the Rights of Peoples*, Canada expressed opposition especially to its Article 3, which explicitly affirms the right to self-determination for indigenous peoples. This opposition was based on the belief that this article extends the *same* right of self-determination found generally in international law to indigenous peoples in Canada.

<sup>41</sup> MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975) at 1-2.

<sup>42</sup> John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 8.

regulate trade, resolve disputes and govern the relationships between different nations.<sup>43</sup> Over time, the diverse norms and practices progressed into highly developed legal traditions that guided these peoples for centuries in the governance of community, the environment and relationships between people. Passed down through generations in stories, songs, ceremonies and practices, there are many Indigenous societies in Canada today who still rely on these legal traditions to guide their affairs. However, currently these traditions have an indeterminate status before certain Canadian institutions. Our country's history of denial has resulted in a failure to recognize that Indigenous peoples have systems of law that governed, and still govern our lives today.

As case law demonstrates, the right to govern according to one's own laws and legal traditions is grossly underdeveloped within Canada.<sup>44</sup> The inherent right of self-government has been academically defined as the right of the Aboriginal peoples to govern their own territories and peoples within Canada.<sup>45</sup> The existence of this inherent right was first agreed to by all the First Ministers in the Charlottetown Accord of 1992, which would have explicitly protected (and

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<sup>43</sup> Canada, *Justice Within: Indigenous Legal Traditions* (Ottawa: Law Commission of Canada, 2006) at 1.

<sup>44</sup> See generally John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997/1998) 22:1 *American Indian Law Review* 37; John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall LJ* 537; John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38 *UBCL Rev* 285; Larry Chartrand, "Re-conceptualizing Equality: A Place for Indigenous Political Identity" (2001) 19 *Windsor YB Access Just* 243; Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, *Delgamuukw* and *Haida Nation*" (2005) 23 *Windsor YB Access Just* 17; Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6 *Indigenous LJ* 13; James (Sákéj) Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 *Sask L Rev* 241; John H Hylton, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon: Purich, 1999); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2002); Kent McNeil, "Aboriginal Rights: Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government" (2003) 22 *Windsor YB Access Just* 329; Bradford Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (2003) 42 *RD McGill* 1011; Dan Russell, *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver: UBC Press, 2002); Kerry Wilkins, "... But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (Winter, 1999) 49 *Univ of Toronto LJ* 53; Kerry Wilkins, "Take Your Time and Do It Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy" (2000) 27 *Man LJ* 241.

<sup>45</sup> McNeil, *ibid.*

regulated) this right in s. 35.1 of the Constitution Act, 1982.<sup>46</sup> This was not to be, as the Charlottetown Accord was rejected in a nationwide referendum.<sup>47</sup> Thus, it has been left to the courts to grapple with the notion of Aboriginal self-government.

The Supreme Court of Canada has not provided much guidance. In *R. v. Pamajewon*,<sup>48</sup> the Court rejected a claim by the Shawanaga and Eagle Lake First Nations to conduct high-stakes gambling on their reserves. In each case, the gambling operations were conducted pursuant to a law enacted by the band council. According to Chief Justice Lamer, “[a]ssuming that s. 35(1) encompasses claims to self-government, such claims must be considered in light of the purposes underlying the provision and must, therefore be considered against the test derived from consideration of those purposes.”<sup>49</sup> The Court then held that such claims were to be resolved by the same *Van der Peet*<sup>50</sup> test which defined an Aboriginal right as an element of a custom, practice, or tradition integral to the distinctive culture of an Aboriginal nation. The Court rejected the Eagle Lake First Nation’s characterization of its claim as “a broad right to manage the use of their reserve lands” (which arguably would have passed the *Van der Peet* test), and instead characterized the claimed right as a right to participate in, and to regulate, gambling activities on their respective reserve lands. While the evidence illustrated that the Ojibwa people engaged in gaming activities prior to the arrival of Europeans, the Court found that the gambling was informal and on a small scale, and it was never part of the means by which the communities were sustained. Lamer C.J. concluded that before the arrival of Europeans

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<sup>46</sup> Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2009) at 640.

<sup>47</sup> See generally Michael Burgess, “Constitutional Reform in Canada and the 1992 Referendum” (1993) 46:3 Parliamentary Affairs 363.

<sup>48</sup> *R v Pamajewon* [1996] 2 SCR 821 [*Pamajewon*].

<sup>49</sup> *Ibid* at para 24.

<sup>50</sup> *R v Van der Peet* [1996] 2 SCR 507 at para 45.

gambling was not an integral part of the distinctive cultures of the First Nations, and, therefore, that the First Nations had no aboriginal right to regulate gambling.<sup>51</sup>

According to the reasoning in *Pamajewon*, the Aboriginal right of self-government extends only to activities that were an integral part of aboriginal society prior to European contact. These restrictions are very severe for most aboriginal rights, but arguably they are singularly inappropriate to the right of self-government.<sup>52</sup> This decision and others like it do not give enough attention to Indigenous peoples' own laws in their regulatory relationships.

Fortunately, the Supreme Court has not always been as inattentive towards Indigenous law as they were in *Pamajewon*. The Court's decision in *Pamajewon* should be read in light of its subsequent decision in *Delgamuukw v. British Columbia*,<sup>53</sup> which contained discussions of these laws. In the *Delgamuukw* case, the Gitksan and Wet'suwet'en nations asserted that they had aboriginal title and self-government rights over a territory in northern British Columbia. The Supreme Court of Canada did not grant the declaration sought, but ordered a new trial. The Court also declined to comment directly on the claim for self-government rights.<sup>54</sup> However, Chief Justice Lamer did provide extensive reasons as to the nature of aboriginal title. Two of the things that Chief Justice Lamer wrote about aboriginal title have relevance to self-government rights. First, land held under aboriginal title is "held communally," and decisions with respect to the land are "made by that community."<sup>55</sup> Secondly, aboriginal title "encompasses the right to choose to what uses land can be put."<sup>56</sup> These characteristics of aboriginal title imply a necessary role for aboriginal laws and customs when determining how the land is to be shared by

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<sup>51</sup> Borrows, *Recovering Canada*, *supra* note 20 at Chapter 3.

<sup>52</sup> Hogg, *supra* note 46 at 641.

<sup>53</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].

<sup>54</sup> *Ibid* at para 171.

<sup>55</sup> *Ibid* at para 115.

<sup>56</sup> *Ibid* at para 166.

the members of the community, how the land is to be managed, and how the land is to be developed.<sup>57</sup>

This recognition of the inherent nature of Indigenous law and custom is central to the insights that follow in this work. Viewed together, these two cases suggest that “the Canadian Constitution recognizes and affirms an inherent Aboriginal right of self-government – specifically, a right to make laws in relation to customs, practices, and traditions integral to the distinctive culture of the Aboriginal nation and in relation to the use of reserve lands and lands subject to Aboriginal title.”<sup>58</sup> However, as Patrick Macklem articulates, “Whether the constitution ought to be interpreted as recognizing an Aboriginal right of self-government, however, turns less on precedent and more on the distributive justice of recognizing an Aboriginal order of government within the Canadian constitutional order.”<sup>59</sup>

Although these cases do not recognize a clear Aboriginal order of government in the constitution – they do not necessarily exclude it. This is important in light of the British Columbia Supreme Court’s decision in *Campbell v. British Columbia*<sup>60</sup> (a case involving a challenge to the constitutionality of the self-government provisions in the Nisga’a Treaty). In upholding the validity of these provisions, Williamson J. found that the

... passages from *Delgamuukw* suggesting the right for the community to decide to what uses the land encompassed by their Aboriginal title can be put are determinative of the question. The right to Aboriginal title “in its full form,” including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by Section 35.<sup>61</sup>

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<sup>57</sup> Hogg, *supra* note 46 at 641.

<sup>58</sup> Macklem, *supra* note 44 at 174.

<sup>59</sup> *Ibid*

<sup>60</sup> *Campbell et al v AG BC/AG Cda & Nisga’a Nation et al*, [2000] 4 CNLR 1 (BCSC).

<sup>61</sup> *Ibid* at para 137.

Furthermore, the court in *Campbell* made some definitive statements regarding the distribution of powers within the *Constitution Act, 1982*. In *Campbell*, the plaintiffs argued that all the legislative powers in Canada were “exhaustively” distributed between Parliament and the legislative assemblies by virtue of the *Constitution Act, 1982*. Consequently, they argued that the constitution had to be amended in order to allow Aboriginal governments, such as the Nisga’a Lisims Government, the power to make laws that prevail over federal or provincial laws. In finding against this argument, the court stated:

[W]hat was distributed in ss. 91 and 92 of the *British North America Act* was all of (but no more than) the powers which until June 30, 1867 had belonged to the colonies. Anything outside of the powers enjoyed by the colonies was not encompassed by ss. 91 and 92 and remained outside of the power of Parliament and the legislative assemblies just as it had been beyond the powers of the colonies.

[A]boriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten “underlying values” of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue and was a division “internal” to the Crown.<sup>62</sup>

The court in *Campbell* also recognized that the common law has long recognized “customs” or rules that have obtained the force of law in a particular locality.<sup>63</sup> While *Campbell* was only a decision of the British Columbia Supreme Court, it was not appealed and so remains the law of British Columbia.<sup>64</sup>

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<sup>62</sup> *Ibid* at paras 76, 81.

<sup>63</sup> *Ibid* at para 81. See generally, *Connolly v Woolrich* (1867), 17 RJRQ 75, 1 CNLC 70 (Que SC).

<sup>64</sup> In *Chief Mountain v Canada*, Mercy Thomas and other Nisga’a peoples are attempting to challenge the constitutional legality of the Nisga’a Final Agreement. In particular, they are challenging the restrictions placed on their rights as Canadians, protected under the Charter of Rights and Freedoms, by the Nisga’a Final Agreement legislation. The trial took place in Vancouver, from October 4 to October 8, 2010 and concluded in early 2011. On October 19, 2011 the Supreme Court of British Columbia dismissed the plaintiffs’ claim for declaratory relief. *Chief Mountain v British Columbia (Attorney General)*, 2011 BCSC 1394.

In the recent case of *Tsilhqot'in Nation v. British Columbia*<sup>65</sup>, the Supreme Court of Canada granted a declaration of Aboriginal title over Tsilhqot'in land. As this was the first time a declaration of Aboriginal title had ever been granted, the Court took the opportunity to explain the rights conferred by Aboriginal title. First, the Court acknowledged that Aboriginal title is an independent legal interest,<sup>66</sup> meaning the Crown or courts did not create it. Secondly, the Court described the content of Aboriginal title:

“the right to exclusive use and occupation of the land ... for a variety of purposes, not confined to traditional or ‘distinctive’ uses.. In other words, Aboriginal title is a beneficial interest in the land. In simply terms, the title holders have the right to the benefits associated with the land – to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land.”<sup>67</sup>

Finally, the Supreme Court states that First Nations who have title can use their lands as they choose, similar to a fee simple ownership, subject to two limitations: 1) Aboriginal title cannot be alienated except to the Crown, and 2) Aboriginal title cannot be encumbered, misused or developed in a manner that would substantially deprive future generations of the First Nation from using and enjoying it.<sup>68</sup>

This implies that First Nations, with recognized title lands, now have a measure of control over their lands, which is largely akin (though not exactly like) fee simple ownership.<sup>69</sup>

As the Court wrote:

Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic

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<sup>65</sup> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*].

<sup>66</sup> *Ibid* at para 69.

<sup>67</sup> *Ibid* at para 70.

<sup>68</sup> *Ibid* at para 74.

<sup>69</sup> John Borrows, “Sovereignty’s Alchemy PART II: Aboriginal Title in *Tsilhqot'in v. British Columbia*” (forthcoming) *Maori Law Review* 5.

benefits of the land; and the right to proactively use and manage the land.<sup>70</sup>

This seems to support the conclusion drawn earlier from *Delgamuukw* that Indigenous peoples in Canada have right to make laws in relation to customs, practices, and traditions integral to the distinctive culture of the Aboriginal nation and in relation to the use of reserve lands and lands subject to Aboriginal title.

However, this is not an *exclusive* right to make laws in relation to Aboriginal title lands.

The Court also found that:

... provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property rights and civil rights in the province.<sup>71</sup>

The law-making powers of the province are limited by s. 35 of the *Constitution Act, 1982*; however, the doctrine of interjurisdictional immunity does not prevent provincial governments from legislating on “lands reserved for Indians” because the Court characterized Aboriginal rights as a limit on both federal and provincial jurisdiction.<sup>72</sup> This suggests that the Court is advocating for a concurrent law model, one similar to that utilized in the current modern British Columbia Treaty Process.

This insight is important to understanding my position throughout this dissertation.

Hul’qumi’num law lives on its own terms, though it can be reconciled with other laws. As such, I am not proposing to use the common law, statutory law or Canadian constitutional law to give Hul’qumi’num laws recognition and validity within the Canadian legal framework. The main purpose of my research is to give validity and recognition to the Hul’qumi’num legal tradition in

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<sup>70</sup> *Tsilhqot’in*, *supra* note 65 at para 73.

<sup>71</sup> *Ibid* at para 102.

<sup>72</sup> *Ibid* at paras 103, 141.

its own right, while arguing for a more pluralistic approach within the Canadian legal system. As stated by James (Sákéj) Youngblood Henderson:

Indigenous thought and law exists in Canada as a constitutional whisper; a problem Eurocentric law has not been able to eliminate or remedy. Most Canadian and Aboriginal judges, lawyers and students have been immersed in Eurocentric thought and in its educational structure, with little awareness of Indigenous thought or experience. Awareness of those excluded traditions is the first step in creating a post-colonial order.<sup>73</sup>

My overarching goal in this research project is to articulate and theorize the Hul'qumi'num legal tradition, and its' fundamental categories of law, in a way that is both practical and useful to my community today. As my research will demonstrate, the Hul'qumi'num legal tradition has changed, as all legal traditions do, but this does not render them inauthentic or inoperable. As Vine Deloria states:

American Indian people are presently faced with almost certain extinction of their land base and legal rights, and this is bad. But it is strangely enough, not evil. That Indian people might have not sufficient strength to survive this projected loss would necessarily require a judgment that my own community is not fit to survive. If the realization should come to that, I would somehow have to share our created evil. The problem is never to surrender to either possibility, success or failure, but to accept the fact the [sic] somehow peoples come and go and it is their experience of themselves in retrospect that is ultimately important.<sup>74</sup>

As such, my research also considers how social change in Hul'qumi'num communities can strengthen these legal traditions and bring insight into reconciling Indigenous legal traditions with Western legal traditions more generally. This notion of reconciliation will be introduced in the following section and this theme will also be threaded throughout this dissertation.

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<sup>73</sup> James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous LJ 1 at para 116 (QL) [Henderson, "Postcolonial Indigenous Legal"].

<sup>74</sup> Vine Deloria Jr, "It Is A Good Day To Die" (1972) 4 Journal of the Committee of Southern Churchmen 62 at 65.

## 1.4 Reconciling Difference

The notion of reconciliation has led me to research Hul'qumi'num law because I see that these laws continue to have a strong influence in the life of my community. At the same time, I recognize that other laws, introduced through a colonial process, also compete for my community's allegiance. Just as in my personal life there are, in effect, two legal ancestries streaming through the Coast Salish World. Both structure our growth and development and must continually be reconciled.

Much has been written about the common law and British Columbia's legal traditions. These traditions have not been kind to my Coast Salish relatives, though there is a vast literature about how British Columbian and Canadian law attempt to structure relationships and resolve disputes. Although scholars are turning their minds towards the concept of Indigenous legal traditions, little has been written about Hul'qumi'num law per se, and how it continues to structure relationships and resolve disputes within the Coast Salish world.<sup>75</sup> My thesis aims to change this. I want to respect both of my legal ancestries. Hul'qumi'num law is a living legal tradition that has great relevance in my life, and in the lives of many people in my territory. The point of my dissertation is to show how Hul'qumi'num law is a continuing force in contemporary Canada and examine how both legal traditions can exist in harmony within my traditional territory.

As I alluded to previously, our *snuw'uyulh* has proven to be especially important for me as I seek to protect and enhance the lives and aspirations of my community, Coast Salish Nation and Indigenous people in general. I have struggled to find the answers and solutions to

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<sup>75</sup> Coast Salish law manifests itself the protocols of daily life, dispute resolution, spirituality, land and property, fishing, language etc. Accordingly, one can see aspects of this legal tradition in the works of other scholars studying in the Coast Salish World. See generally, Miller, *supra* note 9; Douglas C Harris, *Fish, Law and Colonialism* (Toronto: University of Toronto Press, 2001); Thom, *supra* note 9; Suttles, *Coast Salish Essays*, *supra* note 9.

contemporary quandaries within myself, and I am now attempting to reveal my understandings more broadly through this research. I have found this to be an intimate road to achieving reconciliation through respect and recognition. As James (Sákéj) Youngblood Henderson has stated:

Most Indigenous lawyers and law students ... are people of shared persuasion. They share their experiences and ideas of justice and use them to persuade others of the good and just road. These paths call on us to face others and ourselves on pivotal issues. We must face the unresolved and unknown with awareness, courage, kindness and honesty. These attributes are the integral skill or 'weapons' of Indigenous lawyers as legal warriors; they are the forces of Indigenous lawyers as diplomats.<sup>76</sup>

I hope that readers will see my research as flowing in this vein. As Henderson suggests, Indigenous research is often informed by the wider project of reclaiming control over Indigenous ways of knowing and being. There is a desire by Indigenous scholars to make real contributions to families and communities. Linda Tuhiwai Smith, in her book *Decolonizing Methodologies*, describes these contributions in terms of "Indigenous projects."<sup>77</sup> These "Indigenous projects" all work towards achieving reconciliation between Indigenous communities and Western communities.

One objective of my dissertation is to promote cultural revitalization. Indigenous communities in Canada have recently embarked on a new era. All across Canada, communities are reclaiming their independence and inherent right to self-determination. My community is no exception. While the direction and focus of this reclamation process is somewhat different for each Indigenous community, they all seem to share one common goal: the right to live according to one's own culture and system of beliefs and practices – including one's own legal traditions.

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<sup>76</sup> Henderson, "Postcolonial Indigenous Legal" *supra* note 73 at para 2.

<sup>77</sup> Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 2006) at 142.

This is important work. I support and share in this enthusiasm for living in accordance with our best traditions. However, in following this path, there is an important question that needs to be asked: What are Indigenous legal traditions? What are the sources of these traditions? We need clearer answers to these questions. I believe such knowledge will assist in their revitalization and reconciliation with other legal traditions. Arguably, Indigenous legal traditions are in a state of crisis due to the impact over many centuries, in some cases, of Western laws and concepts of justice deeply embedded in a colonial process driven by the Department of Indian Affairs, missionization and in some cases, Indian band governments. My research will work towards helping to revitalize the Hul'qumi'num legal tradition and other Coast Salish legal traditions by unraveling the tenets of this process.

This dissertation will also aid in the project of developing connections. As Smith states, “Connectedness positions individuals in sets of relationships with other people and with the environment.”<sup>78</sup> As my methodology chapter will demonstrate, “to be connected is to be whole.”<sup>79</sup> Understanding my connection to community, territory, and laws that emanate from my culture has provided me with a profound sense of peace and purpose. It is my hope that this research will foster the similar feelings of connection within my own community, especially amongst the youth.

Another project Smith identifies is story telling. Storytelling and oral histories have become an integral part of all Indigenous research. As Smith so aptly describes, although each individual story is powerful, these stories contribute to a collective story in which every Indigenous person has a place.<sup>80</sup> In my research, storytelling offers a way for me to understand the legal tradition of my own community, for example, the process of how beliefs, values,

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<sup>78</sup> *Ibid* at 148.

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid* at 144.

traditions and customs are passed down by Elders, in the hopes of creating a new memory in the minds of our younger generations. Russell Bishop has suggested that story telling is a useful and culturally appropriate way of representing the “diversities of truth” within which the story teller retains control.<sup>81</sup> I hope to illustrate these “diversities of truth” within this dissertation by sharing complete narratives of my Elders as they were told to me, and then interpreting those stories through my own personal narrative. The following section, along with my methodology chapter, will outline how I will structure my dissertation to achieve this objective.

### **1.5 Describing What Follows: Chapter-by-Chapter Outlines**

In Chapter 2, I discuss the two key themes of my research methodology: 1) relationships; and 2) the collective and connectedness. I do so by illustrating the importance of these concepts to the Hul’qumi’num Mustimuhw in general, drawing upon the ontology and epistemology of my community. I also discuss the questions relating to insider/outsider research as a Cowichan member researching the Hul’qumi’num legal tradition. Finally, I describe the actual research process that I engaged in, highlighting the Hul’qumi’num protocols and laws I followed to do so.

Chapter 2 serves a much larger purpose than simply articulating the methods of ‘gathering data’ and garnering credibility for my research. In this chapter you will come to understand the processes involved in learning and living Hul’qumi’num law. Through my experiences, you will come to understand more fully the protocols associated with gathering traditional knowledge. You will recognize the importance of ‘locating’ oneself within one’s community. This chapter will provide recognition that just as we are continually learning and growing, so too are our legal traditions. As I have reflected on my methodology chapter, I have come to realize that it is only through learning and following the protocols outlined in this chapter that Hul’qumi’num law has come to live within me. Because of my methodology, I now

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<sup>81</sup> Russell Bishop, *Collaborative Research Stories* (Palmerston North: Dunmore Press, 1996) at 24.

have a greater understanding of what it means to follow our *snuy'uyulh* and I know how to put it into practice. Accordingly, this chapter proves itself to be a very powerful tool in advancing my goal of demonstrating that Coast Salish law is a living legal tradition and a continuing force in contemporary society.

In Chapter 3, I present a literature review of works covering the Coast Salish world and legal traditions. I examine the research of those earlier travellers through the Coast Salish world. I examine their research findings and describe how their scholarship has enlightened my own research journey. I also situate my research and theoretical orientations in the scholarship relating to Indigenous legal traditions more generally, and describe how I approached and drew from the legal theory scholarship. Finally, I discuss how my research project will contribute to this scholarship.

Although this chapter serves the more general purposes of a literature review, i.e. it gives an overview of the current context in which my research is situated; it includes a discussion of relevant theories and concepts which underpin my research; and it describes related research in the field and shows how my work extends or addresses a gap in work in the field. Chapter 3 also works to advance my analysis of the Hul'qumi'num legal tradition as a living legal tradition with a view towards reconciliation within the community and with Canada. The works examined in this chapter help to situate the reader within the Coast Salish world. As such, this chapter illustrates the worldview of the Hul'qumi'num people and establishes a foundation upon which the Hul'qumi'num legal tradition resides. As I have been taught, laws must be understood in their proper context. The teaching of the legal tradition does not take place apart from an understanding of the Coast Salish worldview; failure to do so could result in improper

interpretations of Hul'qumi'num laws and legal principles. This chapter provides the reader with the necessary context in which to consider the Coast Salish legal tradition.

In Chapter 4, I examine the legal history of the Coast Salish people. I do so by tracing the development of two different encounter stories within the Coast Salish world – *shxunutun's tu suleluxwtst* and the development of the colony of Vancouver Island. Imposition of new laws and jurisdictions are reflected in the landscape of the Hul'qumi'num territory. As such, in this chapter I connect the reader to the culture and history of the Hul'qumi'num people by describing the history of their “legal landscapes.” This chapter is included to show that the Hul'qumi'num people were living according to their own laws and traditions at the time of contact and that they resisted the imposition of a foreign legal tradition. Chapter 4 serves as an introduction to the conflicts that occurred between the Hul'qumi'num legal tradition and the Canadian legal system. Accordingly, it demonstrates the importance of exploring various ways to reconcile these two legal systems. It illustrates this by examining the difficulties that the Hul'qumi'num people face in accessing their lands and continuing their cultural practices.

In Chapter 5, I examine the concept of law within the Coast Salish legal tradition. I utilize a taxonomy of teachings and explicit rules to help explain the plurality of laws within the Coast Salish world. I draw heavily upon the voices of my Elders to explain these legal concepts, in an attempt to avoid a positivistic reduction of the Hul'qumi'num legal tradition. Finally, I draw upon a personal familial dispute in an attempt to illustrate how some of these legal principles could be applied in present day situations and conflicts.

I consider this chapter to be the heart of my dissertation. The preceding chapters were designed to prepare the reader to consider and understand the principles and concepts outlined in this chapter. In Chapter 5 the reader becomes immersed in Hul'qumi'num laws and the

Hul'qumi'num legal tradition. The concept of *snuw'uyulh* is illustrated through stories and teachings. Also through these stories and teachings, the connection between the Hul'qumi'num worldview and the practice of law is reinforced. In essence, this chapter demonstrates that the Hul'qumi'num law is a living legal tradition that deserves recognition within the greater Canadian legal system.

In Chapter 6, I examine a Hulq'umi'num legal theory of dispute resolution, drawing upon a dichotomy of “universal” and “contingent” legal standards. Law is a practice and much of the practice of law takes place in the form of dispute resolution. As I will demonstrate, many of the teachings that work to bring about *snuw'uyulh* also play an important role in achieving harmony within Hul'qumi'num communities. This chapter will illustrate how the Hul'qumi'num legal tradition works to resolve and mediate disputes amongst the Hul'qumi'num Mustimuhw.

This chapter serves to advance my research question in two ways. First, it works to demonstrate the existence of Hul'qumi'num laws and how those laws can be put in practice to resolve disputes. Second, it introduces the legal standards drawn upon by the Hul'qumi'num Mustimuhw to resolve disputes. These standards are of vital importance in reconciling the Hul'qumi'num legal tradition with the Canadian legal system. If true reconciliation is to occur between these two legal systems, any process designed to resolve conflict must also draw upon a Hul'qumi'num theory of dispute resolution. True recognition of the validity of these laws must be given in order to achieve *snuw'uyulh* with Canada.

In Chapter 7, the conclusion chapter, I briefly summarize and restate my findings about the Hul'qumi'num legal tradition and my analysis of their conflict resolution processes. I reflect on my research findings in light of the current political complexities surrounding the

Hul'qumi'num people, and examine how this research could be of benefit to the community in this light. Finally, I explore future research that may stem from this project.

## **1.6 Chapter Conclusion**

Where do Indigenous peoples, or Hul'qumi'num Mustimuhw, fit in relation to the Canadian legal system – inside, outside, or somewhere in between? How have the historical and modern expressions of colonialism shaped the modern Canada – Indigenous legal relationship? What are the differences between Indigenous and Canadian political actors in the way that they answer these questions? Although my research in no way attempts to answer these questions definitively, it is my hope that this dissertation will meaningfully contribute to the dialogue surrounding these contemporary issues.

My Elders continue to express that the *snuw'uyulh* of the Hul'qumi'num peoples exists and continues to govern my peoples' interactions daily. However, the struggle remains as to how the Hul'qumi'num legal tradition can coexist with and interact with the larger Canadian legal system.

It is my hope that this dissertation will stimulate more open debate and discussion about the depth and scope of the Hul'qumi'num legal tradition. I also hope that it will foster dialogue about the importance of these traditions to the Canadian legal context and to one's lived experience with "law." This is the purpose of my dissertation.

## CHAPTER 2

### Methodology: Locating oneself in one's Research

Native scholars and writers are demonstrating that “voice” can be, must be, used within academic studies not only as an expression of cultural integrity but also as an attempt to begin to balance the legacy of dehumanization and bias entrenched in Canadian studies about Native peoples.<sup>1</sup>

#### *“Turning my Eyes Upward”*

*Developing relationships is integral to an Indigenous research methodology. When contemplating how I was going to connect you with my perspectives, my community and my research topic, I thought of the land as the most important connection between each of these distinct entities. Land best tells the story of who I am. Through the land you can know who my community is and the shape of our legal traditions. Land is the very entity that has inspired, recorded and preserved our histories.*

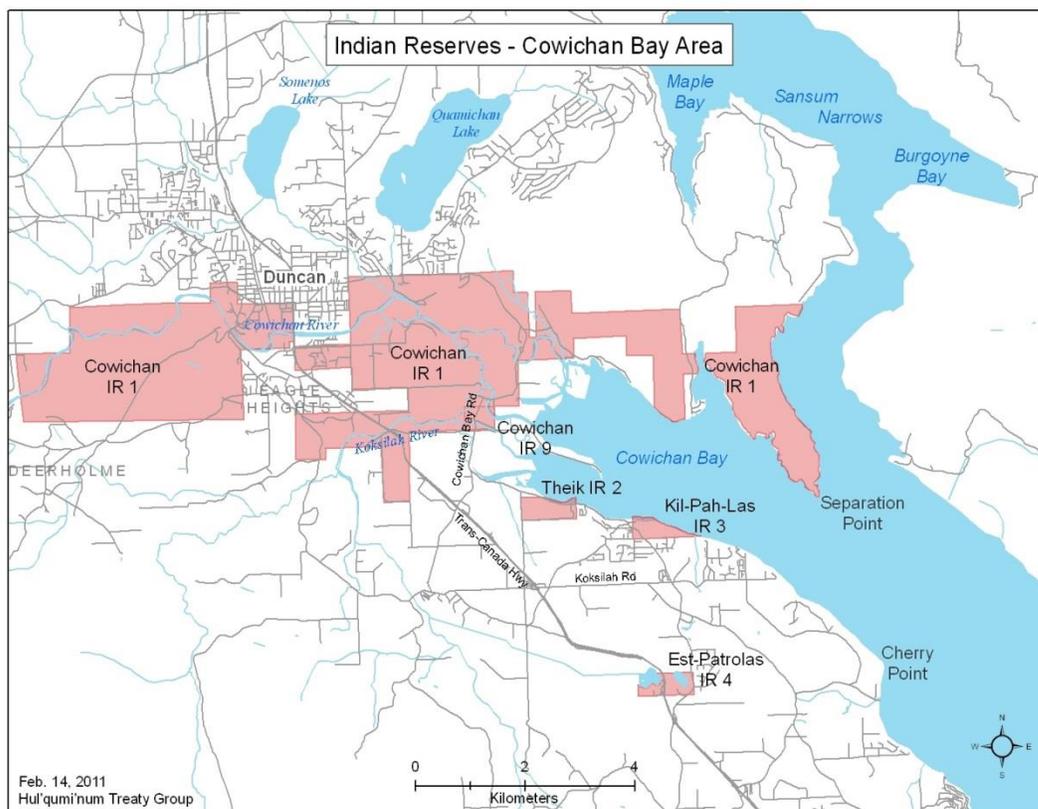
*Through my educational journey, I have learned that “places possess a marked capacity for triggering acts of self-reflection, inspiring thoughts about who one presently is, or memories of who one used to be, or musings on who one might become.”<sup>2</sup> Different landscapes conjure different emotions. My territory prompts reflection upon what was “experienced” or “learned” in those places. I will share with you some of these experiences to demonstrate how the idea of “place” has impacted my research.*

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<sup>1</sup> Emma LaRocque, “The colonization of a Native woman scholar” in C Miller & P Chchryk, eds, *Women of the First Nations: Power, wisdom, strength* (Winnipeg: University of Manitoba Press, 1996) 11 at 13.

<sup>2</sup> Keith Basso, *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (Albuquerque: University of New Mexico Press, 1996) at 107.

*When I was nine years old, my parents completed the construction of our home in Cowichan Bay and our family moved from our quiet cul-de-sac in Cobble Hill to our family property on the Theik Reserve.<sup>3</sup>*



*Being so young, at first I didn't really comprehend that we were now living "on-reserve." The property my father had inherited from his brother was vast – 10 acres of wooded lands bordered on either side by two natural ravines and overlooking Cowichan Bay and Mt. Tzouhalem. This land did not resemble a "typical" reserve. Our only neighbors were the deer and the eagles flying overhead. Days were spent exploring the property. Going down to the tumbled down shack at the foot of ravine, where my uncle once lived, searching for "treasures." Cutting trails*

<sup>3</sup> My home is located on 10 acres of land on Theik IR 2. As shown on the map below, this reserve land is found on the shores of Cowichan Bay and is one of the smaller areas of reserve land granted to Cowichan Tribes. However, it is a bit more secluded, as some of the larger tracts of reserve lands are found within Duncan city boundaries.

*through the forest. Building lean-tos in the shadows of the huge fir trees that hid our home. This is my home. Returning there conjures up feelings of peace and safety.*

*Although growing up I felt quite connected to my home in Cowichan Bay, I cannot say the same for what I would later consider my entire traditional territory. I attended an all-girls private school in Duncan, B.C. Although I experienced no overt racism during my education there, First Nations history and understanding were not part of the curriculum. As a result, I must admit that my knowledge of my community's history was quite limited. My grandmother passed away when I was quite young and, although I "knew" that I was a "status Indian" (I had the card to prove it) I never thought about the implications of this knowledge. To me, it was just another characteristic of myself, no different from the fact that I had six brothers and sisters, played the piano or had brown hair and brown eyes. Not being able to fully comprehend this history led me to have a somewhat indifferent attitude towards my traditional territory. As a teenager, I felt restricted and confined by this territory. I was overcome with the need to "escape," to get out of my small town and see the "real world." I therefore applied only to post-secondary institutions in Canada's eastern provinces. I felt like I wouldn't "learn" anything if I stayed close to home.*

*After graduation, I accepted an offer to attend the University of Western Ontario and left my home in September of 1998 to embark on what I hoped would be the experience of a lifetime. Looking back, I can honestly say that this was one of the hardest years of my life. It was a place so different from that in which I grew up. When I looked out my dorm window in the morning I was welcomed by concrete, rather than the sun rising over majestic Mt. Tzouhalem. Chipmunks and squirrels, not eagles, occupied the trees overhead as I walked to my classes. Although the subject matter taught in my classes was interesting, I felt no connection to it. I missed my family*

*and my heart ached for the place I called home. I knew I wouldn't be able to survive there more than a year. Although one of the determining factors in attending that post-secondary institution was its distance from home, I knew I had to be closer to home. As a result, I applied to the University of Alberta for the next school year.*

*The summer after my first year I obtained summer employment with the Education Department of Cowichan Tribes. Upon reflection, I can see this was a turning point in my life. Working in this environment with individuals who would affect my life forever, I finally began to understand what it meant to be a Hul'qumi'num person. When I arrived in Edmonton in September of 1999 I declared a Native Studies major. My next two years at the University of Alberta were life changing. As I became engulfed in the subject matter I also embarked on a journey of self-discovery. Surrounded by Cree and Blackfoot students, I listened to their experiences and their histories. I finally began to realize the implications of being a First Nations student from B.C.*

*I will never forget a question posed to me by one of my instructors. I was the only First Nations student from B.C. in the class, and she said to me, "If you don't have a treaty, what Aboriginal rights do you possess?" I remember sitting in silence trying to determine my rights. "All," she responded. It was there, in the flat-lands of Alberta that I finally began to comprehend the present-day implications of my peoples' past history.*

*In 2001 I returned home to study law at the University of Victoria. Although it was wonderful to be home, the law school experience was almost as foreign to me as my first year in Ontario. Again, I found myself surrounded by individuals with whom I felt no real connection. My first year was overwhelming and I became lost. Looking back, I feel like I lost sight of why I was there. It took me the remaining two years to finally get back on track. However, because I*

*was so close to home I was able to draw strength from my family, my community and the land. They helped remind me why I was there and what I hoped to accomplish from that experience. Ironically it was law school itself that reinforced the idea that I didn't want to be a practicing lawyer. Instead I wanted to teach law. I wanted to have the freedom to theorize about the manner in which law should be applied and taught.*

*With this understanding in mind I spent a year working for the Hul'qumi'num Treaty Group and applied to the University of Arizona's Indigenous Peoples Law & Policy Program. My experience at the Hul'qumi'num Treaty Group was transformative. I spent months researching the implications of treaty clauses and contemplating self-determination for my community. Many of the research questions that I am now exploring came from days spent in a little portable nestled in the woods of Ladysmith, B.C. Surrounded by brilliant lawyers and academics, wise Elders, respected Chiefs and council members, I began to realize the importance of drawing one's mandate from the community and the validity that it gives one's research.*

*In August 2005 I set off for the deserts of Tucson. I love the landscapes of Arizona. There is a healing quality to these landscapes. Being in that place strengthened me in unimaginable ways. I felt close to the people. Because my father is of mixed Mexican and Aboriginal heritage, similar to many of the Indigenous peoples in Arizona, I felt at home. I felt connected to this place in a way similar to my own home in Cowichan Bay.*

*The academics I had the opportunity to study with in Arizona still inspire me. They provided me with numerous opportunities for experiential learning. They encouraged me to make my studies applicable to my own community. This nurtured the development of the research questions explored in this dissertation. Working for the Pascua Yaqui Appellate Court*

*and the Navajo Supreme Court, I began to recognize the need for establishing or re-establishing Indigenous legal traditions as part of self-governance. My community had also conveyed this approach to me, and they stressed the importance of beginning this work. As a result, when faced with the decision of whether to complete my S.J.D. at the University of Arizona or return home to complete my Ph.D. at the University of Victoria, I chose to return home.*

*Although I left Arizona with a renewed sense of vigor, ready to tackle these important issues in my own community, that vigor did not last long. When I returned home I was overwhelmed by the dysfunction and poverty of my community. I spent the first two years of my Ph.D. struggling with how to pursue this research question. I didn't think my community was ready for this work to be done. I felt they had more immediate problems that needed to be resolved. What I felt about my territory when I was 17 years old came flooding back. Whenever I would drive up from Victoria over the Malahat to my community I would feel a tightening in my chest. I would start to panic and worry about my research.*

*My Ph.D. supervisor was so supportive during this time. On many occasions he told me that I could change my research question to a topic that did not involve my community. As an Indigenous scholar himself, he recognized how emotionally draining it could be to do research in one's home community and I drew comfort from this.*

*As I tried to push through these feelings of anxiety to work through my research question, I realized the solution to my apprehension was in the work itself. As I spent my days pouring over books, learning about the history of my community and listening to stories about Our First Ancestors, I found my source of strength – the land. I began to picture my traditional territory in a different way. I began to realize that it wasn't my people's legal traditions that created the reserves, the poverty and the family dysfunction – it was the application of Western legal*

*traditions to my people. Our laws were written in the lands – quietly and majestically surrounding us, waiting for their renewal. These are the laws that can bring healing and health to my people. As a result, when I now return home to my community I don't focus on the over-development of our territory and the poverty of our reserve lands. Instead I look up towards Swuq'us; I see the face of my First Ancestor Stuts'un and remember the teachings he gave me. This realization is what I hope to share with my community through this dissertation. I want to change how they envision our landscape. I want them to draw strength from the laws embedded in the lands. I want them recognize that we are a strong people. I want them to see we have a living legal tradition that operates within our communities and guides our daily decision-making processes.*

## **2.1 Introduction**

As the previous section has demonstrated, my research has been a journey. This is a journey that has taken me full circle: from home, to Oneida and Anishinaabe territory in London, Ontario, to Cree territory in Edmonton, Alberta, to Yacqui territory in Tucson, Arizona and finally home again, to the Coast Salish territory of Vancouver Island. What this journey has taught me is that although research deals with unanswered questions, it also reveals our unquestioned answers. In this chapter, I hope to set out some of those unquestioned answers and examine them more fully.

The greatest unquestioned answer that I had at the outset of this research project had to do with the process of obtaining knowledge. As I discuss below, my inability to move past traditional research methodologies and the assumptions surrounding how research should proceed resulted in many hurdles at the outset of this project. This chapter discusses how I overcame those challenges, with the hope of providing some insight for those who wish to study

Indigenous legal traditions in the future. First, I examine the connection between methodology and worldview. Within that discussion, I identify the two main theories that best capture the connection between my worldview and methodology: 1) relational-connectedness and 2) autoethnography. In my discussion on relational-connectedness I speak to the importance of building connections and respecting relationships both in the study and practice of Hul'qumi'num laws. Furthermore, I identify three main categories to which we, as students and researchers, owe an obligation to develop relationships and maintain connections as we engage in this learning process: i) ancestors, ii) kinship and iii) the land. In my discussion of autoethnography, I introduce the reader to the reasoning behind my writing style and acknowledge that my own experiences, as a practitioner of Hul'qumi'num law, are part of the subject matter of this research project. This section also examines the insider/outsider dichotomy that many Indigenous scholars, including myself, have to struggle with. The second half of this chapter examines the methods that I used in this research: a) naming ceremony; b) family interviews; c) secondary interviews; d) speakers; e) participant selection; f) self-reflexivity; g) gathering; h) interviews; i) fieldwork materials; j) data and analysis and k) writing. It examines these tools or practices and explains the significance behind those choices and how those methods helped establish relationships and maintain connections throughout this project.

One of my first experiences in trying to articulate my methodology occurred in the first semester of my Ph.D. program. I was applying to SSHRC for a doctoral fellowship and one of the requirements was a research methodology outline. The description of my methodology went something like this:

I will utilize a combination of both primary and secondary sources to conduct my research. Much research has been conducted by anthropologists on the Coast Salish peoples, outlining their customs and traditions. I will begin my research by conducting a

literature review of those materials. I will then interview elders from each of the communities I am working with, and ask them specific questions relating to Coast Salish legal tradition.

Upon reflection I see how problematic my initial “methodology” was. In fact, I believe that it was my failure to ‘question’ the presumptions embedded within this simplistic and shallow research methodology that led to some of the delays I have had in articulating my final research project.

What does methodology mean? It appears that it can be either narrowly or broadly defined, depending on the researcher’s perspective and the type of research itself, for example, quantitative vs. qualitative. As my personal experience has demonstrated, often it seems to get intertwined with the research methods themselves. This type of narrow definition focuses primarily on the tools or practices associated with research, for example, interviews, surveys, coding, etc., without acknowledging the theoretical assumptions implicit in the work.<sup>4</sup> In qualitative research, feminist scholars and critical race theorists have stressed the importance of both *theory* and *method* in methodological considerations. Feminist scholars have argued that one’s theoretical lens ought to guide the research practices and, as such, methodology encompasses not only the mechanisms of research, but “how research does or should proceed.”<sup>5</sup> They have suggested that we distinguish between “methods” (i.e. particular tools for research), “methodology” (theorizing about research practice), and “epistemology” (the study of how and what we can know).<sup>6</sup> In the social sciences, methodologies are often categorized according to the purpose of the research being undertaken, i.e. positivist, interpretative, critical. More recently, Indigenous methodology has emerged as a research process with its own methodology

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<sup>4</sup> Robert R Alford, *The Craft of Inquiry: theories, methods, evidence* (New York: Oxford University Press, 1998).

<sup>5</sup> Sandra Harding, “Introduction: Is there a feminist method?” in S Harding, ed, *Feminism and Methodology: Social Science Issues* (Bloomington: Indiana University Press, 1987) 1 at 3.

<sup>6</sup> See generally *ibid.*

and while it can draw from feminist, interpretive and critical theories, it does not easily fit into a pre-existing Western theoretical approach.<sup>7</sup>

As I have worked on developing this chapter, I have come to view it as a curriculum in and of itself (which helps to account for its length). In my mind, this chapter is more akin to a course on Coast Salish legal processes. In essence, it is the necessary starting point for any individual wishing to understand more fully how to engage *in* and *with* the Coast Salish legal tradition. It provides an introduction to the worldview, legal institutions, skills and theories of the Coast Salish people. It is my hope that by reading and reflecting upon this chapter, readers will begin to understand how law should be approached within a Coast Salish context and see contemporary examples of the legal tradition in action. As I have come to know, there are protocols and laws associated with learning Hul'qumi'num laws. Accordingly, as soon as one becomes a student of this legal tradition, they also become a practitioner.

## 2.2 Theory

Many Indigenous people in North America, Australia and New Zealand believe that they are among the most studied on earth.<sup>8</sup> While some may contest the truth of this, there is no denying that there is a long history of research being conducted in Indigenous communities. Usually the community neither initiated this research, nor did the research have any beneficial consequences for the Indigenous community. As a result, many Indigenous communities have become wary of research in general.

However, in recent years Indigenous people have begun to write about Indigenous issues. This is often the result of their excelling in academia and choosing to focus research on their own

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<sup>7</sup> See generally Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 1999). See also Shawn Wilson, *Research Is Ceremony: Indigenous Research Methods* (Winnipeg: Fernwood Publishing, 2008).

<sup>8</sup> See generally Smith, *supra* note 7.

communities. By a natural progression, Indigenous research is fast becoming a methodology in its own right. Shawn Wilson has said this: “when we talk about methodology, we are talking about how you are going to use your ways of thinking (epistemology) to gain more knowledge about your reality.”<sup>9</sup> From this perspective, methodology is about a process related to a worldview. This has certainly been my experience with methodology. It wasn’t until I began incorporating my worldview and system of knowledge into my research methods that I finally began to work through my research questions. It was a long journey that involved a constant cycle of breaking down my own “unquestioned answers” and redefining my own “unanswered questions” in order to become “teachable” by those willing to speak with me. Although I still don’t feel like I have answered all the “unanswered questions” I set out to address in my initial research proposal, I feel that my research methodology has given me the best tools in the circumstances to work through those issues.

Directed by my experience, there are two main theories utilized in my methodology that I will examine below: (1) relational-connectedness and (2) autoethnography.<sup>10</sup> Although I will refer to these themes as theories below, it is also important for me to acknowledge that these two theories are also reflective of protocols or laws surrounding the general practice of Coast Salish law that I was expected to follow in conducting this research. As illustrated in Chapter 5, these two methodological theories are reflective of the two major categories of Hul’qumi’num law that I identified through my research: (1) *snuw’uyulh* and (2) family law-making. As previously described, *snuw’uyulh* is the Hul’qumi’num word that most closely resembles the Western concept of law. However, it does not lend itself to a literal translation because the closest

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<sup>9</sup> Wilson, *supra* note 7 at 175.

<sup>10</sup> Margaret Kovach, “Emerging from the Margins: Indigenous Methodologies” cited in Leslie Brown & Susan Strega, eds, *Research As Resistance: critical, indigenous & anti-oppressive approaches* (Toronto: Canadian Scholars’ Press & Woman’s Press, 2005) 19 at 30.

English translation is “our way of life,” or “our way of being on Mother Earth.” It describes a state of balance or harmony that Hul’qumi’num Mustimuhw strive to achieve in their interactions with all things. Because Hul’qumi’num Mustimuhw strive to live life according to *snuw’uyulh*, this doctrine organizes and guides one’s thinking, speaking, behaviour and interactions with people and the natural world on a daily basis. Accordingly, maintaining connections and fostering good relations is imperative to both achieving and maintaining *snuw’uyulh*.

Family law-making encompasses the norms, customs and traditions which produce or maintain the state of *snuw’uyulh*. These laws find their expression within the specific practices of individual families and as such, are not reflective of the customs and traditions of the Hul’qumi’num people as a whole. Through my research I have come to discover that although *snuw’uyulh* is a universal concept within the Coast Salish world, the practices associated with achieving and maintaining *snuw’uyulh* are not prescriptive. For example, families have different practices when it comes to certain ceremonies and traditions, such as the naming ceremony, and that difference is accepted within the legal tradition. Accordingly, pluralism exists within the Hul’qumi’num legal tradition. Individuals and families are encouraged to apply the norms, customs and traditions according to their own interpretations of the teachings (“laws”) and others are taught to respect those interpretations. As such, transmission of these laws necessarily requires the storyteller, or teacher, to include themselves as part of the subject matter, using personal narrative and reflexive analysis to create an understanding that has significance to the listener, or student. It is in keeping with tradition that I utilized the theory of autoethnography.

**a. Relational-Connectedness – “All my Relations”**

As described above, my research methodology was enhanced by an understanding of the collective and the nature of relationships amongst the Hul’qumi’num Mustimuhw. The collective nature of the Coast Salish culture is reinforced through our familial, social, cultural, economic and political systems. Inherent in this worldview are the principles of respect, accountability and reciprocity to each other, the community, and the nation. It is a set of beliefs that creates a sense of belonging. This sense of belonging is a legal concept, as well as a research concept. I say this because the notions of connectedness and belonging influence the notion of legal jurisdiction in the Hul’qumi’num legal tradition. As previously mentioned, legal pluralism exists within the Hul’qumi’num world because of the acceptance of family law or law-making. One can imagine that expanding one’s familial connections would also expand the jurisdiction of laws over other individuals.

I can attest to the strength and wisdom that comes from being connected – connected to one’s family, one’s community, one’s ancestors and one’s territory. This research project has been a journey. Learning about my ancestors, my family and the teachings embedded in my traditional territory has brought about a new sense of reality – a new ontology. “Ontology is the theory of the nature of existence, or the nature of reality.”<sup>11</sup> It asks the question, “What is real?” Situating myself within this new ontology, I have come to realize that an object or thing is not as important as one’s relationships to it.

Therefore reality is not an object, but rather a process of relationships. Connecting is about establishing these good relations.<sup>12</sup> As a result, I needed to conduct my research in a manner that met the criteria of collective responsibility and accountability. Accordingly, I

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<sup>11</sup> Wilson, *supra* note 7 at 33.

<sup>12</sup> Smith, *supra* note 7 at 148.

attempted to build many connections through my research. I did so by taking a broad approach to information gathering. I viewed each opportunity, whether it was an individual interview, a family gathering, a big house dance, discussions with my co-workers and peers, conference presentations, community working group meetings, dinners, walks, talks with family members etc. as a learning opportunity or “teachable moment.”

“All my relations” is a term that I heard often growing up. Whenever I was present at a community event or meeting, the speaker would always start by acknowledging “all my relations.” Although I felt as though I understood what the speaker was trying to achieve by acknowledging “all my relations”, it wasn’t until recently that I began to see how that one simple phrase shapes the entire ontology and epistemology of my community. The way we view the world, and our reality within it, is based upon our relationships to our ancestors, the people and the land around us – all our relations. The importance of developing relationships and maintaining connections to i) ancestors, ii) people and iii) land are discussed below. These concepts are discussed because together they form the bedrock of the Hul’qumi’num worldview.

### **i. Ancestors**

Our duty to care for our ancestors is one of the key relationships in the Coast Salish world. The continued existence of the dead in the Coast Salish World is evident in the Hul’qumi’num practice of ritualized burnings, or feasts for the dead, where food is literally burned to feed the spirits of the deceased. I had it described to me as follows: “We believe that when people pass on and go to the afterlife, we have to take care of these loved ones. We do this through burnings. A table is set, it looks just like a regular table but it’s not, and food, clothing, blankets and what not are offered up on it and burned.”<sup>13</sup>

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<sup>13</sup> *Hul’qumi’num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Sylvia Harris).

However, ritual burnings are not the only way in which ancestral relationships are fostered in the Coast Salish World. Taking care of these individuals also implies a duty to take care of their final resting places. Another Cowichan community member described the teaching as follows: “If they’re disturbed, their rest is disturbed and they need to be taken care of. Their remains need to be reinterred. We have to try and put them back in the exact same area so that we can put that person back to rest.”<sup>14</sup> In honouring the ancestors and looking after their gravesites there are important rules for dealing with the dead that have to be followed. If these laws are not followed the living could be endangered. Death, like life, is filled with regulations and protocols. These practices are followed to honour our ancestors and to protect the living. “If you don’t take care of it, something could happen to those ancestors’ families or young ones. That’s our teachings. That’s our way.”<sup>15</sup> It is through following these laws that the relationships between the dead and the living are maintained. This is vital to the maintenance of our legal traditions because these laws govern the intra-societal relationships between the dead and living. They are reinforced in the laws governing the personal relationships amongst the living.

The importance of these relationships could not be dismissed when forming my research methodology. My research methodology had to be respectful and attentive to those who had passed on. These beliefs, although some might view them as spiritual, are not separate but rather an integral part of the Hul’qumi’num legal tradition. They are a part of everyday life, as well as ceremony. They are a part of law.<sup>16</sup> They are a necessary part of my research. As such, they need to be given ample deference when deciding upon or developing a research methodology.

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<sup>14</sup> *Hul’qumi’num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Charles “Chuck” Seymour).

<sup>15</sup> Affidavit of Sylvia Harris, *supra* note 13.

<sup>16</sup> This concept will be more fully developed in Chapter 5.

The teaching of honouring the dead took on special significance to me during my research. Two of my Elders passed on during this research process. Accordingly, I had to observe certain time periods of respect, in which I could not engage in certain research practices. Furthermore, in order to signify to the families of my Elders the importance of their contribution to my research and, more significantly to my individual growth as a Hul'qumi'num scholar, monies were given to the family heads.

More generally, often my focus groups and individual interviews became very emotional for me. During the luncheon at my gathering one of the Elders explained to me that this was because they were sharing our ancestors' teachings with me. They said it was very emotional for them too and that I was taking on those feelings for them. This teaching demonstrated to me the close connection between our Elders and our ancestors and signified to me that this relationship had to be honoured during my research.

## **ii. Kinship**

The relationships that may be the easiest to describe are the ones we share with people. While most people recognize the importance of families, all forms of interpersonal relationships take on a special legal significance within Indigenous communities. Indeed, I would argue that within Hul'qumi'num communities, individuals delve deep into a person's lineage to try to establish a kinship connection. Because kinship was, and still is, the primary means through which the ethics of sharing is exercised, Coast Salish communities find a benefit from strengthening their kinship ties.<sup>17</sup>

Almost everyone in my community is related through kin or traditional Hul'qumi'num names. For example, my family on my father's side is very small. When he and I received our

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<sup>17</sup> Brian Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property, and Territory in the Coast Salish World* (PhD, McGill University, 2005) [unpublished] at 358.

traditional names in January of 2009 there were only a handful of us at our family meetings and standing as witnesses for the work. However, since that day, our family has grown. Before I received my traditional name, I was told to “keep it clean” and part of the way that I am to keep it clean is to use it. In order to honour that teaching, I now make it a point to introduce myself by my traditional name whenever I’m speaking or presenting. As I have done this, I have had relatives come up to me and introduce themselves as my aunties and uncles. I have had people come up to me and explain their connection to my family. I have found that my traditional name acts as a bridge to a greater family – one that far exceeds the numbers of my more immediate family. This is obviously important to our societies’ legal relationships because, as illustrated in the following chapter, tangible and intangible property rights often depend on these types of familial relationships. Because I am Coast Salish, it is also an important part of my research.

The process of forming a relationship with an Indigenous research paradigm depends upon relationships with several families and groups of friends. Family is often viewed with the upmost importance for Coast Salish people, including the Hul’qumi’num Mustimuhw. Family is what holds us in relationship as individuals and connects us as individuals to our communities and nations. The role my own family has played in my research demonstrates the living nature of Hul’qumi’num law. In this respect, my academic research method is also a Hul’qumi’num legal method. They are connected because they are both based on the recognition that strength that comes from preserving relationships.<sup>18</sup>

As explained in further detail in the following section, my great uncle and father viewed my naming as an integral part of my research methodology (although they never explicitly categorized it as such, choosing instead to refer to its importance in relation to Hul’qumi’num protocol). Because of the nature of the work that I wanted to conduct and the research questions

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<sup>18</sup> The Coast Salish legal principle of preserving relationships will be examined more closely in Chapter 3.

that I wanted to ask, they spoke together and came to the conclusion that receiving a traditional name would enable community members and Elders to determine who I was as a Hul'qumi'num Mustimuhw. It would help people see their own connections to me as I did my research. Upon reflection, I can see that it wasn't just the act of receiving the name that helped me with my research. The very process involved in preparing for and receiving my name provided me with an opportunity to be thrust into a Coast Salish legal tradition and witness firsthand the ongoing relevance and strength of our *snuw'uyulh*.

### iii. Land

Indigenous knowledge can also be found in the relationships and connections formed with the land that surrounds us.<sup>19</sup> Arvid Charlie,<sup>20</sup> *Luschiim*, a respected Cowichan elder, shared the following with me: “I keep getting asked about our sacred areas. But to me, that’s like asking which part of a church is important or which part of a story is important. Our whole territory is important to us. Besides being sacred, there are all kinds of values connected to our land.”<sup>21</sup> Recognizing the importance of these landscapes, many Indigenous peoples have completed traditional use studies to delimit and demarcate these landscapes. The Coast Salish communities that make up the Hul'qumi'num Treaty Group have completed just such a plan.<sup>22</sup>

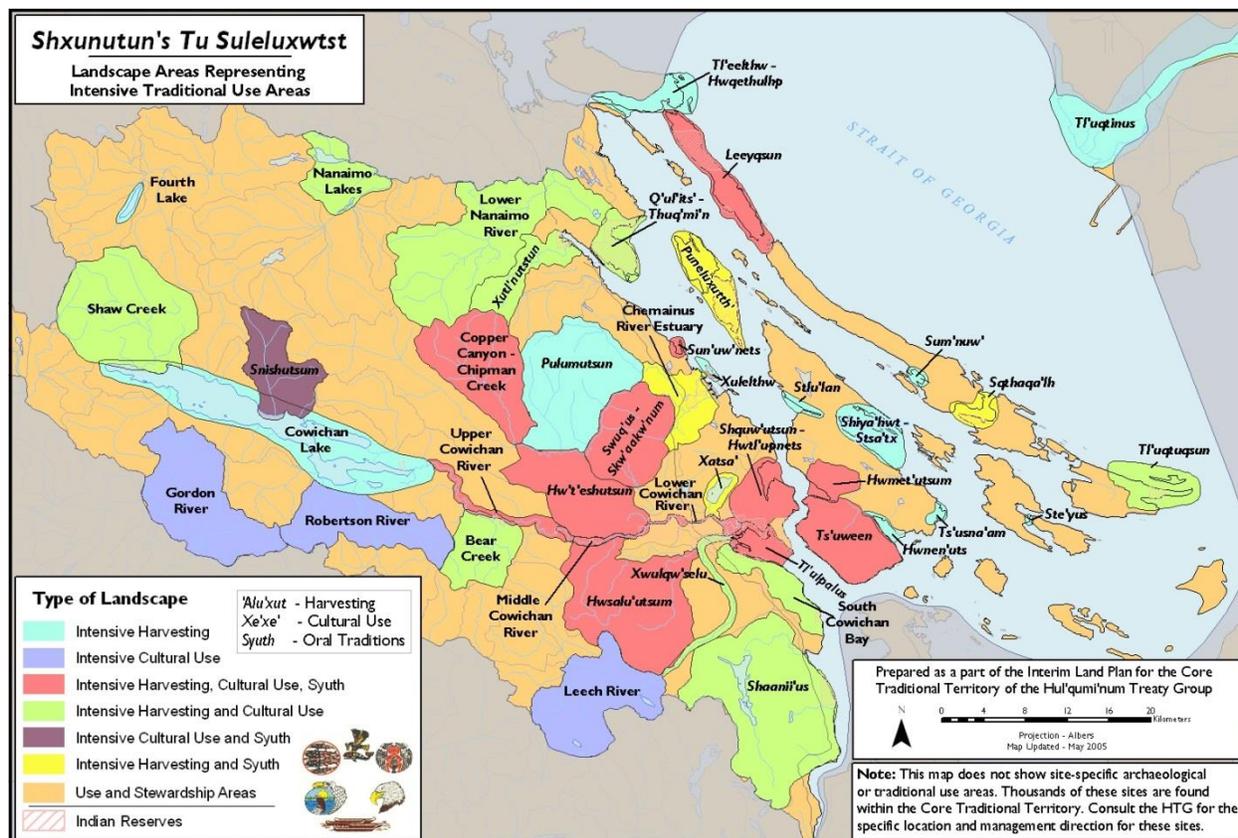
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<sup>19</sup> Wilson, *supra* note 7 at 87.

<sup>20</sup> See Appendix A for biography.

<sup>21</sup> *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Arvid Charlie). However, it is important to note that Elders and community members have identified specific “sacred” sites within the traditional territory. As demonstrated by the Hul'qumi'num Treaty Group’s land use plan, some areas require greater protection than others.

<sup>22</sup> This document was created by the Hul'qumi'num Treaty Group for use as an interim strategic land and resources plan for the Hul'qumi'num Core Traditional Territory. The purpose of this land plan is to describe the Hul'qumi'num people’s vision for how land and intertidal (beach) resources should be used, managed and protected to sustain them indefinitely and provide benefits for the Hul'qumi'num people. It is intended as a foundation for discussion about the future use and management of Hul'qumi'num land and resources with all levels of government and third party interests involved in land planning and resource use in their territory. The plan is not intended to be a definitive demonstration of the extent of Hul'qumi'num historic or current use and occupation of the core traditional territory for the purpose of establishing aboriginal or other legal rights and title.



The purpose of this land plan is to describe the Hul'qumi'num people's vision of how land and intertidal resources should be used, managed and protected to sustain them indefinitely and provide benefits for Hul'qumi'num people. This is a contemporary expression of our law. It is interesting to note that this management plan is in large part based on the oral traditions rooted within the landscape itself. The plan reads:

... Oral histories connect Hul'qumi'num people to the land from the beginning of time. Hul'qumi'num oral histories, part of the oral traditions that have been passed on by generations of Hul'qumi'num Elders, clearly express the laws that root Hul'qumi'num people in their traditional lands ... [Xe'el's] taught the Hul'qumi'num people about the respect and obligations that were required to live in the world. His transformations live on today in the animals and places in the landscapes, which carry the history of his work in the Hul'qumi'num names.

... The oral histories tell about the family-owned hunting territories and fishing grounds. They tell about the camas-root and berry grounds owned by women, about the clam beds, hunting grounds, and fish weirs held in common for the community to use.

... The oral histories tell about the importance of sharing resources with extended family members from other Coast Salish communities.

... Hul'qumi'num people wish to continue the tradition of contributing to the wealth of our society in ways that follow the laws taught in our oral histories. Our *snuw'ey'ulh* or Hul'qumi'num laws, dictate that we have an inalienable connection to one-hundred percent of our traditional territory. They lay the foundation for how Hul'qumi'num people must continue our obligations in our relationship with the natural world, which is connected to us through the First Ancestors. Respecting these obligations is integral to the Hul'qumi'num way of life. It is the foundation of our wealthy, healthy society.<sup>23</sup>

As this passage demonstrates, relationships form the backbone of our Hul'qumi'num laws.

These relationships connect us to our traditional territory, securing our legal jurisdiction.

Relationships to First Ancestors secure individual and family property rights. *Xeel's*, "The Transformer", was one of the first people to travel throughout these lands, and has left his mark all across the territory. His transformations serve as a reminder to my community of the way in which we are to order our relationships with others. The relationships of the natural world, for example the relationship between the eagle and the Douglas fir, remind us of our more natural laws.<sup>24</sup> Hul'qumi'num laws are therefore not only derived from these encounters on the land, but they are 'stored' in the land itself.

It is the land and environment that we come from which make us who we are.<sup>25</sup> The ways we perceive land are rooted in the ways in which our cultured selves<sup>26</sup> experience the

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<sup>23</sup> Hul'qumi'num Treaty Group, *Shuxunutun's Tu Suleluxwtst In the Footsteps of our Ancestors: Interim Strategic Land Plan for the Hul'qumi'num Core Territory 2005* (Ladysmith: Hul'qumi'num Treaty Group, 2005) at 12-13.

<sup>24</sup> John Borrows describes these natural laws as laws developed by Indigenous peoples by observing the physical world around them. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 28.

<sup>25</sup> Gregory Cajete, *Look to the Mountain: An Ecology of Indigenous Education* (Skyland, NC: Kivaki Press, 1994) at 164.

<sup>26</sup> "The very notion of what it is to be a person is cultural and consequently variable. For example, the individualism and self-centeredness of Western societies is not shared by cultures for whom personhood is inseparable from a network of kinship relations and social obligations." Chris Barker & Darius Galasinski, *Cultural Studies & Discourse Analysis: A Dialogue on Language and Identity* (London: SAGE, 2001) at 29.

world. Dwelling in a particular place engages our memory, language and environment and the social relationships that are entangled in these places. Places and people continually form each other in our collective experiences of place. “As we experience the world, so we are also experienced by the world.”<sup>27</sup> Vine Deloria Jr. discusses this concept when he states that Indigenous people often give greater prominence to space (or the place and environment than we occupy) than we do upon time in the western sense of the word.<sup>28</sup> So our continuing connection to the land and fulfilling our role within that ongoing relationship is centred on our specific environment and the relationships it maintains, rather than on events that may be seen as historically important to others but have only a tenuous connection to our land. Maintaining traditional obligations to the land is no less important than common law proof of ownership. Furthermore, although there are distinctions made between relationships with ancestors and people and those made with the environment, the principles of *snuw’uyulh* govern all these interactions. This idea informs my research methodology because in examining the Hul’qumi’num legal tradition I need to be careful not to sever the relationship between the law and the land. This was demonstrated to me during interviews with my Elders. Laws were never discussed in the abstract. They were always spoken with in relation to place and time. Context was always given to help me understand a greater teaching than a single legal principle. I came to realize that understanding this process was just as important as understanding the legal principle itself. This recognition is important to this legal tradition because failure to recognize the integral connection between the law and the territory would fundamentally alter the legal tradition that I am trying to preserve, revitalize and practice.

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<sup>27</sup> Gregory Cajete, *Native Science: Natural Laws of Interdependence* (Santa Fe: Clear Light Publishers, 2000) at 20.

<sup>28</sup> Vine Deloria Jr, *God Is Red: A Native View of Religion* (New York: Grosset and Dunlap, 1973) [Deloria Jr, *God Is Red*].

As this section has demonstrated, understanding the concepts of the relations and connectedness greatly influenced my research methodology. Western research tends to be very individualistic; often it is a person's individual research goals that defines the question; determines the participants; designs the methodologies; documents the findings and publishes the report (though there are exceptions to this generalization).<sup>29</sup> I wanted to ensure that my research methodology both reinforced existing connections and also worked to rebuild connections that had been broken due to our colonial histories. Hul'qumi'num law itself aims to strengthen these connections. This ontology became the basis for my research agenda. Not only did I want to examine the Hul'qumi'num legal tradition, I wanted to reaffirm to my community the strength and wisdom within that tradition. I wanted to demonstrate that our laws have relevance in this modern world, not just for us, but for others as well.

### **b. Autoethnography**

Strongly connected to the discussion on an Indigenous research methodology, is the notion of autoethnography. Autoethnography is “an autobiographic genre of writing and research that displays multiple layers of consciousness, connecting the personal to the cultural.”<sup>30</sup> This research method is evident throughout this dissertation. Autoethnographically based personal narratives are:

Highly personalized, revealing texts in which authors tell stories about their own lived experience, relating the personal to the cultural ... In telling the story, the writer calls upon ... fiction-writing techniques. Through these techniques, the writing constructs a sequence of events ... holding back on interpretation,

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<sup>29</sup> See e.g. Chris Arnett, ed, *Two Houses Half Buried in Sand: Oral Traditions of the Hul'q'umi'num Coast Salish of Kuper Island and Vancouver Island* by Beryl Mildred Cryer (Vancouver: Talonbooks, 2008); Thom, *supra* note 17; Bruce Miller, *The Problem of Justice – Tradition and Law in the Coast Salish World* (Lincoln: University of Nebraska Press, 2001) [Miller, *Problem of Justice*].

<sup>30</sup> C Ellis & A Bochner, eds, *Ethnographically Speaking: Autoethnography, Literature, and Aesthetics* (Walnut Creek, CA: AltaMira Press, 2002) at 739 cited in Jonaki Bhattacharyya, *Making Sense of Place: Practicing Spirituality in Organic Relationship with the Earth* (MES Thesis, University of Waterloo Environment and Resource Studies, 2003) [unpublished] at 19.

asking the reader to emotionally “relive” the events with the writer.<sup>31</sup>

It acknowledges and includes the researcher as part of the subject matter, using personal narrative and reflexive analysis to create an understanding that has significance beyond just the life of the author – one with applicability to the readers.<sup>32</sup> As Bhattacharyya describes, “Autoethnography is more than just a style of writing; it is an approach which advocates paying close attention to one’s physical feelings, thoughts, emotions.”<sup>33</sup> This introspection helps the researcher to understand his or her own experiences and then write them in a way that fosters a better understanding of way of life within the reader.<sup>34</sup>

The field of autoethnography has had a significant influence on my writing style.<sup>35</sup> It provided me with an established form for integrating my personal experiences operating within the Hul’qumi’num legal tradition with the words and descriptions shared with me by my family members, Elders and community members. It also provided a mechanism for me to foster connections – connections between community, my readers, and myself. The theory and form of autoethnography demonstrated to me that there is a way to incorporate personal experiences and feelings into academic writing, and that those elements can be given a voice.<sup>36</sup> I found this approach to be even more significant, given my own personal struggles with the “insider/outsider” dichotomy of working within my own community (discussed below). This is

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<sup>31</sup> L Richardson, “New Writing Practices in Qualitative Research” (2000) 17 *Sociology of Sport Journal* 5 at 11 cited in S Wall, “An Autoethnography on Learning about Autoethnography”, (2006) 5:2 *International Journal of Qualitative Methods* 9 <[http://www.ualberta.ca/~iiqm/backissues/5\\_2/pdf/wall.pdf](http://www.ualberta.ca/~iiqm/backissues/5_2/pdf/wall.pdf)>.

<sup>32</sup> Jonaki Bhattacharyya, *Making Sense of Place: Practicing Spirituality in Organic Relationship with the Earth* (MES Thesis, University of Waterloo Environment and Resource Studies, 2003) [unpublished] at 18.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> See for example, John Borrows, *Drawing out Law: A Spirit’s Guide* (Toronto: University of Toronto Press, 2010). As I struggled to write in a narrative format, I drew strength from reading John Borrows recent work. The manner in which he used personal experience and dreams to teach legal principles and arguments provoked questions, stimulated thought and caused self-reflection in a manner that proved to be very beneficial to my own research.

<sup>36</sup> C Ellis & A Bochner, *supra* note 30 at 737.

why I write in the first person, active voice throughout this dissertation. This approach is integral to my research method.

**i. Insider/Outsider Research: Working from “Home”**

As my LL.M. studies were coming to an end at the University of Arizona, I was faced with a decision – Do I continue my studies there and complete my S.J.D. in Tucson or do I return “home,” and begin the Ph.D. program at the University of Victoria? One of the integral factors in making this decision was the understanding that I wanted to “return home” and conduct my research in my community. But what does it mean to “work from home?”

Despite the familiarity of that phrase to each of us, there is nothing simple or transparent about it. Utter the simple word “home,” for instance, and immediately images and notions of “away” come to mind because “home” takes some part of its meaning from its relationship to places that are “not-home.”<sup>37</sup> And working *from* home (as opposed to *at* one’s home or *on one’s* home) doubles that implication because it suggests that work is normally situated elsewhere.<sup>38</sup> It’s possible for one to read the opposite of “working from home” in the phrase “I’m going to work.” Working from home does not merely indicate another *location* for the performance of services (“I’m working at home today but will be back at work tomorrow”) but rather seeks to normalize it (“My work – at its core – will *emanate* from my home”).<sup>39</sup> While “working from home” may sound (and be) perfectly acceptable, this decision has had a profound impact on my research methodology. Because the majority of my Elders continue to reside within our traditional territory, it would have been difficult for me to study and understand this legal tradition from a place other than my traditional territory or “home.”

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<sup>37</sup> Philip Deloria, “Commentary on ‘Working from Home in American Indian History’” (2009) 33 *American Indian Quarterly* 545 at 545.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

Many of the issues raised by Indigenous researchers about the dichotomy of conducting research “from home” have been addressed in the research relating to insider/outsider research. Insider research – women, ethnic minorities, sexual minorities, disabled, youth and others conducting research in their home communities – has flourished since the 1970s.<sup>40</sup> This increase in insider research has sparked a debate about its scholarly validity.

Many research methodologies are based on the assumption that the researcher is an outsider capable of observation without being implicated in the scene. This is related to positivism and notions of objectivity and neutrality.<sup>41</sup> Feminist research and other more critical approaches have made the insider methodology much more acceptable in qualitative research. Insider scholars challenge the research conducted by outsiders for its colonial nature, which ignores, silences, and/or diminishes insider perspectives.<sup>42</sup> This critique originated with African American scholars in the 1960s and led to an emergence of what Robert Merton describes as the “insider doctrine,” namely, that members of a particular group should research their own group.<sup>43</sup> For example, Indigenous scholars should research Indigenous’ issues. The result of these assertions has been the development and implementation of research methods designed for insider researchers, which, in turn, has generated discussion among scholars. Specifically, scholars have questioned what actually constitutes insider research, the validity of the data obtained by insiders and to what degree the insiders are, in fact, insiders.

According to Merton, the central idea behind the insider doctrine – that only members of a particular group possess the ability to undertake research of their group – is “solipsistic.”

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<sup>40</sup> Robert Alexander Innes, ““Wait a Second. Who Are You Anyways?” The Insider/Outsider Debate and American Indian Studies” (2009) *American Indian Quarterly* 441 at 441.

<sup>41</sup> Smith, *supra* note 7 at 137.

<sup>42</sup> See generally Vine Deloria Jr, *Custer Died for Your Sins* (New York: Macmillan, 1969) [Deloria Jr, *Custer Died*]. See also Homi Bhabha, *The Location of Culture* (New York: Routledge, 1994).

<sup>43</sup> Robert Merton, “Insider and Outsider: A Chapter in Sociology of Knowledge” (1972) 78 *American Journal of Sociology* 9.

Solipsism is the theory that the “self” is the only thing that can be known to be true. The solipsism of the insider doctrine, Merton asserts, “can be put in the vernacular with no great loss in meaning: you have to be one to understand one.”<sup>44</sup> For Merton, a major shortcoming of this exclusiveness is that it leads to fragmentation, for groups contain additional subgroups:

Thus, if only whites can understand whites, and blacks, blacks, and only men can understand men, and women, women, this gives rise to the paradox which severely limits both premises: for it then turns out, by assumption, that some Insiders are excluded from understanding other Insiders with white women being condemned not to understand white men, and black men, not to understand black women, and so through the various combinations of status subsets.<sup>45</sup>

Insider researchers’ bias has also been examined, due to the apparent close ties to the research group. Insiders’ close ties have led some scholars to point out “the dangers of over-rapport.” Over-rapport occurs when a researcher closely identifies with the research group’s perspectives and fails to approach the research itself in a critical manner.<sup>46</sup> As John L. Aguilar describes it, “the conduct of research from home often inhibits the perception of structures and patterns of social and cultural life. ... [T]oo much is too familiar to be noticed or to arouse the curiosity essential to research.”<sup>47</sup> Insider researchers’ close relationship with the researched group means that significant observation can “easily be overlooked, including many taken-for-granted assumptions about social behaviour and the blindness to common, everyday activities; these are hazards of intimate familiarity.”<sup>48</sup> Scholars have additionally argued that insider

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<sup>44</sup> *Ibid* at 15.

<sup>45</sup> *Ibid* at 22.

<sup>46</sup> Martyn Mammersley & Paul Atkinson, *Ethnography Principles and Practice* (New York: Routledge, 1995) at 111-112.

<sup>47</sup> John L Aguilar, “Insider Research: An Ethnography of a Debate,” cited in DA Messerschidy, ed, *Anthropologists at Home in North America* (Cambridge: Cambridge University Press, 1981) 15 at 16.

<sup>48</sup> David M Hayano, “Auto-Ethnography: Paradigms, Problems, and Prospects” (1979) 38 *Human Organization* 99 at 102.

researchers, unlike outsiders, are more likely to have difficulty “intellectually and emotively” distancing themselves from the research group.<sup>49</sup>

In contrast to insider researchers, outsider researchers see themselves as being better equipped to provide objective accounts of the research population. Merton cites Georg Simmel, who states that an outsider or stranger to the research group is “freer, practically and theoretically. ...[H]e surveys conditions with less prejudice; his criteria for them are more general and more objective ideals; he is not tied down in his action by habit, piety, and precedent.” Merton adds, “It is the stranger, too, who finds what is familiar to the group significantly unfamiliar and so is prompted to raise questions for inquiry less apt to be raised at all by Insiders.”<sup>50</sup> While insider researchers have to deal with the issues that prevent them from examining some areas, outside research “involves a comparative orientation in which contrast promotes both perception and curiosity. The researcher undergoes a kind of heuristic culture shock that operates through curiosity as an impetus to understanding.”<sup>51</sup> These notions support the view that “only outsiders can conduct valid research on a given group; only outsiders, it is held, possess the needed objectivity and emotional distance ... [and that] insiders invariably present their group in an unrealistically favourable light.”<sup>52</sup>

These critiques reveal some highly questionable assumptions about the very possibility and neutrality and objectivity in conducting insider research. As Clifford Geertz states:

I have never been impressed by the argument that, as complete objectivity is impossible in these matters (as of course it is), one might as well let one’s sentiments run loose ... [T]hat is like saying that as perfectly aseptic environment is impossible, one might as well conduct surgery in a sewer. Nor on the other hand, have I been impressed with claims that structural linguistics, computer engineering, or some other

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<sup>49</sup> Emiko Ohnuki-Tierney, “Native Anthropologist” (1994) 11 *American Anthropologist* 584 at 584.

<sup>50</sup> Merton, *supra* note 43 at 32-33.

<sup>51</sup> Aguilar, *supra* note 47 at 16

<sup>52</sup> Joseph Styles, “Outsider/Insider: Researching Gay Bath” (1979) 8 *Urban Life* 135 at 148.

advanced form of thought is going to enable us to understand men without knowing them.<sup>53</sup>

I tend to agree with Val Napoleon's argument that a literal interpretation of these critiques would lead to a nonsensical result for all researchers:

A literal interpretation ... would mean that indigenous peoples could not conduct research in their own societies – and if they did, their findings would be deemed subjective or contaminated. Arguably, if this were the case for indigenous researchers, it should also be the case for non-indigenous researchers – a completely nonsensical and untenable situation for everyone. For instance, imagine a non-aboriginal Canadian researcher being precluded from conducting research into some aspect of Canadian society for fear of bias.<sup>54</sup>

So as we can see, Indigenous researchers often find themselves in a double bind, confronting the doubled audiences and structures that originate from work that must speak both to “home” – often experienced as family, community, or location – and to something that is “not home” – the academy and non-Indigenous audiences. I would go further and say that rather than finding myself in a double bind, I found myself in a knot. You see, I have been a student of law since 2001 and a student in the academic world since 1998. I moved away from home at the age of 17 to pursue my education and my residence, or “home,” over the past 16 years has often been dictated by my academic pursuits. I feel as much at “home” in the academy as I feel in my own community. In a sense, the academy has become my “home away from home.”

“Home” references a range of desires within me: to be accepted, to make real contributions, to find safe locations for dialogue, and to shift the very way individuals approach my research topic of the Hul'qumi'num legal tradition. But how does one navigate their research agenda when their desires within their two separate “homes” are often conflicting? For example, even as “objectivity” begins to be acknowledged as unattainable in the academy, one can

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<sup>53</sup> Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973) at 30.

<sup>54</sup> Valerie Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD, University of Victoria Faculty of Law, 2009) [unpublished] at 21.

sometimes get the sense that the most acceptable form of subjective encounter with sources and subjects is the *striving for* this impossible goal. However, as some Indigenous researchers have stated: “From our own experience, it is the *lack* of distance that has enhanced our own research.”<sup>55</sup> For many insider researchers, the act of distancing was, in fact, detrimental to the research objective. In her social work research Valli Kalei Kanuha, a Native Hawaiian, found that distancing herself from her participants “resulted instead in distancing from the process of the research and the ability to attain ‘thick’ descriptions of complex phenomena.”<sup>56</sup>

I was faced with this conflict as I prepared to go before the Research Ethics Committee. The process that I had to follow in order to gain approval to begin my primary research was a process based upon the notion of detachment, which seemed to imply that objectivity is the end goal in research. Contacting and speaking with community members about my research project was discouraged until after the Committee granted approval of my project. As a community member residing in my home community, where everyone was aware of the fact that I had returned home to do this work, one can imagine the impossible situation I was placed in. Was I not permitted to speak to my Father about my research over the dinner table? When extended family members asked me how my schooling was coming along should I just respond with a simple platitude? Contact with my community and asking them for permission to conduct research in my community was to occur via letter, so that the Committee could have written record of their consent. According to Hul’qumi’num protocol these kinds of discussions are more appropriate in person. In fact, such practices are part of our legal tradition.

As one can imagine, I felt quite torn by this entire process. On the one hand, I wanted the support of the university. I wanted to be accepted within the academic community and I wanted

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<sup>55</sup> Innes, *supra* note 40 at 444.

<sup>56</sup> Valli Kalei Kanuha, “Being Native versus Going Native: Conducting Social Work Research as an Insider” (2000) 45 *Social Work* 439 at 442.

them to value my research. As such, I felt I should comply with their policies and procedures. On the other hand, I wanted to maintain a healthy relationship with my own community. I didn't want them to start to see me as an "outsider." I was worried that these formal and bureaucratic requirements would strain my connections to my community. Recognizing the importance of relations within the Hul'qumi'num community one can imagine my desire to strengthen my kinship ties prior to beginning my research, not weaken them.

I struggled with this dilemma for some time. I even considered not conducting any primary research and relying solely on secondary sources. In the end, I was able to rectify the situation by choosing to approach a more political body in my community – the Hul'qumi'num Treaty Group. The Hul'qumi'num Treaty Group was founded in 1993 to jointly negotiate a comprehensive treaty with British Columbia and Canada in the BC Treaty Process. This political organization represents over 6,200 members in six First Nations: Stz'uminus First Nation, Cowichan Tribes, Halalt First Nation, Lake Cowichan First Nation, Lyackson First Nation, and Penelakut Tribe. Hul'qumi'num is the shared language that connects these First Nations, as do their common traditional territories, culture, history and legal tradition. Because the Treaty Group represents six First Nations within my traditional territory, it was more appropriate that I contact them and ask their Board of Directors for permission to conduct my research within that area. Recognizing the unique nature of their society, no one called into question my desire to present my proposal and request a resolution supporting my research and it was accepted within a very short timeframe. Although it was not the ideal situation, it was a solution that allowed me to satisfy the university's requirements while still respecting the protocols of the Hul'qumi'num Mustimuhw.

Although insider researchers acknowledge that their research presents certain challenges, they dispute that these challenges weaken the validity of their findings.<sup>57</sup> As Smith has articulated “[t]he critical issue with insider research is the constant need for reflexivity. At a general level insider researchers have to have ways of thinking critically about their processes, their relationships and the quality and richness of their data and analysis.”<sup>58</sup> As insider researchers we need to constantly be evaluating and re-evaluating the kinds of subjectivities we bring to our work and considering how we negotiate these in relation to the multiple communities we inhabit.<sup>59</sup> So, to the extent that my limitations have allowed, I have attempted to explore and interpret the Hul’qumi’num legal tradition from an internal philosophical basis – an autoethnography. I believe that utilizing this methodology will help me acknowledge the subjectivities that I bring to this research in a manner that increases the validity of this work rather than detracts from it.

This is one reason my dissertation is partially written in a narrative format. Although I share the teachings of my elders in their own words, I make it very clear that the interpretation of these laws is my own. This is in keeping with the nature of law in the Hul’qumi’num legal tradition. Traditionally, Coast Salish legal traditions were the sum total of laws articulated by separate Coast Salish families.<sup>60</sup> It is recognized that different families have different understandings about law because laws are received from *Xeel’s* on an individual basis, for the benefit of the family, the community and the natural world.

These laws are received from *Hals* after a purification period or a retreat of months or years of daily bathing in cold water, in streams or lakes, and living with nature during this period. Laws would come after *Hals* feels

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<sup>57</sup> Bryan McKinley Brayboy & Donna Deyhle, “Insider-Outsider: Researchers in American Indian Communities” (2000) 39 *Theory and Practice* 163 at 166.

<sup>58</sup> Smith, *supra* note 7 at 137.

<sup>59</sup> Deloria Jr, *God Is Red*, *supra* note 28 at 547.

<sup>60</sup> Miller, *Problem of Justice*, *supra* note 29 at 205.

that you are pure enough, then he would give you the law through one of the resources or through a vision. It is through total commitment, concentration and fasting of an individual that he is able to receive these laws from *Hals*.

When one received a law from *Hals* he would further bathe and fast to give thanks for the law or vision he has received. He must who his thanks for what he received for it should be for the survival of his family, the community, and the resources. Once this law is in place it is the responsibility of parents and Elders to uphold this law and pass it onto their children and their children's children.<sup>61</sup>

Therefore, interpreting this legal tradition through my own understanding not only allows me to live my laws even as I describe them, but also allows me to be constantly reflexive in my approach. This legal principle was shared by my great uncle Angus. In his last interview with me before passing on he said:

Grandniece, this is for your ears only ... Everything that is going to be put on this paper here is for you to keep for your own. You can't pass it to anybody. You can talk about. You can teach them about what you learned here, but you can't pass it on to anybody. That's the law ... The reason is because there's many ways and each person has a different teaching ... and they can't use it because they have different laws.<sup>62</sup>

His words validate that my methodology is in keeping with my own teachings as a Hul'qumi'num Mustimuhw.

### **2.3 TOOLS OR PRACTICES**

Whereas "methodology" is theorizing about a research practice, "methods" are the particular tools or practices used for conducting research. This section will describe my research process: what I did, and the tools I used to gather and analyse information in a manner consistent with the methodological approaches described above. In addition to a literature review, there was the field time itself; followed by writing up and transcribing of notes; then the analysis; and writing up on the work. Furthermore, in this section I will introduce you to the specific

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<sup>61</sup> Bruce Miller, "Justice, Law and the Lens of Culture," (2003) *Wicazo Sa Review* 135 at 143.

<sup>62</sup> Interview of Angus Smith (8 November 2009).

Hul'qumi'num protocols, or laws, that I followed throughout my research process. These are practices or tools that were necessary for me to both *learn about* and *practice* Hul'qumi'num law.

One might try to compare the materials that follow to a textbook on legal procedure; however, I would caution against such a comparison. As I have learned, and as demonstrated by the description below, these practices are not only utilized when there is a dispute to resolve; but rather all practitioners of Hul'qumi'num law can draw upon them and utilize them in working to achieve *snuw'uyulh*. In the following pages I will describe the major practices and tools that I utilized in order to complete this research: a) naming ceremony; b) family interviews; c) secondary interviews; d) speakers; e) participant selection; f) self-reflexivity; g) gathering; h) interviews; i) fieldwork materials; j) data and analysis and k) writing. As you will see, these tools and practices can be utilized in many other situations in order to achieve and maintain *snuw'uyulh*.

#### **a. Naming Ceremony - *Su-taxwiye***

As noted above, the process of receiving my traditional Hul'qumi'num name was the first step in my primary research project. My Father immediately recognized this and spoke with my Great Uncle, Angus Smith,<sup>63</sup> about the possibility of both of us being named in January 2009. My Great Uncle had wanted to name my Father for some time and he was quite pleased with the suggestion. Recognizing the potential significance of the journey I was on, he indicated that it would be appropriate for me to be named at that time as well.

My naming ceremony was a beautiful experience. Before the ceremony, I had the opportunity to hear our family teachings and genealogy from my great uncle as he prepared us for the event to follow. I had the opportunity to be fully engulfed in the customary laws and

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<sup>63</sup> See Appendix A for biography.

processes surrounding the giving of a name.<sup>64</sup> I was witness to issues and conflicts that can occur over the passing down of these significant ancestral markers.<sup>65</sup> Finally, in the ceremony itself I had the opportunity to stand beside my Father and have my family walk beside us as our names were announced and witnessed by our community.

At the luncheon following the ceremony, Arvid Charlie,<sup>66</sup> one of our hired speakers,<sup>67</sup> stood up and explained to us that we were now expected to live up to the standing of our ancestors and that we were never to shame our name. As I have embarked on this journey I have carried this teaching with me. I have found that holding my name has strengthened my own

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<sup>64</sup> Preparing for the naming ceremony took months. During family meetings, the significance and processes surrounding the naming were explained in great detail. I was given duties to fulfill, such as hiring dancers, lady singers, attending singing practices, feeding those who we had hired, paying out those we had hired, gathering items for the give away etc. For more details surrounding naming ceremonies see Hul'qumi'num Treaty Group & University of Victoria, "Nuheylhum: Naming Ceremony" DVD (Ladysmith, BC: Hul'qumi'num Treaty Group, 2008). This DVD describes each of the stages of a naming ceremony: 1) *Stl'eshun*/Invitation; 2) *Sts'ewulhtun Shqwaluwun*/Contribute Money; 3) *Hwiineemstum*/Call Witnesses; 4) *Sts'uyulh*/Acknowledgement; 5) *Tus'utthu*/Begin the Work; 6) *Nuw'els Shulmuhwtsus*/Rattlers Ceremony; 7) *Imush tthu Neetum*/Named Go Around; 8) *Tthu Hun'tsew Sne*/ A Name is Reborn; and 9) *Snuw'uyulhs tthu syuwen*/'Ancestors' Teachings.

<sup>65</sup> As stated briefly in this chapter and explained in further detail in Chapter 3, ancestral names and the ability to pass on ancestral names is a kinship right. The name originally selected for my father, was one of my great uncle Angus' names. He had received two Hul'qumi'num names – one from his own father and one while he was working as a babysitter for a new initiate. In order to thank him for his work done that winter dance season, the family of the new dancer had passed on to him an ancestral name. The name originally chosen for my father was the name that my great uncle had been gifted. However, because the name did not come from his kinship line, some individuals in the community challenged his ability to pass it on to my father. Although my great uncle had met with the family members, from whom the name was given, and received their permission to pass it on, resistance was still voiced by community members. As a result, my great uncle decided not to give that name to my father, and instead, would pass down his other name to him. His second Hul'qumi'num name came from his father's side of the family, to which my immediate family has no ancestral connection (as he and my grandmother were half-siblings on my great-grandmother's side). As a result, when my great uncle stood before the community and passed down his name, he also took my father "as his own" – customarily adopting him in order to pass down this inherited right. Although my great uncle was upset about the discord surrounding the original name he wanted to pass down to my father, he did not want to bring bad feelings to the naming ceremony and so he decided not to challenge the objecting community members. Instead, he quietly voiced his frustration with our family and announced that he would not give his permission for his name to be given to anyone else. Brian Thom, a family friend and professor of Anthropology at the University of Victoria, explained to me that my great uncle's decision not to permit the passing down of that ancestral name ever again was virtually destroying it and that it was in keeping with the old potlatching practices.

<sup>66</sup> See Appendix A for a biography

<sup>67</sup> A speaker is an individual who is hired to represent another individual or group of individuals at a cultural event ("work"). Because of the language training they receive, family histories and cultural protocols etc., they are considered "experts" and are relied upon to ensure that the "work" is carried out according to cultural protocols and no mistakes are made. Interview of Robert Morales (16 February 2011).

sense of personal and community identity. It serves as a way to build connections among my community, my research and myself.

### **b. Family Interviews**

The first step in this research project was to identify and contact participants for my study. My initial research project entailed interviewing a cross-section of Coast Salish communities – one from Vancouver Island, one from the mainland and one from the northwest coast of Washington State. However, upon further reflection and discussion with my supervisors, family members and Elders, I decided to limit the scope of this study to the six communities of the Hul’qumi’num Treaty Group or the Hul’qumi’num Mustimuhw, as described in Chapter 1.

My family played an important role in identifying participants and preparing for interviews – in particular my father, Robert Morales.<sup>68</sup> He occupies a unique position within the community, as he currently acts as the Chief Negotiator for the Hul’qumi’num Treaty Group. Not only is he a lawyer and well aware of the literature surrounding the Canadian legal system, he is also a strong advocate for my community, recognizing the strength of our own legal traditions. He has spent the past 12 years trying to negotiate a treaty and during this time he has met with and fostered relationships with many of the Elders within my community. From the outset of this process, I realized the importance of his presence within this research project.<sup>69</sup>

After I received support from the Hul’qumi’num community to conduct this research, I was able to begin my interview process. Again, I utilized my family connections for this initial “test” interview and approached my great uncle Angus to see if he would be willing to speak with me. He agreed and so we arranged a time to meet at a later date.

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<sup>68</sup> See Appendix A for biography.

<sup>69</sup> See generally Chapter 2: “Relational-Connectedness: All my Relations” at 53-63.

Before I met with my great uncle I sent my father a copy of the research questions, previously approved by the University of Victoria's Ethics Committee. Upon reviewing them he suggested that I hire a respected speaker within the community, Arvid Charlie, to come to the meeting with great uncle Angus. He explained that because many legal concepts are foreign to our Elders and because my great uncle's first language was Hul'qumi'num, Arvid could act as an interpreter of sorts. I agreed with his suggestions and further suggested that he come with us as well, as he might serve a similar purpose because he was very familiar with my project.

We met one quiet November afternoon<sup>70</sup> at my great uncle's home in Quamichan. The four of us sat around a kitchen table. We discussed my project more generally, and my specific research questions for almost three hours. That process proved to be very enlightening for the next steps in my research project. It brought to light some of the issues surrounding both the manner in which I had framed my interview questions and the interview process itself. It was at that time that my great uncle told us that he had wanted to gather Elders, from each of the communities, to meet and discuss the Hul'qumi'num legal tradition. He asked my father to help facilitate and we decided to hold the event in the next month or so at the Chemainus First Nation meeting room.

I look back on that experience with fond memories. Less than a month after that meeting my great uncle passed away. It was a great loss to our family as he was the Elder and knowledge holder for us. In keeping with Hul'qumi'num law, I knew that some time would be required to pass before I could continue the work my great uncle discussed with me during our meeting.<sup>71</sup> I

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<sup>70</sup> November 8, 2009.

<sup>71</sup> According to cultural teachings, after a family member dies there is a period of time that must be respected before certain things are "brought out." For example, a memorial usually occurs four years after the time of passing. Pictures are usually stored and brought out during a cultural event, which usually occurs one or two years after the time of passing. Interview of Robert Morales (15 February 2011).

spoke with my father and Arvid Charlie and they both agreed that, in order to honour my Great Uncle, this work would need to be continued in the New Year.

### **c. Secondary Interviews**

While I initially worried about the potential “stall” in my research, my father provided me with another unique opportunity during the winter months. The Hul’qumi’num Treaty Group’s admissibility petition to the Organization of American States had been argued successfully before the Inter-American Commission and in the winter of 2009-2010 they were busily preparing for the merits phase of that process. I was hired to conduct interviews and draft affidavits from 20 community members.<sup>72</sup>

From December 2009 – March 2010 I travelled throughout the territory meeting with and interviewing 20 community members on the effects of development on our cultural teachings and practices. The community members were selected based on their age, gender and cultural knowledge. As demonstrated in Appendix A, young adults, middle-aged community members, Elders, cultural leaders and political leaders were all interviewed for this project.

An employee hired by the Hul’qumi’num Treaty Group to transcribe the interviews and I met with the interviewees twice on average. The first time was to conduct the initial interviews and the second time was to go through the draft affidavit with the interviewee to ensure that no mistakes were made. If the interviewee agreed with the content of the affidavit, it could be signed. However, if corrections had to be made, we would arrange to meet with the interviewee for a third time to go over the affidavit again and obtain a signature.

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<sup>72</sup> See Appendix A – Secondary Interviews

Although the interview questions were not my own research questions<sup>73</sup> they included questions on customary laws, the learning process surrounding cultural teachings and practices and the effects of development on these traditions.<sup>74</sup> The stories and teachings learned through this process also influenced my research. I spent four months learning about the cultural teachings surrounding our ancestral connections to land, cedar, fishing, hunting, gathering, bathing etc. I also learned about the teaching processes involved in sharing this information. Being involved in this project helped to reaffirm the purpose of my work. It helped me see the strength that continues to live within my community and helped me build relationships with knowledgeable individuals. Many things learned through this process are also sprinkled throughout this dissertation.

#### **d. Speakers**

By the time the HTG IACHR project was completed it was time to turn my thoughts to the gathering that I was to host. Again, I met with my father. We discussed the teachings he had learned and the thoughts he had about my research project. We worked on refining my questions for the gathering and spoke about the proper procedures and protocols to follow in order to honour my great uncle. I wanted to ensure that in learning about our laws I was also applying them in appropriate ways.

Hiring speakers is widely practiced within the big houses in the Coast Salish world. Shirley Julian, a Stó:lō elder, explains, “At feasts there would be special people who were speakers, real good speakers, one from each place that knew the background and the history and the culture.”<sup>75</sup> Recognizing the importance of culture and reflecting on the benefits of having

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<sup>73</sup> Although I initially drafted the interview questions, they were sent out to Hul’qumi’num Treaty Group employees and Robert Williams, the lawyer for the Hul’qumi’num Treaty Group, for comments, suggestions and final approval.

<sup>74</sup> See Appendix B – Affidavit Questions

<sup>75</sup> Miller, *Problem of Justice*, *supra* note 29 at 133.

Arvid Charlie at my interview with my great uncle, I decided to hire two speakers to help facilitate my gathering.

I arranged a luncheon<sup>76</sup> with Arvid Charlie and Willie Seymour, two highly respected big house speakers in the community. I also invited my father and Joey Caro,<sup>77</sup> the Communications Specialist at the Hul'qumi'num Treaty Group. At this initial meeting I hired Arvid and Willie and asked them to act as speakers for me at my gathering. They suggested that I put together a two-page document<sup>78</sup> outlining the project, purpose of the gathering and types of questions that I would like them to consider.

#### **e. Participant Selection**

An important question at this planning meeting was which Elders to invite. It is important to note that discussions to help plan the 'work' of the gathering are also part of our law. While preliminary discussions can vary in procedures and protocol they do highlight the deliberative nature of aspects of our laws. Because my great uncle had suggested only one name for our gathering we were at a loss to understand whom he wanted present. Joey, Arvid, Willie and my Father then began suggesting names.

This was a very interesting process. It was explained to me that we could invite individuals based on a variety of criteria. One was political; did we want to have Chiefs and council members invited? Another was based on community; did we want to invite one or two Elders from each community? The last criterion was based on knowledge; did we want to invite only the most knowledgeable individuals, even if they were all from only one or two of the six communities?

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<sup>76</sup> May 27, 2010

<sup>77</sup> See Appendix A: Primary Interviewees and Secondary Interviewees

<sup>78</sup> See Appendix C: Coast Salish Legal Traditions - A Discussion

Names were put to me, but always only as suggestions. The speakers whom I had hired said that although they felt comfortable suggesting potential participants from their own communities, I would have to get support for their suggestions from the other communities. By the end of the process, I had over 25 names. As we did not want this gathering turning into an Elder's advisory meeting, we decided that I would cap invitations at 6-8 individuals.<sup>79</sup>

The invitation of these individuals was also discussed at this preliminary meeting. Recognizing the purpose of my work, it was stressed to me that traditional hiring protocols should be followed. Once again I was counselled to apply our law as I was learning it. Accordingly, during the next two weeks I went around to the homes of the suggested eight individuals and invited them to the gathering. My father told me that it was appropriate to travel with another person, so I asked my husband, as well as my dear friend Renee Racette,<sup>80</sup> to come with me. At these invitational visits I would introduce my family, and myself if I did not already have a relationship with the Elder. I would explain the purpose of my project and what I hoped to achieve. I often found the Elders prepared to speak about their thoughts on Hul'qumi'num laws and dispute resolution and so I found it helpful to have a notebook with me at all times. The information that flowed from these initial encounters helped me realize what the Elders were prepared to speak about.

#### **f. Self-Reflexivity or Teachable Moments**

I feel it necessary to preface this section with some initial thoughts and feelings. As I previously stated, I am Hul'qumi'num Mustimuhw. I am an "insider" of the Hul'qumi'num

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<sup>79</sup> As a result of the long list created by following Hul'qumi'num protocols, the eight individuals I chose to work with were all Elders and only two of them were women. I feel it important to note this because I want to acknowledge the gap in this research in accounting for specific concerns of the youth and women. I feel that is important work that needs to be carried out in the next phase of my research on the Hul'qumi'num legal tradition.

<sup>80</sup> Renee Racette is Métis-Cree with strong ties to the Hul'qumi'num community and is legal counsel for the Hul'qumi'num Treaty Group.

community and as such, I often felt it difficult to distinguish my interactions within my community as “fieldwork” or “research related” as opposed to social, ceremonial or more familial interactions. What I’ve come to understand, however, is that it is through these social, ceremonial or familial interactions that our *snuw’uyulh* is taught and learned. As such, throughout the past eight years, I have come to recognize that every interaction with my community or family members provides some opportunity to learn more about our *snuw’uyulh*. Not just the opportunities in which a pen and paper, recording device or consent form were present.

Accordingly, I have identified six situations in which these “teachable moments” occurred. They are i) focus groups; ii) affidavit interviews; iii) ceremonial gatherings; iv) individual interviews; v) discussions and vi) conference presentations.

#### **i. Focus Groups**

Although I did not refer to them as such at the time they occurred, I conducted three focus groups during the course of my research. The first occurred on November 8, 2009 and included my great uncle, my father, Arvid Charlie and myself.<sup>81</sup> The second occurred on May 27, 2010 and included my father, Joey Caro, Willie Seymour, Arvid Charlie and myself.<sup>82</sup> The third focus group occurred on June 16, 2010.<sup>83</sup>

#### **ii. Affidavit Interviews**

As described above,<sup>84</sup> twenty individual interviews were conducted with Hul’qumi’num community members in preparation for a merits petition to the Inter-American Commission on Human Rights. These interviews were conducted between December 2009 and March 2010.

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<sup>81</sup> The content and results of this focus group are discussed above at 77.

<sup>82</sup> The content and results of this focus group are discussed above at 79-81.

<sup>83</sup> The content and results of this focus group are discussed below at 84-87.

<sup>84</sup> See generally “Secondary Interviews” at 78-79.

They helped me to identify individual knowledge holders for my own research questions and helped strengthen my relationships with my community members. Although the interview questions varied from my own research questions, they provided opportunities for me to learn about customary laws and conflicts between Hul'qumi'num laws and Canadian laws.

### **iii. Ceremonial Gatherings**

Since I began my PhD, in September 2006, I have had the opportunity to attend many cultural and ceremonial events within the Hul'qumi'num community. This has been my life. My naming ceremony undoubtedly provided the greatest opportunity for learning about customary laws in the Hul'qumi'num world. However, every time I have attended the big house, or a naming ceremony, wedding or funeral, I have also been provided with countless “teachable moments.” Although witnessing the events themselves taught me a lot about Hul'qumi'num laws and practices, I have also gained considerable insight through my discussions with family and Elders afterwards, as they've taken the opportunity to describe to me the significance of the events that have taken place. These experiences have also found a place within this research, whether it be through an outright description of the events witnessed or by providing an interpretive lens for my writing.

### **iv. Individual Interviews with Elders**

As described in more detail below,<sup>85</sup> after the larger gathering, I began to conduct interviews with the individual Elders who were present at that meeting. These interviews began the week of June 21, 2010 and continued for two months. However, less formal but equally informative discussions with these Elders have continued. As I have started to make connections and analyse their teachings, I have called upon them to verify that my understanding is correct.

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<sup>85</sup> See discussion at 87-89.

Florence James, a respect Penelakut Elder who was present at the larger gather, has been vital to my Hul'qumi'num translations and has worked with me on a continual basis since June 2010.

**v. Interviews and Discussions with Family, Peers, Friends, Band Council members, Treaty Group employees**

My research has also benefitted from the opportunity to be able to discuss my ideas and/or findings with family members, friends, peers, community members and employees of First Nation organizations through more “informal” discussions. My weekly discussions with my father, the Chief Negotiator of the Hul'qumi'num Treaty Group, have enabled my research to stay grounded in the needs of my community. Discussions with academic peers have helped me determine where further research and analysis is needed. Furthermore, as I've attempted to explain my project to friends and community members, it has pushed me to further clarify my research question.

**vi. Conference Presentations**

Finally, I would also categorize the opportunities I have had to present at conferences as “fieldwork” or “teachable moments.” Since 2006, I have presented my research at over sixteen research conferences. The feedback and questions that I have received from these conference presentations have also helped to develop my dissertation. Through such presentations I have come to see the areas of strength and weaknesses in my research. This has helped me to see where further analysis is needed. Again, although each presentation is not described in detail in this methodology chapter, I still feel it is necessary to acknowledge the contribution of these presentations to my fieldwork.

**g. A Gathering<sup>86</sup>**

My gathering was held on June 16, 2010 in Ladysmith, B.C. On the drive up from Victoria, I pondered the significance of the day's events, both for my community and myself. Unexpectedly, the gathering was a very emotional event for me. I felt blessed to have the help of my family members in preparing for the event. I felt love and support from the Elders who participated.

Focus groups were not part of my initial research methodology, but a greater understanding of the importance of witnessing to Coast Salish people made me change my mind. Witnessing is important to Coast Salish law because it acts as both a legal ratification process and legal record. It has been described as follows:

Being called to 'witness' in the Coast Salish tradition is a sacred honour.

Bearing witness by a 'hired' speaker carries responsibilities and duty. As a witness they are to listen and watch the work that is going to take place.

They are to carry the message back to their home community. If, in the future or anytime in their life, there is a concern over what took place they, as witnesses, have to recall what they heard and seen [sic] with regard to the event.<sup>87</sup>

This was one of the reasons why I felt it important to work with Hul'qumi'num Elders. As some of our oldest community members, they collectively hold our legal traditions in their minds.

In one of my initial interviews, one of the Elders seemed hesitant to speak about certain topics. At first I thought this hesitancy stemmed from the sensitive nature of the subject matter, but another Elder informed me that my interviewee might not be sharing information because there was no witness to verify those teachings. The cultural significance of witnesses had not

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<sup>86</sup> My father suggested to me that we use the term "gathering" rather than focus group to describe the event. He felt that it was more culturally appropriate and would serve to foster connections between myself and the invitees.

<sup>87</sup> Excerpt from *Squamish Nation Assertion of Aboriginal Title* cited in Rachel Thompson, "Uts'am: Bearing Witness A Traditional Coast Salish Ceremony" (2002) *Women and Environments* 27 at 28.

even occurred to me when designing my research methods. As a result, I changed my interview process to one that involved a community gathering. This experience helped me understand the importance of cultural fit or cultural relevance in every part of the research process.

Preparing for this gathering was again a family affair. My mother and mother-in-law donated and prepared the food for the gathering. My sisters helped me prepare gift bags for the Elders. Family, food and gifts are all necessary in doing the work of living and learning about Hul'qumi'num law. Renee Racette attended and helped ensure that the Elders were comfortable throughout the event by bringing them tea and attending to their needs. My sister, Katie Morales, attended, transcribed and recorded the event so as to enable me to be fully engaged in the gathering. My father sat by my side, ensuring that my needs were also met that day.

I was very happy about my decision to hire speakers for the gathering. Willie announced the start of the gathering and shared his thoughts on the learning journey I was on. Florence James then opened with a prayer – which set the tone in the room for the discussion that followed. Arvid then went through my two-page document with the Elders, translating it into Hul'qumi'num and explaining any concepts that may have been foreign to them. The Elders in the room then went around in a counter-clockwise circle, sharing their teachings on Coast Salish law and conflict resolution. As lunchtime approached, I was encouraged to meet again with the Elders present, in order to gain greater insight into the teachings shared with me. A luncheon was served, gifts were exchanged and follow-up appointments were made.

It was a short meeting, only three hours, but the relationships that were fostered during that short time continue to influence my decision-making on a daily basis. As my interviews continued over the next two months<sup>88</sup> the teachings I learned reinforced that the gathering I had hosted was the proper manner in which to discuss the Hul'qumi'num legal tradition. As I have

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<sup>88</sup> June 2010 – August 2010

learned, Hul'qumi'num laws and conflict resolution depend on face-to-face meetings to ensure proper relationships are built.

#### **h. Interviews**

During the gathering and luncheon I scheduled follow-up interviews with each of the participants to start the week of June 21, 2010. I choose this week because I felt that it would give me enough time to go over the transcript of the gathering and my own notes and develop individualized research topics for each of the participants based on the teachings they had shared during the gathering. It also allowed me time to conduct a “gap” analysis of sorts – identifying areas of interest about which I had little or no information.

Surveys, in-depth interviews and focus groups continue to be important method choices; however, the manner in which they are approached in Indigenous communities is often quite different from the way they are undertaken in non-Indigenous communities. I will never forget the difficulties I had in setting my “research questions” to be used in my “interviews.” Although I tried my best to make them as accessible and open-ended as possible, I found myself having difficulty getting the information I was looking for out of my interviewees. I soon realized that the issue was not the questions themselves, although that was part of it. The issue was the interview process.

Upon reflection, I realize that coming into an Elder's home armed with a consent form, a tape recorder and a set of questions, disconnected me from them. It positioned me as an outsider. To counter this I had to trust in the Hul'qumi'num process. I had to trust in the Elders as knowledge holders. I had to do away with my individualistic approach to conducting research and focus on fostering my relationship with these respected community members.<sup>89</sup>

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<sup>89</sup> See also John Borrows, “Listening for a Change: The Courts and Oral Tradition” (2001) 39 Osgoode Hall LJ 1.

I found that it was more useful to approach these elders with the general topic of our *snuw'uyulh*, rather than a set of questions. In one of my first interviews, perhaps sensing my frustration with the direction the interview was taking, an Elder told me that although I might not now understand why a particular story was being shared, a time would come when I would make the connections needed to further my understanding. I have found the truth of this statement verified numerous times and have therefore altered my interview method. I have focused more on entering into a conversation with my Elders, trusting that I will be able to extrapolate the information I am searching for later.

Based on the research questions set out in Appendix C and the thoughts the Elders shared during the gathering, I prepared guiding interview questions and themes as materials for the open-ended interviews. However, when I met with the participants I found that they too had been reflecting on the discussions and often had already prepared what they wanted to share with me – what they felt was necessary to an understanding of the Hul'qumi'num legal tradition and conflict resolution. Although there were moments where I felt it was appropriate to ask more directed questions, and I was encouraged to do so, I did not treat these interviews as a means to an end for my initial research question. Rather, I focused on understanding why my Elders were choosing to share these specific teachings with me.

By concentrating on “teachable moments” rather than interviews, I found that my opportunities for data collection expanded exponentially. I received some of the most profound teachings in my car, as I was picking up my Elders to take them to meetings or dropping them off at their homes. Teachings were also shared over tea at the local Tim Horton's or over lunch buffets. Also, because I would see my Elders out and about in my community, they would often

share thoughts with me about my research project. As a result, these “teachable moments” continue to occur up until the present.<sup>90</sup>

Because of the informal nature of some of these interactions, I did not always have my recording devices present, only my notebook. So, as I went along I shared drafts of my transcripts with each of my participants and went over their comments with them individually to ensure that they approved of my interpretation of their statements. In addition, Florence James<sup>91</sup> agreed to proof-read my dissertation for correct Hul’qumi’num spellings.

### **i. Fieldwork Materials**

Materials necessary for fieldwork were minimal. I met with my participants equipped with my notebook for my writing, RCA mp3 recorder, external microphone, extra batteries, initial interview questions, see Appendix C, transcript of the gathering, and spare batteries for the recorder. I also hired my sister to help assist me in the transcribing of the interviews. As her schedule permitted, she also accompanied me to some of the interviews with her laptop computer.

One research constraint of my fieldwork was the mobility of my participants, especially the Elders. As a result, my vehicle could also be considered a material necessary for my fieldwork. In all of my interviews I travelled either to the homes of my interviewees or picked them up and drove them to and from our meeting place.

Gift-giving was also an important part of what I learned in my fieldwork. As explained by my father, it is customary to give gifts to Elders to thank them for their time and sharing.

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<sup>90</sup> Because these “teachable moments” have occurred in various places and situations over the past five years, I have relied on verbal consent. I found that the written consent forms were viewed with apprehension. In fact, some Elders expressed to me that they would not sign a consent form until after they had read my chapters and how I had used their words and teachings. As a result, consent has been a continual process. Every time I am home, I make it a point to meet with my Elders, share my latest thoughts and show them the progress of my dissertation. This is all to ensure that I have their consent as I move forward.

<sup>91</sup> See Appendix A: Primary and Secondary Interviewees

However, I also recognize that these Elders are important teachers and scholars in my own learning journey. I have paid tens of thousands of dollars to universities over the past fifteen years for my education. I have also spent many thousands of my own money working with Elders and others, as described above. I regard my community education as being just as valuable as my university education, if not more. So I asked myself: How do I recognize this? How do I put a monetary value on their teachings?

I struggled with this for some time. One teaching I followed is that I should always give a gift from the land and one that I have made myself. This is a Hul'qumi'num legal practice. Keeping this in mind, my mom and I spent one late summer's weekend making blackberry freezer jam for me to gift. I was also fortunate to get canned salmon from my mother-in-law and gift it to the Elders. Monetary gifts were also distributed throughout this process.

Although I recognize that my modest gifts will never accurately reflect the value of knowledge received, I have gained comfort in the words of my Elders who have told me how much they have enjoyed our visits and conversations. I appreciate their invitations to come again. I feel it a blessing to have spent this time with them and look forward to continuing my relationship with each one of them – far beyond the conclusion of this dissertation.

#### **j. Data and Analysis**

The analysis of my gathering transcript and interviews took place continuously as my research project progressed. I have come to acknowledge that analysis is not a neatly bound process that takes place somewhere between fieldwork and writing. Rather, the process of analysis began in the field as I noticed certain themes or points of interest emerging out of my discussions with my participants. As I became aware of these patterns I would inquire into certain situations or ideas more deeply with some participants than others. In addition, analysis

has lasted well into the writing process in this project, as I continue to develop my understanding and interpretation of the teachings shared with me through the challenging process of writing about it.

My basic procedure was this. Immediately upon returning home from a “teachable moment” I would transcribe my notes from my notebook. At this time, I would make distinctions between my own conclusions and questions I had jotted down during the meeting and the actual words of my participants. I would then divide my own comments into two categories: 1) follow-up questions and 2) initial conclusions.

As previously mentioned, I hired my sister to transcribe my interviews. I was initially worried that this would be detrimental to my research, as I felt it could benefit me to “re-live” the interviews through the transcription process. However, I found this method benefited me in two ways. First, it allowed for a faster turn-around of the transcriptions and as a result, my follow-up interviews could occur rather quickly while my participants were still contemplating the research project. Secondly, and perhaps most importantly, it ensured that the transcriptions remained as unbiased as possible. As I came to realize through the transcription of my own notes, oftentimes I found myself drawing conclusions about the Hul’qumi’num legal tradition that were not articulated in the actual words of my participants themselves.

Following the transcription of fieldnotes and interviews, I read through each interview and made margin notes. I applied the same process to my own fieldnotes. I focused on making margin notes based on the topics being discussed. After my notes were completed, I loosely sorted the margin notes, looking for patterns and themes, scanning them for similarities and differences. Out of that process, a set of categories developed.

The second step of the analysis was a re-read all of the transcripts, focussing on these categories. I used colours to signify certain categories and then coded the transcripts with coloured highlighters and post-it notes. As I coded the texts, certain ideas, patterns and theoretical links occurred to me and I began to make skeletal chapter outlines based on the findings of this initial analysis. I also began to make note of categories that required further exploration in order to fully analyse the significance of the teachings shared.

Analysis has continued through the process of writing this dissertation. As I have shared chapter drafts with colleagues and community members, new categories have come to light and I have continued to re-organise the structure of my dissertation. As a result, original categories have shifted and changed as my understanding of my participants' words, the research material, and my relationship to the Hul'qumi'num legal tradition has continued to develop through the writing process.

#### **k. Writing**

The most important aspect of writing this dissertation, for me, has been the attempt to honour both the words of my Elders and my own experiences as a living participant in the Hul'qumi'num legal tradition. For me, this thesis focuses on the lived experiences of the Hul'qumi'num Mustimihuw, their stories and their teachings. Often the teachings shared conjured up deep emotions for both my Elders and me. As a result, the stories shared in this dissertation should be personal and include my participants' stories or perspectives in their own words.

However, because the research is part of a legal dissertation, analysis is required. It is not enough to simply reproduce the discussions of my Elders and leave analysis for the reader. Given the enormity of the subject-matter I have often hesitated to draw over-arching legal

conclusions. Accordingly, as described briefly above, I have decided to base my conclusions on my own personal experiences as a participant within the Hul'qumi'num legal tradition. This approach is the most appropriate one to take within Hul'qumi'num law because it preserves the integrity of my Elder's teachings by reproducing them in their entirety. I have followed those passages with my own analysis of the legal teachings shared.

Furthermore, I have used italicized sections in each chapter to describe my emotional connection to each subject. This is in keeping with an autoethnographical approach. It also allowed me to convey to the reader where I was in my learning process at the time of writing. I felt encouraged to write about my research as a learning process, which included personal reflection, joy, sadness and frustration – all of which contributed to the entire research experience. Writing has been as much a part of my research journey as the fieldwork was for me; however, the final product represents only a snapshot of my Elder's teachings and of my experience as a student of the Hul'qumi'num legal tradition.

## **2.4 Conclusion**

Indigenous researchers belong to the research. As Ladson-Billings states, "My research is part of my life and my life is part of my research."<sup>92</sup> As scholars, we are still too often embedded in a dominant academic culture that claims the personal contaminates the search for meaning and the farther the distance between "research" and "researched" the more reliable the result. It is clear that the nature of the research that we do as Indigenous people must carry over into the rest of our lives. It is not possible for us to compartmentalize the relationships that we are building apart from the other relationships that make us who we are.

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<sup>92</sup> Gloria Ladson-Billings, "Racialized Discourses & Ethnic Epistemologies" in NK Denzin & YS Lincoln, eds, *Handbook of Qualitative Research*, 2d ed (Thousand Oaks, CA: Sage, 2000) 257 at 268.

My connection to this research played an important role in determining both my research methodology and the tools and practices that I used to carry out this research. Recognizing the importance of developing relationships and maintaining connections between people, ancestors and the land to the Hul'qumi'num legal tradition, I utilized a methodology that respected that teaching. Autoethnography was also drawn on to allow for my own reflexivity throughout this dissertation. As a result, I utilized many different research tools and practices throughout this research project. Some, such as interviews, are familiar research methods, and others, such as my naming ceremony, may be considered foreign to some. However, all were utilized because of the understanding that Hul'qumi'num law cannot be understood apart from the context in which it takes place – in people's lives, in my life.

## CHAPTER 3

### Literature Review: Learning from Previous Travellers

“One’s destination is never a place but rather a new way of looking at things.”<sup>1</sup>

#### *The road less travelled*

*Before embarking on my journey throughout the legal landscapes of the Hul’qumi’num Mustimuhw, my thoughts turned to those who have gone before me. Although I recognize that I am taking the “road less travelled” by examining the Hul’qumi’num legal tradition, there are many travellers who have journeyed throughout the Coast Salish world before me. They have left their imprint upon the mountains and valleys of this territory.*

*Perhaps the first significant “explorer” of this complex and somewhat rocky and rugged terrain was Xeel’s – The Transformer. Xeel’s was the first arbiter of justice in the Coast Salish world. He travelled these lands extensively – from the springs of Porlier Pass to the inlets of Greenpoint. Throughout these travels he altered the Coast Salish landscape, transforming individuals into rocks and animals, to serve as a reminder to the Coast Salish people of the ways in which they should order their life.*

*As a backpacker examines maps before he travels into an unfamiliar territory, I started my journey by pouring over any and all of Xeel’s accounts that I could get my hands on. I read and re-read the works of Franz Boas<sup>2</sup>, Beryl Cryer<sup>3</sup> and Dan Marshall<sup>4</sup>. I poured over the Coast*

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<sup>1</sup> Henry Miller, *Big Sur and the Oranges of Hieronymus Bosch* (New York: New Directions Publishing Corporation, 1957) at 25.

<sup>2</sup> Randy Bouchard & Dorothy Kennedy, eds, *Indian Myths & Legends From The North Pacific Coast of America: A Translation of Franz Boas’ 1895 Edition of Indianische Sagen von der Nord Pacifischen Küste Amerikus* (Vancouver: Talonbooks, 2006).

<sup>3</sup> Chris Arnett, ed, *Two Houses Half-Buried in Sand: Oral Traditions of the Hul’q’umi’num’ Coast Salish of Kuper Island and Vancouver Island by Beryl Mildred Cryer* (Vancouver: Talonbooks, 2008) [Arnett, *Two Houses Half-Buried*].

<sup>4</sup> Dan Marshall, *Those Who Fell From the Sky: A History of Cowichan Peoples* (Duncan: Cowichan Tribes, 1999).

*Salish 'myths' collected by Diamond Jenness.<sup>5</sup> I contemplated the accounts recorded by the Hul'qumi'num Treaty Group in earlier research projects and the writings of Brian Thom<sup>6</sup>. I was hoping that through gaining an understanding of the legal principles Xeel's was trying to teach my ancestors, I could delimit and demarcate a clear path upon which to make my journey.*

*Unfortunately, such a clear path never came to light through my research. But that is not to say that my preparation was in vain. I learned a great deal from Xeel's through this process. First, from reading and hearing various versions of Xeel's actions, I learned that everyone's journey is different – and that is a strength of this legal system. One criticism of Indigenous legal traditions is that they are indeterminate or unintelligible.<sup>7</sup> As described by Borrows, some Indigenous laws are framed as stories, songs, practices and customs, and as a result, they may be criticized as not being prescriptive enough for citizens to follow.<sup>8</sup> At first, I must admit, these types of criticisms entered my thoughts as well. I remember reading stories that seemed to describe the same event; however, details were sometimes very different. Some stories were very short, while others were very descriptive. I found myself favouring the lengthier accounts, ignorantly refusing to believe that the shorter narratives (sometimes only a paragraph or two) had anything of value to contribute to the Hul'qumi'num legal tradition.*

*However, a discussion with one of my Elders changed my perspective completely. He explained to me that we are given knowledge line upon line, precept on precept. In trying to describe why my great uncle Angus was telling me a specific story, even though it appeared unrelated to the question I had initially asked, he stated:*

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<sup>5</sup> Diamond Jenness, *Faith of a Coast Salish Indian* (Victoria, B.C.: British Columbia Provincial Museum, 1955) [Jenness, *Faith of a Coast Salish*].

<sup>6</sup> Brian Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World* (PhD Thesis, McGill University Department of Anthropology, 2005) [unpublished].

<sup>7</sup> John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 138-142 [Borrows, *Canada's Indigenous Constitution*].

<sup>8</sup> *Ibid* at 139.

Sometimes he's looking for something. He'll go on and all you can do is just bear with it. In some cases it will verify what he has to say later. In some cases, it may be totally different information, but it may be valuable. He used to tell me stories with all these different places, no connection whatsoever, but months later he'd finish the story and it would answer my question.<sup>9</sup>

*This process of sharing information accounts for differences I found within the writings on Xeel's. Great uncle Angus helped me to see that I could find legal guidance in small, tangential and sometimes conflicting accounts if I placed what I learned in a broader Hul'qumi'num context. Verification of a story's usefulness would come through accumulating details and the subsequent cross-referencing of those details over time.*

*This concept of incremental and holistic learning helped me realize that because all individuals are treated uniquely, they are taught in a manner which reflects their current understanding and their individual needs. What a beautiful concept. To me, this principle is fundamental justice at its highest level. A legal system built upon this notion would recognize a core set of legal principles; however, it would apply them in a manner which recognizes the individual circumstances of each person. This goal is similar to that of the common law system; demonstrating that these legal traditions share similar ideals.*

*Secondly, in my literature review, I learned that we are never alone in our journeys. As I poured over the accounts written about Xeel's, I began to realize that individuals have recognized the strength of these stories for many years. Although they may not have been recorded or studied with the same purpose in mind, each traveller had spent a considerable amount of time on their own journeys throughout the Coast World. How did they navigate their way through this rocky terrain? What were their encounters like? What did they learn from my ancestors? How were they "transformed" as people? How did they "transform" my people? I*

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<sup>9</sup> Interview of Arvid Charlie (8 November 2009).

*realized that I had a lot to learn, both good and bad, from these early explorers of the Coast Salish world. They may help to point out the mountains that may be difficult to climb or the rivers that may be too fast to navigate alone. Understanding their success and errors can help me proceed. Although my path may not be clear, they may help me avoid some of the potential pitfalls of my research project, or they may point out a shortcut – known only to those who've spent years within the Coast Salish world.*

### **3.1 Introduction**

As previously mentioned in the introductory chapter, and alluded to in the section above, many scholars who attempt to study Indigenous legal traditions are entering uncharted territory (from a formal academic standing). Although Indigenous societies customs and practices have long been a source for academic research, rarely have these customs and practices been examined from a legal perspective. Accordingly, when one sets out to engage in this type of research, often they must rely heavily on primary research methods to gather information and data to be analyzed. However, this does not mean that the work of previous academics and researchers within these Indigenous communities is of no use to us.

John Borrows argues that law must be explained by reference to the cultures in which indigenous peoples live,<sup>10</sup> and I agree. If, as illustrated in the previous chapter, an understanding of the Hul'qumi'num worldview is vital to the process of learning about the Hul'qumi'num legal tradition, then it is a logical inference that one cannot understand Hul'qumi'num legal principles or laws without contextualizing those principles and laws within Hul'qumi'num culture. Accordingly, in this chapter I will examine the contributions of the travellers who have gone before me. I do this - not in an attempt to draw out Hul'qumi'num laws from their observations and understandings - but rather to help illustrate the culture in which these laws operate.

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<sup>10</sup> See generally Borrows, *Canada's Indigenous Constitution*, *supra* note 7.

Through my observations of the work of the travellers who have gone before me, I have come to the conclusion that there are three main aspects to the Hul'qumi'num culture which act as the theoretical foundation for its legal tradition. These three aspects are: 1) Ancestors and Spirituality; 2) Kinship and Social Groupings; and 3) Land and Property. These three concepts will be explored in detail throughout this chapter, and their significance to and influence on the Hul'qumi'num legal tradition will be discussed. This examination will aid in the recognition of this legal tradition, because thinking about Hul'qumi'num laws in their cultural context will help individuals to understand that they are not unintelligible or indeterminate.

For over one hundred and twenty-five years, the Coast Salish people, including the Hul'qumi'num Mustimuhw, have been studied, observed and written about. While the earlier traders from the Hudson Bay Company wrote about their encounters with Coast Salish people, arguably, the earliest 'outsider' academic research done within the Coast Salish world began with the arrival of Franz Boas in 1886.<sup>11</sup> Since that time, many others, 'outsider' and 'insider' researchers, have spent time amongst the Coast Salish people. The types of research conducted can perhaps be classified into three time periods, all relating to the timeframe produced by the research of Wayne Suttles,<sup>12</sup> an American anthropologist and linguist, i.e. pre-Suttles in the late

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<sup>11</sup> See generally, Bouchard & Kennedy *supra* note 2.

<sup>12</sup> Wayne Suttles, "Central Coast Salish" in Wayne Suttles, ed., *Handbook of North American Indians Volume 7, Northwest Coast* (Washington: Smithsonian Institution Press, 1990) [Suttles, "Central Coast Salish"]; Wayne Suttles, "Central Coast Salish Subsistence" (1990) 24:2 *Northwest Anthropological Research* 147 [Suttles, "Central Coast Salish Subsistence"]; Wayne Suttles, "Affinal Ties, Subsistence and Prestige among the Coast Salish" in Wayne Suttles, ed, *Coast Salish Essays* (Vancouver: Talonbooks, 1987)16 [Suttles, "Affinal Ties"]; Wayne Suttles, "Coping with Abundance: Subsistence on the Northwest Coast" in Wayne Suttles ed, *Coast Salish Essays* (Vancouver: Talonbooks, 1987) 45; Wayne Suttles, "Persistence of Intervillage Ties among the Coast Salish" in Wayne Suttles, ed, *Coast Salish Essays* (Vancouver: Talonbooks, 1987) 209 [Suttles, "Persistence of Intervillage Ties"]; Wayne Suttles, "The Plateau Prophet Dance among the Coast Salish" in Wayne Suttles, ed, *Coast Salish Essays* (Vancouver: Talonbooks, 1987) 152; Wayne Suttles, "Private Knowledge, Morality and Social Classes among the Coast Salish" in Wayne Suttles, ed, *Coast Salish Essays* (Vancouver: Talonbooks, 1987) 1-15 [Suttles, "Private Knowledge, Morality"]; Wayne Suttles, "Productivity and its Constraints – A Coast Salish Case" in Wayne Suttles, ed, *Coast Salish Essays* (Vancouver: Talonbooks, 1987) 100; Wayne Suttles, "Spirit Dancing and the Persistence of Native Culture among the Coast Salish" in Wayne Suttles, ed, *Coast Salish Essays* (Vancouver: Talonbooks, 1987) 199; Wayne Suttles, "The Variation in Habitat and Culture on the Northwest Coast" in Wayne

1880s, the Suttles period between the 1950s and the early 1990s and post-Suttles after the turn of the millenium.

According to Bruce Miller, before Suttles, the Coast Salish region had suffered as an area of academic interest, not receiving the same attention as other areas of the Northwest Coast.<sup>13</sup> He credits this to the salvage paradigm, prevalent during the early twentieth century among anthropologists such as Franz Boas, based on the notion that Indigenous life and peoples would soon disappear due to rapid dying out or assimilation. As a result, Boas, who profoundly respected the agency and accomplishment of Indigenous peoples,<sup>14</sup> felt that any distinctive socio-cultural features should quickly be recorded.<sup>15</sup> Since the Coast Salish people seemed to be irredeemably corrupted by non-Indigenous influences, little effort was made to study them.<sup>16</sup>

As Miller so persuasively argues, many of these early works on the Salish were based on reporting on a wide range of topics, such as kinship, material culture, technology, oral traditions etc., rather than on advancing theoretical notions regarding the region.<sup>17</sup> Unlike the research

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Suttles, ed, *Coast Salish Essays* (Vancouver: Talonbooks, 1987) 26; Wayne Suttles, “The Halkomelem Sxwayxwey” (1982) 8:1 *American Indian Art Magazine* 56; Wayne Suttles, *The Economic Life of the Coast Salish of Haro and Rosario Straits* (New York: Garland Publishing Inc., 1974); Wayne Suttles, “Post-Contact Culture Change among the Lummi Indians” (1954) 18:1-2 *British Columbia Historical Quarterly* 29; Wayne Suttles, “The Early Diffusion of the Potato among the Coast Salish” (1951) 7 *Southwestern Journal of Anthropology* 272.

<sup>13</sup> Bruce Miller, ed, *Be of Good Mind: Essays on the Coast Salish* (Vancouver: UBC Press, 2007) at 2 [Miller, *Be of Good Mind*].

<sup>14</sup> Herbert Lewis, “Franz Boas: Boon or Bane” (2008) 37 *Reviews in Anthropology* 169.

<sup>15</sup> *Ibid.*

<sup>16</sup> Susan Roy, *These Mysterious People: Shaping History and Archaeology in a Northwest Coast Community: The story of how the Musqueam First Nation have used cultural objects to take control of their history and land* (Montreal: McGill-Queen’s Press, 2010).

<sup>17</sup> See generally Charles Hill-Tout, “Ethnological Report on the Stse’ēlis and Sk’aūlits Tribes of the Halkōmē’lem Division of the Salish of British Columbia” (1904) 34 *Journal of the Anthropological Institute of Great Britain and Ireland* 311; Charles Hill-Tout, “Some Features of the Language and Culture of the Salish” (1905) 7:4 *American Anthropologist* 674; Charles Hill-Tout, “Report on the Ethnology of the South-eastern Tribes of Vancouver Island, British Columbia” (1907) 37 *Journal of the Royal Anthropological Institute of Great Britain and Ireland* 306; Edward Curtis, *The North American Indian* (Charleston: BiblioLife, 2008); Thelma Adamson, *Folk-Tales of the Coast Salish* (New York: Kraus Reprint, 1969); Jenness, *Faith of a Coast Salish*, *supra* note 5; Homer Barnett, “The Coast Salish of Canada” (1938) 40:1 *American Anthropologist* 118; Homer Barnett, “The Nature of the Potlatch” (1938) 40:3 *American Anthropologist* 349; Homer Barnett, *The Coast Salish of British Columbia* (Eugene: University of Oregon Press, 1955) [Barnett, *Coast Salish of British Columbia*]; Homer Barnett, “The Coast Salish of Canada” (1939) 40 *American Anthropologist* 118 [Barnett, “Coast Salish of Canada”].

done by more recent academics and researchers, individual people were largely absent from these early studies, and in their place, a normative culture was described. Miller also points out that during this early research period, the Coast Salish world was regarded as being a “receiver area” – an area that received cultural developments that had been created by supposedly “core” Northwest Coast groups, such as the Nuu-chah-nulth people of the west coast of Vancouver Island and the Kwakwaka'wakw people of the north end of Vancouver Island and the adjacent islands and British Columbia mainland.<sup>18</sup>

The late 1980s and early 1990s was a turning point in the study of the Coast Salish people and Wayne Suttles was at the forefront of this movement. Suttles disputed the previous theories surrounding the Coast Salish and his research was integral in developing the notion that the presence of dispersed, bilateral kin groups was related more to patterns of local ecology than the absence of a matrilineal clan system.<sup>19</sup> However, he did not work alone in promoting this theory. Other researchers, both of his generation and the one before, such as Diamond Jenness,<sup>20</sup> Barbara Lane,<sup>21</sup> Sally Snyder,<sup>22</sup> Wilson Duff,<sup>23</sup> Pamela Amoss,<sup>24</sup> and William Elmendorf,<sup>25</sup> all

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<sup>18</sup> Miller, *Be of Good Mind supra* note 13 at 2-3.

<sup>19</sup> *Ibid* at 3.

<sup>20</sup> Jenness, *Faith of a Coast Salish, supra* note 5; Diamond Jenness, *Coast Salish Mythology* (1935), Hull, Canadian Museum of Civilization (VII-G-9M, Box 39, F.1.); Diamond Jenness, *The Saanich Indians of Vancouver Island* (1935), Ottawa, Canadian Ethnology Service Archives, Canadian Museum of Civilization (Ms. 3 VII-G-8M) [Jenness, *The Saanich Indians*] cited in Dorothy Kennedy, *Looking for Tribes in all the Wrong Places: An Examination of the Central Coast Salish Social Network* (MA Thesis, University of Victoria, 1993) [unpublished] at 38 [Kennedy, *Looking for Tribes*].

<sup>21</sup> Barbara Lane, *A Comparative and Analytical Study of Some Aspects of Northwest Coast Religion* (PhD Thesis, University of Washington, 1953).

<sup>22</sup> Sally Snyder, “Quest for the Sacred in Northern Puget Sound: An Interpretation of Potlatch” (1975) 14:2 *Ethnology* 149; Sally Snyder, “Stylistic Stratification in an Oral Tradition” (1968) 10:1 *Anthropologica* 235; Sally Snyder, “Skagit Society and its Existential Basis: An Ethnofolkloristic Reconstruction” (PhD Thesis, Department of Anthropology, University of Washington, 1964).

<sup>23</sup> Wilson Duff, “The Fort Victoria Treaties” (1969) 3 *BC Studies* 3; Wilson Duff, *The Upper Stalo Indians of the Fraser Valley, British Columbia* (Victoria: British Columbia Provincial Museum, 1952) [Duff, *The Upper Stalo*].

<sup>24</sup> Pamela Amoss, *Coast Salish Spirit Dancing: The survival of an Ancestral Religion* (Seattle: University of Washington Press, 1978) [Amoss, *Coast Salish Spirit Dancing*]; Pamela Amoss, “The Power of Secrecy among the Coast Salish” in R Adams, ed, *The Anthropology of Power: Ethnographic Studies from Asia, Oceania and the New World* (New York: Academic Press, 1977) 131 [Amoss, “Power”]; Pamela Amoss, “Strategies of Reorientation: The

contributed to a greater understanding of the Coast Salish communities. This research period produced some of the most thorough ethnographic accounts from the Central Coast Salish. Wayne Suttles remains noteworthy in this field because the theoretical contributions that emanated from his research form the basis of most of the discussion amongst scholars interested in the Coast Salish today.

The turn of the millennium was another watershed in Coast Salish scholarship. During this period several important monographs were published that, for the first time, named specific Indigenous individuals and gave a more detailed and theorized consideration of historical change.<sup>26</sup> The Coast Salish people in the works written during this period were described in relation to other populations, particularly the settlers, rather than in isolation.<sup>27</sup> Arguably, this field of research had been relatively dormant since the 1970s, and these works illustrate a rejuvenation of the study of Coast Salish cultures and communities. Rather than focusing on salvage anthropology, strictly local issues or assimilation, these writings illustrate the connections between the larger scholarly fields and work conducted on the Coast Salish. More recently, historians, anthropologists and other social scientists and community intellectuals have begun to work together to create a more holistic description of the Coast Salish world.<sup>28</sup>

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Contribution of Contemporary Winter Dancing to Coast Salish Identity and Solidarity” (1977) 14:1 *Arctic Anthropology* 77.

<sup>25</sup> William W Elmendorf, *Twana Narratives: Native Historical Accounts of a Coast Salish Culture* (Seattle: University of Washington Press, 1993); William W Elmendorf, “Coastal and Interior Salish Power Concepts: A Structural Comparison” (1977) 14:1 *Arctic Anthropology* 64; William W Elmendorf, “Coast Salish Status Ranking and Intergroup Ties” (1971) 27 *Southwestern Journal of Anthropology* 353 [Elmendorf, “Coast Salish Status Ranking”].

<sup>26</sup> Brad Asher, *Beyond the Reservation: Indians, Settlers, and the Law in Washington Territory, 1853-1889* (Norman, OK: University of Oklahoma Press, 1999); Crisca Bierwert, *Brushed by Cedar, Living by the River: Coast Salish Figures of Power* (Tucson: University of Arizona Press, 1999); Bruce Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* (Lincoln: University of Nebraska Press, 2001) [Miller, *The Problem of Justice*].

<sup>27</sup> Miller, *Be of Good Mind*, *supra* note 13 at 5.

<sup>28</sup> See generally Arnett, *Two House Half-Buried*, *supra* note 3; Keith Thor Carlson, *The Power of Place The Problem of Time: Aboriginal Identity and Historical Consciousness in the Cauldron of Colonialism* (Toronto:

The contributions of these early travellers in the Coast Salish world in each of these three time periods are considerable and encompass a wide range of topics. However, with the exception of Bruce Miller's work,<sup>29</sup> few of these scholars focused specifically on the legal traditions of the Coast Salish peoples, and none studied Hul'qumi'num legal traditions. Again, this does not mean that these writings have not contributed to my understanding of the Hul'qumi'num legal tradition.

As I have studied the observations of previous travellers in the Coast Salish world, I have come to recognize that their understandings help to form a theoretical underpinning of the Hul'qumi'num legal tradition. The Hul'qumi'num legal tradition, at its core, is based upon recognizing relationships and building and maintaining connections. When considered in this manner, the writings of earlier and present academics on the Coast Salish people have a lot to say about relationships. In particular, I have found that the scholarship regarding Coast Salish notions of ancestors, kinship and land are integral to developing an understanding of the Hul'qumi'num legal tradition.

In a sense, these three topics: 1) ancestors 2) kinship and 3) land are somewhat similar to a first-year curriculum in law school. They provide an essential foundation for subsequent study in the Hul'qumi'num legal tradition and help to illustrate the Coast Salish worldview, or framework, within which legal analysis should occur. In this chapter, I will highlight the contributions of some of these earlier travellers to these three essential topics. I will examine their observations and seek to explain how these findings contribute to a greater understanding of the Hul'qumi'num legal tradition and foster its recognition.

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University of Toronto Press, 2010) [Carlson, *The Power of Place*]; Marshall, *supra* note 4; Miller, *Be of Good Mind*, *supra* note 13; Thom, *supra* note 6.

<sup>29</sup> See generally Miller, *Problem of Justice*, *supra* note 26.

In my chapter conclusion, I will also explore how other scholars studying Indigenous legal traditions have been able to utilize scholarship by ethnographers, linguists, anthropologists, historians etc. in order to advance their research. Along these lines, I will briefly examine how my research helps to contribute to the growing field of Indigenous legal traditions. It is my hope that through studying the journeys of these scholars, my journey, and the journey of those who come after me, will be made easier.

### **3.2 Theoretical Foundations of the Coast Salish Legal Tradition**

#### **a. Ancestors and Spirituality**

As articulated by the research of Barbara Lane,<sup>30</sup> the Hul'qumi'num people are one of the last strongholds of Coast Salish religion.<sup>31</sup> They have preserved many of the practices and beliefs which have been lost among their neighbours and the Hul'qumi'num area is recognized as a centre of winter spirit dancing.<sup>32</sup> However, it is important to note that the Hul'qumi'num people have been in contact with Catholic and Protestant missionaries for the past century and a half. As a result, one must acknowledge that some reinterpretation of their spiritual beliefs has taken place. The existence of syncretism in Indigenous practice is a well-recognized phenomenon.<sup>33</sup> Properly understood and executed, syncretism flows from and creates principles of respect and reciprocity within the Coast Salish religion.

This section of the chapter will focus on the previous travellers' observations around Coast Salish spirituality, and in particular, their beliefs about their ancestors. These observations are important to this research because spirituality permeates every aspect of a Hul'qumi'num person's life. In thinking about the relevance of spirituality, I realized that duties and obligations

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<sup>30</sup> See generally Lane, *supra* note 21.

<sup>31</sup> *Ibid* at 1.

<sup>32</sup> *Ibid*.

<sup>33</sup> Simon Ortiz, "Indigenous Continuance: Collaboration and Syncretism" (2011) *American Indian Quarterly* 285.

are owed not only to the living, but also to one's ancestors. Furthermore, one's actions and decisions not only affect living family members, but also family members who have passed on. This worldview is vital to understanding the Hul'qumi'num legal tradition because it brings clarity to the questions: to whom do we owe a legal obligation, and what are those obligations? In my research I have identified two principles which help to answer these questions. The first is the principle of respect and the second is the principle of reciprocity. Furthermore, the research of those previous travellers have also helped bring insight about why the Hul'qumi'num Mustimuhw believe they owe obligations to their ancestors.

### **i. The Principle of Respect**

Have I received any teachings from my parents or Elders? Yes. I've always been told to be, to be careful and be mindful [of] our, of our Ancestors. You always pay respect. It's like when you visit, visit a gravesite, you have to carry yourself in a certain way ... You always have to have a prayer in your hear and *tsiit sulwheen* [thank ancestors] I guess thank them and in a very respectful way. I guess with that all just go in the teachings.<sup>34</sup>

As part of my literature review, one of the most comprehensive works I encountered is a report of the Hul'qumi'num Treaty Group entitled, "*A'lhut tute et Sulhween: 'Respecting the Ancestors.'*"<sup>35</sup> This work is so valuable because it draws on the words of respected Elders within our communities. It states: "If there is one central principle that underlies the basis for all discussion about archaeological heritage by our Hul'qumi'num Elders and participants, it is that the ancestors and their ancestral places must be respected."<sup>36</sup> These ancestral places are respected and valued because "they embody inherent social values that connect 'people' –

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<sup>34</sup> Eric McLay et al, *A'lhut tut et Sulhween "Respecting the Ancestors": Report of the Hul'qumi'num Heritage Law Case Study* (Ladysmith: Hul'qumi'num Treaty Group, 2004) at 18.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

specifically themselves and their ancestral relations.<sup>37</sup> Kinship relations are not only recognized as extending across broad geographic regions, but across generations over time. The Hul'qumi'num Treaty Group report suggests that Hul'qumi'num communities today regard these sacred sites as a natural extension of their system of kinship and customary laws about inherited property and mortuary practices.<sup>38</sup> I will briefly recount what I learned in reviewing this work, as it relates to my dissertation.

According to Hul'qumi'num Elders, their ancestors continue to maintain responsibility for their cultural property, in particular the ancient objects, or artifacts, that are buried with them.<sup>39</sup> Florence James states:

Ancient objects, when we're finding them, in a way, we cherish it. The people cherish it because it belonged to our Ancestors, ancient objects. We don't touch it when it's from a graveyard. We don't touch it when it's in the casket or the little homes [above-ground grave houses] that I remember. We don't touch that. That belongs to them. And we're forbidden to touch it. But when we find, like lately, the odd time, people finds it. And we cherish it as long as it's not in the graveyard.<sup>40</sup>

Mable Mitchell explains some of the reasoning behind this teaching:

We were taught not to take anything from a grave. Even now, you don't do that. You respect the deceased because if you take something from there, something bad will happen to you and bringing something home from a dead person, they'll always follow what they own and they'll want it back. And, and that's when you'll get haunted. And you won't have no rest. You'll be bothered all the time until you return that.<sup>41</sup>

Abner Thorne explains this concept by comparing it to the holding of an ancestral name. Similar to an ancestral name, an artefact is not something that an individual owns, rather it is family-

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<sup>37</sup> *Ibid* at 19.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid* at 19.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid* at 19-20.

owned inherited property that the name holder must honour by good conduct and pass along to the care of their descendants.<sup>42</sup>

The principle of respect identified by this report is a principle that I have had stressed to me numerous times over as I've conducted my own research. What this teaches me is that there is no distinction between the living and the dead in the Coast Salish world. Everything and everyone is connected, so the duties and obligations that I owe to my fellow Hul'qumi'num Mustimuhw are no different from the duties and obligations that I owe to my ancestors. It is only through acknowledging and honouring this connection that one can truly begin to understand the Hul'qumi'num legal tradition. We have highly developed laws related to the life after-life. This report is a valuable resource for understanding these laws and obligations and it is also a valuable resource in helping us to understand the cultural context in which the Hul'qumi'num legal tradition operates.

## **ii. Principle of Reciprocity**

As explained in Chapter 2, part of my 'literature' review is family-based. In a community with an oral literacy the words of my Elders and immediate family help me to understand the research terrain I am exploring. The family I must learn from include the living and the so-called dead. As explained to me by my father, Hul'qumi'num culture continues to maintain strong customary laws concerning the dead. He told me that he remembered my grandmother talking to him about death and a fear of the spirits that did not end with a burial, but persisted for many generations. As a result, there are many social and ceremonial responsibilities associated with death.

The Hul'qumi'num Elders teach that we are "socially bound" to care for the deceased.<sup>43</sup> This entails a number of familial responsibilities, such as ensuring that the deceased is afforded a

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<sup>42</sup> *Ibid* at 20.

proper funeral, their burial site and physical remains are respected, and the needs of their spirits are tended to through the appropriate mortuary rituals.<sup>44</sup> Pamela Amoss observed that the deceased depend upon living kin to fulfill their needs, such as food, their belongings and respect.<sup>45</sup> Barnett observed that families who neglected their deceased were denounced by other families and the deceased themselves.<sup>46</sup> As one can imagine, neglect or improper care of the deceased is a community concern and is regarded as dangerous not only for the family members of the deceased, but for the entire community.<sup>47</sup>

However, the responsibility to care for and respect the deceased is not entirely based upon the fear of harm against the living. It is also understood to be advantageous to foster relations with the deceased because such relations could potentially result in one gaining the deceased's supernatural protection, knowledge and advice.<sup>48</sup> Arvid Charlie describes his experience with this teaching:

I was carrying posts, we were fencing a graveyard, an old graveyard that used to have huts. So it was cleared, brushed out and we were supplying the fence materials. So we were packing it across, right across the graveyard from that top side where the tractor was with all the posts. And I seen what I thought was a bone when I was carrying this post. On the way back up I looked at it and it was a, looked like part of a skull. That was my first experience with something like that. And I told the guys, 'I know what it is. It looks like part of a skull.' So several trips later, we're carrying the posts back and forth, carrying one at a time, I seen what looked like part of a jaw. So I just put them together and that night I asked an elder, 'What should I do with it? What should we do with it?' He asked me what I had done with it and I told him its, its laying there on the ground. He says, 'Well, you found it. You should tend to it right away. First thing in the morning, you be there and you look after it.' So the next morning, I took a friend with me and we went and looked at it and buried it. I go visit it once in a while. I was there a

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<sup>43</sup> *Ibid* at 21.

<sup>44</sup> *Ibid*.

<sup>45</sup> Amoss, *Coast Salish Spirit Dancing*, *supra* note 24 at 75.

<sup>46</sup> Barnett, *Coast Salish of British Columbia*, *supra* note 17 at 221.

<sup>47</sup> McLay et al, *supra* note 34 at 21.

<sup>48</sup> Amoss, *Coast Salish Spirit Dancing*, *supra* note 24 at 73-77.

week ago just to visit. I don't know who it was. Part of that was, was said to me was, 'Don't be afraid of it. You'll look after it. One day it may look after you somehow.' But having said that, this other one's also very important which is almost opposite. If a person is afraid, they shouldn't be there. Meaning for their own safety, they should avoid these kinds of places or situations. And I really, really believe that.<sup>49</sup>

Therefore, Hul'qumi'num people's responsibility to their ancestors establishes a reciprocal relationship between the living and the dead that continues over many generations. As one can imagine, this relationship with Hul'qumi'num ancestors greatly affects the customary legal traditions associated with archeological heritage.

Recognition of and respect for our ancestors and the principles and practices associated with these concepts reaffirm the strong kinship connections that exist in the Coast Salish world and its legal tradition – they extend place and time. And our ancestors continue to play a vital role in our Hul'qumi'num legal tradition and social ordering. The significance of this recognition will be explored in more detail in the following section dealing with kinship.

### iii. **Spirituality and Power**

Of course, Elders and family are not the only people I have learned from in researching this work. Bruce Miller's work stands tall for its insights into how concepts of power influence the Hul'qumi'num laws of obligation and dispute resolution processes in the Coast Salish world. Power amongst the Hul'qumi'num Mustimuhw is fluid. It derives from both human and nonhuman relationships. These concepts of power are of great interest to me as I consider the Hul'qumi'num legal tradition. How did the recognition of power influence conflict resolution processes seemingly built upon the concept of consensus? What was the role of leadership in "law making" and dispute resolution if the concept of spirit helpers meant that the notion of leadership was more fluid? If theoretically everyone had access to these powers, was it still

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<sup>49</sup> McLay et al, *supra* note 34 at 21-22.

possible for an individual or group of individuals to coerce individuals for their own personal gain?

In his discussion of tradition and law in the Coast Salish World, Miller suggests that Coast Salish beliefs in the continued influence of First Ancestors and other spirits has a profound impact on power relations within their communities.<sup>50</sup> As observed by Miller, “Coast Salish cultural ideas of the self have emphasized human subordination to and dependence on more powerful, non-human forces.”<sup>51</sup> Some forces, such as that of the First Ancestors, are anthropomorphized beings and others are not; however, all have the ability to be either beneficial or dangerous to living beings.<sup>52</sup> The difficulty lies in the fact that oftentimes individuals keep their relation to these nonhumans private and therefore the source and extent of their power is unknown to others.<sup>53</sup>

The primary manner in which one of these forces could exercise their power to the living is through soul loss. In her Ph.D. dissertation, Barbara Lane describes soul loss in the following way:

Soul-loss is one of the most frequent causes of illness and may be due to accidental loss or theft. Accidental loss can be caused by a sudden fright or a physical jar such as falling or tipping over in a canoe. The soul may be attracted accidentally by a supernatural being out in the open or by a dancer with a powerful spirit power inside the “big house.” In either case theft is unintentional. A powerful force simply attracts a weak soul. In the case of a dancer whose power draws a soul, both the dancer who has acquired a foreign soul and the owner who has lost it fall sick. Souls are intentionally stolen by shamans and ghosts and they may be drawn away from their owners magically by ritualists. Informants do not think that the soul can wander off and get lost in a dream. There is no taboo about waking a sleeping person suddenly.

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<sup>50</sup> See generally Miller, *Problem of Justice*, *supra* note 26.

<sup>51</sup> *Ibid* at 59.

<sup>52</sup> See generally Jenness, *Faith of a Coast Salish Indian*, *supra* note 5.

<sup>53</sup> See generally Amoss, *Coast Salish Spirit Dancing*, *supra* note 24.

All cases of soul-loss, accidental or intentional, can be cured by shamans. Cases in which the loss was due to theft by ghosts, might also be cured by persons with ghost power who were not shamans.<sup>54</sup>

Because of the severe consequences associated with soul loss, Coast Salish individuals are careful not to offend those with strong spirit powers. Pamela Amoss writes:

Coast Salish Indians are ... genuinely afraid of offending those whom they believe have strong spirit powers, because the spirits may take umbrage at the insult offered their human partners and retaliate without the conscious participation of the injured person.”<sup>55</sup>

As one can imagine, dispute resolution processes could be influenced if one of the parties were recognized as possessing such power.

Another source of power, which not all Coast Salish acquire, is the *sil'ye*, or guardian spirit power. The power can be received a number of ways. Some receive it without intentionally seeking it. For example, in her research Barbara Lane describes that on occasion mourners “inherit” the power that is released from their deceased relative; however, this only occurs if “... [t]here’s already power in him.”<sup>56</sup> Others obtain it only after completing a rigorous process of fasting, training and purification through spirit dancing, or *syowen*. At this time, an individual is thought to be repossessed by his spirit power and gains new powers and abilities once the relationship becomes privately managed.<sup>57</sup> Theoretically, the acquisition of spirit power is highly secret and private event.<sup>58</sup> As a result, it is considered dangerous and can be life threatening, if the spirit power is spoken of and if the spirit is offended.<sup>59</sup>

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<sup>54</sup> Lane, *supra* note 21 at 19-20.

<sup>55</sup> Amoss, “Power”, *supra* note 24 at 134.

<sup>56</sup> Lane, *supra* note 21 at 28.

<sup>57</sup> *Ibid* at 110.

<sup>58</sup> *Ibid* at 33.

<sup>59</sup> *Ibid*.

As one can see, power is not viewed as the property of society, but rather as a manifestation of human and nonhuman relationships. But the fact that this power is rarely spoken of does not mean that individuals are not aware of certain people within the community who have obtained these strong spirit powers. As Miller points out, some individuals were and are known publicly to hold particular social roles as a result of their recognizable spirit powers, i.e. warriors, shamans, carvers and public speakers.<sup>60</sup> Today, the identities of winter dance initiates are well known within the Hul'qumi'num communities. It is important to note that not only were these concepts common in the past, they continue to have influence today and are still taught in big houses throughout the Coast Salish world.<sup>61</sup>

Biewert provides this insightful comment on the implications of Coast Salish concepts of power:

The fact that a local culture works without having a master narrative has resulted in a lot of very bumpy roads in Indian country. Coast Salish social structures have been comparatively decentered, a phenomenon attributable to the history of colonial oppression, but also reflecting laterally distributed power. ... Here, local knowledge fits together loosely and contains contradictory statements about human dynamics and human natures. The "text of culture" is episodic, open to accretion of meaning. To use postmodern terms, the culture is destabilized and decentred; to use more classic terms, power is diffuse, laws and characterizations are applied *ad hominem*, and judgements are *ad hoc*.<sup>62</sup>

If Biewert's assumptions are true, then what does this mean for the Hul'qumi'num legal tradition? Does the Hul'qumi'num conception of power lend itself to a legal tradition that is *ad hoc* in nature? If so, would this it make it unfair or unequal in its application? Would such beliefs about power result in laws that appeal to emotions and not to reason or logic? These

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<sup>60</sup> Miller, *Problem of Justice*, *supra* note 26 at 60.

<sup>61</sup> *Ibid* at 61.

<sup>62</sup> Biewert, *supra* note 26 at 5-6.

questions are further complicated by the role that kinship and social groupings play in the Coast Salish world.

#### **b. Kinship and Social Groupings**

During my journey, I have also found the research of previous travellers who studied the kinship and social groupings of the Coast Salish people to be relevant to my understanding of the Hul'qumi'num legal tradition. Building relationships and maintaining connections is at the core of the Hul'qumi'num world view. There are four different types of relationship that have been recognized within the Hul'qumi'num communities: 1) the family; 2) the local group; 3) the village; and 4) the tribe. Although the physical space that these four groups occupy has changed over the years, the relationship and obligations amongst and between these groups have remained relatively the same. Accordingly, the previous research on these social groupings provides valuable insight into the Hul'qumi'num legal tradition. They provide valuable insight into the processes of family law making. They also help one to understand the role of kinship in dispute resolution processes.

This literature review has taught me that one of the most debated issues in the Coast Salish ethnographic tradition concerns what models, formulations and terms should be used to describe social and political organization.<sup>63</sup> Anthropological field research among the Central Coast Salish beginning with Boas and followed by Hill-Tout and others such as Jenness, Barnett, Duff, Suttles and Elmendorf, suggests that each of these researchers struggled with the problem of discerning Coast Salish social units and their interrelationships. Perhaps the most thorough analysis of the available ethnographic material concerning Coast Salish social organization has

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<sup>63</sup> Thom, *supra* note 6 at 75.

been undertaken by Suttles<sup>64</sup> and Elmendorf.<sup>65</sup> Their examinations of Coast Salish kinship and social groupings rely substantially on their own field work, but also draw upon the ethnographic material gathered by their colleagues Duff and Fetzer, in addition to the work of earlier researchers including Stern, Jenness and Barnett. Through her research, Dorothy Kennedy<sup>66</sup> has also contributed greatly to the dialogue around social, political and economic organization. More recently, Brian Thom has proposed two key units of social organization – the cognatic descent group and residence group.<sup>67</sup> The purpose of this section is to summarize those studies concerning kinship and social organization that are pertinent to the analysis of the Hul’qumi’num legal tradition and conflict resolution in Chapters 5 and 6. Ideas around kinship take on a special legal significance within Hul’qumi’num society. Many of the laws deal with these interpersonal relationships and norms and practices are centered on maintaining relationships that produce harmony. Furthermore, one of the legal categories within the Hul’qumi’num legal tradition finds its expression within the family practices of individual families.

According to Elmendorf, “the term ‘Coast Salish’ has at times been used to denote some kind of ethnological unit. In fact, the Coast Salish are a collection of at least twelve mutually intelligible language groupings in southwestern British Columbia and Western Washington.”<sup>68</sup> However, one factor which tended to interconnect all Coast Salish was a series of relationships

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<sup>64</sup> See generally Suttles, “Private Knowledge, Morality”, *supra* note 12; Suttles, “Affinal Ties”, *supra* note 12; Suttles, “Persistence of Intervillage Ties”, *supra* note 12.

<sup>65</sup> Elmendorf, “Coast Salish Status Ranking”, *supra* note 25.

<sup>66</sup> Dorothy Kennedy, “Quantifying “Two Sides of a Coin”: A Statistical Examination of the Central Coast Salish Social Network” (2007) 153 BC Studies 3; Dorothy Kennedy, “Culture and Politics in the Aboriginal Landscape: Reflections on the Identification of Culturally Significant Places in Western North America” cited in Michael Saltman, ed, *Land and Territoriality* (New York: Berg, 2002) 9; Dorothy Kennedy, *Threads to the Past: The Construction and Transformation of Kinship in the Coast Salish Social Network* (PhD Dissertation, University of Oxford, Department of Anthropology, 2000) [unpublished] [“Kennedy, *Threads to the Past*”].

<sup>67</sup> Thom, *supra* note 6 at 72.

<sup>68</sup> Elmendorf, “Coast Salish Status Ranking”, *supra* note 25 at 355.

between individuals of different localized communities.<sup>69</sup> Some of these relationships were expressed behaviourally in important rituals or ceremonies, while others were expressed solely in interactions between sections of two or more localized social units.<sup>70</sup>

The importance of determining the exact nature of the Coast Salish social unit was stressed by Elmendorf.<sup>71</sup> However, a consensus has not been reached on the identification of these units and their relative level of social cohesion. Elmendorf suggests that Coast Salish ethnographers have consistently identified the localized house cluster or village as the basic community unit.<sup>72</sup> Barnett agrees that the village preserved its own “social unity and autonomy.”<sup>73</sup> Suttles, on the other hand, takes a more specific look at Coast Salish groups and distinguishes four types of residential groups: family; household; local group; and winter village.<sup>74</sup> He also acknowledges a non-localized kinship group, as well as a larger named group which he refers to as a “tribe.”<sup>75</sup> According to Suttles, the village was only one of several equally important social groupings and was not culturally homogenous. Instead, he argues that it was the extended household that was the most important social group,<sup>76</sup> an opinion also shared by Duff.<sup>77</sup> A number of other social groupings could also be identified in the Coast Salish world. These included seasonal or activity-specific aggregates not necessarily identical with residential or kinship groupings.<sup>78</sup>

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<sup>69</sup> *Ibid* at 356.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid* at 357.

<sup>72</sup> *Ibid* at 513.

<sup>73</sup> Barnett, *Coast Salish of British Columbia*, *supra* note 17 at 18.

<sup>74</sup> Suttles, “Persistence of Intervillage Ties”, *supra* note 12.

<sup>75</sup> *Ibid*.

<sup>76</sup> Wayne Suttles, “The Shed-Roof House” in Robin K Wright, *A Time of Gathering: Native Heritage in Washington State* (Seattle: University of Washington Press, 1992) 212 at 214 [Suttles, “The Shed-Roof House”].

<sup>77</sup> Duff, *The Upper Stalo*, *supra* note 23.

<sup>78</sup> Barnett, *Coast Salish of British Columbia*, *supra* note 17.

In considering the concept of residential or kinship groupings and how it relates to the Hul'qumi'num legal tradition and/or processes of dispute resolution, I have found the recent work of Keith Thor Carlson to be quite enlightening. In his work, *The Power of Place the Problem of Time*<sup>79</sup> he argues that cultural groupings have never remained static within the Coast Salish world. He describes how internal and external pressures, both pre- and post-contact, have always resulted in collective identities disappearing and then others being born or reborn in a new form. So it is with the Hul'qumi'num legal tradition. Hul'qumi'num laws are fluid, but sufficiently defined to produce a legal order. Accordingly, in light of my research project, I think it is more important to examine the principles that govern the creation of the collective identities of 1) the family; 2) the local group; 3) the village and 4) the tribe, and consider how they continue to influence the Hul'qumi'num legal tradition, rather than focus on the specific characteristics of the residential or kinship groupings themselves. Relationships and connections are vital to the Coast Salish culture and in order to understand the Hul'qumi'num legal tradition one must contextualize it within the culture of the people. Therefore, identifying and analyzing the decision-making processes that go into determining social groupings will provide valuable insight into why certain laws exist within the Coast Salish world and the ends that those laws are meant to achieve.

#### **i. The Family and Household**

In my review of the literature on social groupings in the Central Coast Salish society two residential units were identified in a common structure: the independent household and the extended household.<sup>80</sup> Details about the composition of Coast Salish households contained in

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<sup>79</sup> See generally Carlson, *The Power of Place*, *supra* note 28.

<sup>80</sup> These terms have been put forward in the literature by Donald Mitchell & Leland Donald, "Archaeology and the study of Northwest Coast Economies" in Barry Isacc, ed, *Research in Economic Anthropology, Supplement 3* (Greenwich, Conn: JAI Press, 1988) at 293-351, who suggest their applicability to residential groups throughout the

the work of Barnett,<sup>81</sup> Jenness,<sup>82</sup> Stern<sup>83</sup> and Suttles<sup>84</sup> indicate that individuals occupying each section of a cedar plank house comprised an independent household at the core of which was a nuclear family, which occasionally included older dependent relatives, orphans and slaves, and that the extended household consisted of several such families related either through male or female lineages. While we no longer reside in plank houses, or practice slavery, both the independent household and extended family continue to be at the centre of Hul'qumi'num legal life.

The marriage system described in the research of these previous travellers in the Coast Salish world allowed for continual adjustments to the environment and fostered some interdependence or affinal links in a number of villages. Barnett referred to these marriage alliances as the establishment of “many homes” and stressed that they brought both security and protection to Coast Salish people.<sup>85</sup> Although the emphasis was on the exchange of individuals, the transfer of food and wealth occurred both prior to and following the marriage. This is supported by the descriptions of marriage proposals and the continuing relations of co-parents-in-law after the death of an adult child.<sup>86</sup> I have witnessed these types of connections recognized in contemporary practices as well. Often at meetings, when speaking of different Tribes such as the Malahat, I have heard Elders express that that is our family too; that we have relatives in Malahat or other such neighbouring communities. This relationship, or connection, is

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Northwest Coast. HG Barnett, “The Coast Salish of British Columbia” in *University of Oregon Monographs, Studies in Anthropology 4* (Westport, Conn: Greenwood Press, 1975) at 21 used the term “household cluster” for the aggregate of several households.

<sup>81</sup> See generally Barnett, “Coast Salish of Canada”, *supra* note 17; Barnett, *Coast Salish of British Columbia*, *supra* note 17.

<sup>82</sup> Jenness, *The Saanich Indians*, *supra* note 20.

<sup>83</sup> See generally Bernhard J Stern, *The Lummi Indians of Northwest Washington* (New York: Columbia University Press, 1934).

<sup>84</sup> See generally Suttles, “Affinal Ties”, *supra* note 12; Suttles, “The Persistence of Intervillage Ties”, *supra* note 12; Suttles, “Central Coast Salish”, *supra* note 12.

<sup>85</sup> Barnett, *Coast Salish of British Columbia*, *supra* note 17 at 182.

<sup>86</sup> Suttles, “Affinal Ties”, *supra* note 12 at 298.

acknowledged in order to establish rights of access in other territories or to help guide decision makers in how to deal with disputes between communities etc.

The research also revealed that, much like today, the independent household was the primary social and economic social grouping. Each independent household obtained and stored its own food, cooked its own meals over its own fire and occasionally went its own way during the summer months.<sup>87</sup> However, members of the extended household often shared food and cooperated in some social, economic and ceremonial activities.<sup>88</sup> The economic autonomy of the independent household and its core members is illustrated by the Jenness' following description of the house structure:

Each married family in this group occupied one segment or room in the dwelling; it owned the wall and roof boards of that segment, either through inheritance or through having cooperated in the building; and it might remove these boards whenever it wished, leaving that portion of the common home wide open ... As a rule a family only removed its wall and roof boards for temporary shelter in a spring or summer camp; but occasionally (e.g. In the event of a quarrel) it removed them permanently and used them for construction of a new home.<sup>89</sup>

Barnett records a similar incident:

An instance is recorded of a quarrel between two brothers at Comox which resulted in the removal of one who stripped his half of the house bare of its walls and roof to set up an independent household with his son-in-law. This was the recourse of a man of means; others could not afford to be so sensitive and preferred for many reasons to maintain their brotherly affiliations. Nevertheless this process of segmentation of the extended family within a village must be looked upon as the ordinary mechanism of its growth. Not infrequently brothers or cousins owned adjacent houses, and in all probability the principle of kinship through males governed the formation of villages and even the aggregates of villages as at Cowichan Bay.<sup>90</sup>

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<sup>87</sup> Kennedy, *Looking for Tribes*, *supra* note 20 at 38.

<sup>88</sup> Suttles, "Intervillage Ties," *supra* note 12 at 513.

<sup>89</sup> Jenness, *The Saanich Indians*, *supra* note 20 at 39.

<sup>90</sup> Barnett, "Coast Salish of Canada", *supra* note 17 at 129.

While Jenness and Barnett's reports stress the importance of "family" autonomy and suggests one form of dispute resolution which supports that emphasis, households generally acted more co-operatively and the entire physical structure would be owned by a single owner or jointly by those who shared in its construction.<sup>91</sup>

These writings on the relationships between family and household have much to teach me as I think about Hul'qumi'num laws and the Hul'qumi'num legal tradition in general. Family is an important component of Coast Salish justice and the extended family is the most important social grouping in the Coast Salish world. I would go further and suggest that Hul'qumi'num justice is centred upon extended families that include not only ancestors but also future generations. Law is thought of as a cycle. It doesn't begin and end with the settlement of a dispute between two individuals. Thought is given to those who came before, those who are affected now and those who may be affected by a decision or resolution. The principles of respect and reciprocity greatly influence these considerations.

The current importance of maintaining these family connections is evident in many of the protocols and processes of the Hul'qumi'num legal tradition. Maintaining family ties and connections requires that an individual be aware of one's family history. This includes one's own family, as well as those acquired through marriage, whereby two families are joined.<sup>92</sup> This concept is especially pertinent today, as many Hul'qumi'num members are choosing to enter into relationships with non-Hul'qumi'num individuals and often non-Indigenous people.<sup>93</sup> These

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<sup>91</sup> Suttles, "The Shed-Roof House", *supra* note 76 at 216.

<sup>92</sup> This concept was illustrated to me at my own marriage where my father-in-law, Tony George, stood up and explained that our families were now connected by virtue of the union between my husband and myself.

<sup>93</sup> The notion of kinship and the role of the extended family and in-laws become significant when considering jurisdiction. Although the concept of jurisdiction is beyond the scope of this research, it is important to note how the Coast Salish kinship system could help to determine those who would be considered to be under the jurisdiction of Hul'qumi'num laws. For example, if non-Hul'qumi'num, or non-Indigenous, individuals are viewed to be "adopted in" to the Hul'qumi'num community through marriage, then it could be possible for these laws to apply to them.

connections are reaffirmed and maintained through several Coast Salish events, such as memorials, marriages, naming, births and puberty rites. During these ceremonies the family history is brought to the floor by a speaker and family connections are publicly acknowledged through the calling of witnesses. When this does not occur the work is not regarded as valid and may be criticized in private, as illustrated by a story that I will share in Chapter 5.

Family and relations are also considered to be integral to the well-being of individuals and larger Coast Salish communities. This is evident both in how children are raised and in the Hul'qumi'num language used to define family. Historically, grandparents or great aunts and uncles raised children, especially the first born. In describing to me how she came to live on Kuper Island, Laura Sylvester shared the following:

I left Chemainus Bay when I was two years old and went to live on Kuper Island. In those days, it was the law that grandparents could take the first grandson born and raise it. That was the Indian law then. So when my grandparents took my brother Randy and moved him to Kuper, my mother followed because my brother was still breastfeeding at the time. That's where I was raised and that's where I raised my children.<sup>94</sup>

Unlike the English terms used today, within the Hul'qumi'num language there is no distinction made between one's grandparents and aunts and uncles from that particular generation. For example, the word *sts'ó:mqw* means grandparents, great aunts and great uncles.<sup>95</sup> Within Hul'qumi'num family units, all the offspring of one's aunts and uncles are considered to be your brothers and sisters. Given the size of the families and the importance of maintaining family relations, orphans (by English definition) are extremely rare and "adoption" meant something entirely different in Hul'qumi'num. For example, the Hul'qumi'num word for adoption, is

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<sup>94</sup> *Hul'qumi'num Treaty Group v Canada*, (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Laura Sylvester).

<sup>95</sup> Keith Thor Carlson et al, eds, *A Sto:lo Coast Salish Historical Atlas* (Vancouver: Douglas & McIntyre, 2001) at 29.

*qwelmie*, which means “to take care of your own.”<sup>96</sup> The Hul’qumi’num language is very revealing in demonstrating how family relations are extremely close and well maintained for seven generations.<sup>97</sup> This insight from the literature is very important to my discussion of dispute resolution in Chapter 6. Disputes are often resolved as through the use of family units and research indicates just how large that family unit may be. It also demonstrates the importance of maintaining strong family relations and as a result, conflict within family units is often dealt with in a very timely and private manner.

As Wenona Victoria describes in her research on child welfare in the Sto:lo nation, “With so many connections and family ties, and so many teachers helping to raise the children, justice was preventative by nature.”<sup>98</sup>

I think most of the justice was taught right from when you were, well from the cradle I guess, so it was part of you (St’eniłhot, 1999:1, transcript).

Well in our, in these old family values I there’s an underlying base. I may be wrong, but I view it as a form of justice because it is prevention (Leonard, 2000:2, transcript).

I think the difference was we were more focused on the values of being a human being. Therefore our whole system supported from, like where your daughter is now, Jade, and even when she was in your womb, the process that we go through in living with one another in growing and teaching one another. So that we had those values that prevented a person from being, from going to the wrong side (Leonard, 2000:1, transcript).

If you’re talking about traditional Sto:lo justice, we need to initially set a framework. One of the values that was taught by our people was that mutual respect and one could generalize in saying that our whole philosophy of life has been based on that value. And consider this in terms of justice that if everyone in our communities held that as one of their basic values in their make-up and philosophy of life then you can

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<sup>96</sup> Wenona Victor, “*Searching for the Bone Needle: The Sto:lo Nation’s Continuing Quest for Justice* (MA Thesis, 1998) [unpublished] at 80.

<sup>97</sup> Carlson et al, eds, *supra* note 95 at 27.

<sup>98</sup> Victor, *supra* note 96 at 81.

understand where there wouldn't be a need for laws or police forces that kind of thing (Tíxwelátsa, 1999:1 transcript).<sup>99</sup>

This is a concept that I have had reiterated to me as well, through my interviews and conversations with our Hul'qumi'num elders. Family members had, and continue to have, a responsibility to teach the next generation about the Hul'qumi'num legal tradition, and more specifically our *snuw'uyulh* from as early on as their time in the womb.

## ii. The Local Group or Residence Group

The second Coast Salish social group, identified to me through this literature review is the local group or residence group. The concept of "local group" has been described by a variety of terms with different precision and skill, which for the most part, have been somewhat inconsistent.<sup>100</sup> Arguably, Suttles has adopted the best definition. He defines "local group" as:

a group having a sense of identity and a myth of descent from a "first man," even though its members did not regard themselves as kinsmen and were divided into distinct classes.<sup>101</sup>

I have found the literature on the local group relevant to my examination of the Hul'qumi'num legal tradition for a number of reasons. First, some of the Hul'qumi'num communities that I am working with are, in fact, local groups. Their identity as a group is based, in part, on them having a shared sense of identity based on their connection to place through a First Ancestor story. Second, these First Ancestor stories themselves provide valuable insight into the laws, customs and practices of the Hul'qumi'num people. Finally, there are many property laws associated with these First Ancestor stories. Accordingly, I am not so much interested in the Hul'qumi'num local groups themselves, as the First Ancestor stories that form the basis for these social groupings.

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<sup>99</sup> *Ibid* at 82 (original references retained).

<sup>100</sup> See generally Kennedy, *Looking for Tribes*, *supra* note 20.

<sup>101</sup> Thom, *supra* note 6 at 82.

As argued by Brian Thom, the ethno-literary category *sxwi'em'* and its English counterpart “myth” are an inappropriate classification for these types of stories because they connote a sense of “fable” or “fairy tale” and imply that these oral traditions are fictional and lack any grounding in truth.<sup>102</sup> Thom utilizes another category, *syuth*, for narratives such as First Ancestor or Transformer stories, which are of mythic character but are in no sense to be understood as fictional.<sup>103</sup> The customs of common descent embodied in local group’s *syuth* take several forms, usually telling the story of how an individual, or in the case of the Hul’qumi’num Mustimuhw, a handful of individuals, descend from the sky and travel around, engaging in a series of adventures, during which they establish villages and resource sites.<sup>104</sup> The following extract from a Cowichan first ancestor story illustrates a typical series of events:

Before there was anybody and long before the great flood had swept through the Cowichan world, there appeared twelve separate human beings who fell from the heavens to populate this pristine and untouched wilderness. The very first sky-man that was sent plummeting to earth was a gifted soul by the name of *Syalutsa*.

... [A]fter *Syalutsa* fell to the warm ground of *Quwutsun* near present-day Koksilah Ridge, his younger brother *Stutsun* next appeared from the heavens, landing between the two majestic peaks of *Swuqus*, also known as Mount Prevost. There soon followed a succession of other first Cowichans ... who founded the present-day Cowichan tribes. Among them were the following: *Suhiltun*, who descended to the site marked by the Quamichan bighouse; *Swuttus*, who was set down at Mount Newton in neighbouring Saanich Peninsula; and *Swutun* who when he fell from the sky stood on a massive heaven-sent boulder that thundered when it collided with the earth.<sup>105</sup>

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<sup>102</sup> Thom, *supra* note 6 at 81.

<sup>103</sup> *Ibid.*

<sup>104</sup> Barnett, *Coast Salish of British Columbia*, *supra* note 17 at 18, 20-1; Thom, *supra* note 6 at 83.

<sup>105</sup> Marshall, *supra* note 4 at 9, 11.

As the work of Brian Thom so aptly describes, these *syuth* have important implications for property law in the Coast Salish world<sup>106</sup>:

These local descent groups have property, both material and intangible, that has been inherited over the generations within the group. This property includes: names of these First Ancestors; certain family-owned *sniw'* (private knowledge such as special ritual teachings or detailed resource harvesting knowledge (Suttles 1958); family ritual property (*ts-uxwten*) which these First Ancestors brought with them from the heavens (Barnett 1955: 291); certain *hwnuts'aluwum*-owned legends, songs, dances, secret words, medicinal remedies and ceremonial prerogatives (Barnett 1955: 141, 291; Jenness 1935b:52). People claiming these hereditary privileges know and often develop a special relationship with the places from which these things originated.<sup>107</sup>

The social organization of these local or residence groups has a profound influence on the legal traditions of the Hul'qumi'num people. As indicated in the quotation from Brian Thom, these *syuth* are the source of many Hul'qumi'num property laws. For example, Mt. Prevost continues to be an important place for food and ritual activities of the descendants of *St'uts'un* (communities like Halalt<sup>108</sup> and several Penelakut and Lyackson people<sup>109</sup>). *Syalutsa* is the ancestor for the Cowichan people at *So'mena*<sup>110</sup> and therefore, Koksilah Ridge is a significant area for this community.<sup>111</sup> These stories re-affirm the Hul'qumi'num peoples' ancient and ancestral connections to these landmarks within the Coast Salish World.

These First Ancestor stories not only connect families and residence groups to a particular place, they can also provide insight into dispute resolution between Nations (a concept developed more fully in Chapter 6).<sup>112</sup> During an interview with my great uncle Angus, I asked

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<sup>106</sup> These concepts of property, ownership and cognate practices will be discussed in more detail in the following section of this chapter and also more generally in Chapters 5 and 6.

<sup>107</sup> Thom, *supra* note 6 at 85.

<sup>108</sup> Franz Boas, *Indian Myths and Legends from the North Pacific Coast of America* (Vancouver: Talonbooks, 2002) at 143 [Boas, *Indian Myths and Legends*].

<sup>109</sup> Thom, *supra* note 6 at 93.

<sup>110</sup> Elizabeth B Norcross, *The Warm Land* (Duncan: Elizabeth Blanche Norcross, 1959).

<sup>111</sup> Thom, *supra* note 6 at 93.

<sup>112</sup> *Ibid* at 88.

him about the concept of conflict or disagreement in the Coast Salish world. His response to me was as follows:

We never heard the Old People mention anything about anyone disagreeing about hunting and fishing in this territory ... The only ones were with the West Coast people and the same with the Sooke people, but there was a reason for that.<sup>113</sup>

He then went on to share one of our First Ancestor stories with me. It is a story that I had read many times; however, it was not until this recounting of it that I finally began to understand the significance of it for the Hul'qumi'num legal tradition.

With the passing of the great flood, *Syalutsa*, *Stutsun*, and others returned from the heights of the mountains to the valley floor to rebuild their lost homes ...

One of those who remained was Chief *Teyqumut* of the neighbouring *Sa'ukw* (Sooke) tribe, who had also fallen from the sky. The *Sa'ukw* tribe, too, had experienced the devastating effects of the terrible flood losing many of their own people. *Teyqumut* despaired that many of the men in his community had lost their lives during the catastrophe, but was greatly encouraged to hear that some male survivors of the flood continued to live in Cowichan territory. "Don't eat too much," he instructed his daughter, "I believe *Syalutsa* will come and want you for his wife as there are no women in his country."

The young woman obeyed her father for a time, but grew increasingly impatient as the Cowichan first-man did not show. Desiring to have a mate of her own, *Teyqumut's* daughter could wait no more. Under the cover of night, she quietly left her village and proceeded to cross the low mountains of southern Vancouver Island in search of *Syalutsa*. She took as her companion a young servant girl and provisions consisting of assorted berries, dried clams, fish, and seal meat for the journey.

The trail from *Sa'ukw* heading east across the mountains was rather arduous, but upon reaching Bald Mountain a glimmer of hope soon quickened their pace as they saw smoke rising in the distance from atop *Swuqus*. Their excited steps took them down to the valley floor and next to the Cowichan River where they saw a salmon weir, which they supposed was the work of *Syalutsa*. Believing that they were fast approaching their desired destination, they decided to rest for the evening and start afresh at daybreak. As the first rays of sunshine announced the

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<sup>113</sup> Interview of Angus Smith (8 November 2009).

morning, the two *Sa'ukw* women barely noticed the sound of light footsteps in the distance. Using an ancient cedar to conceal their presence the two watched as a man clothed in a fur coat carrying a large bow with splendid arrows trekked past them in the direction of *Swuqus*. *Teyqumut's* daughter was sure that this must be *Syalutsa* and, quickly breaking camp, followed him at a safe distance. After a considerable time the lone hunter unwittingly guided them to his mountain home, which he entered at once. The two positioned themselves silently near a convenient crack in one of the walls where, undetected, they watched his every move.

At first glance the Chief's daughter was disheartened to see that *Syalutsa* already had a female companion who was enjoying the comfort of a warm fire. And yet, this women did not seem to be particularly human as *Syalutsa* was attempting with some difficulty to offer her food harvested from his recent trip. When the hunter left once more in pursuit of fresh game, they quickly entered his house only to discover that *Syalutsa's* mate was not a woman at all, but a wooden replica which he had carved from an arbutus tree.

*Teyqumut*, the *Sa'ukw* chief, was apparently right to think that there were no women in Cowichan. The lonely first man had taken pains to offer his wooden bride fresh deer meat, which he left at her feet. He even constructed a wooden spindle for her hand in the hope that she might one day come to life. *Teyqumut's* daughter immediately conceived a clever plan by which to win *Syalutsa's* affections for herself. Before leaving the leaving, the two women hurriedly ate the deer meat and then left the house for cover.

Upon *Syalutsa's* return, the absence of the deer meat that had been placed before his wooden bride brought joy to his heart. Perhaps, as he had always hoped, she had finally come to life. The next morning he again left to hunt, all the while anticipating what further changes might occur during his absence. *Teyqumut's* child wasted no time in furthering her plan. The Chief's daughter slid from her hiding place into the house and promptly broke the carved figure into a hundred pieces, flung them into the fire, and placed the clothes that remained on her own body. *Syalutsa's* wooden creation, of which he was so fond, screamed amidst the flames that leapt all around her. Fearing that the hunter might hear the outcry, her companion immediately returned to their hiding spot, while the inventive daughter stay by the fire in as exact a position as the carved figure she replaced.

As it was, *Syalutsa* did hear the distant scream and before long made his return. The anxious hunter quickened his step as if expecting that his companion might be further transformed. Perhaps she might have eaten

more of the meat he had set out before her. Or perhaps there was a chance that the wooden spindle he had constructed for her might be put to good use. Little did he imagine though, that his wooden bride would come to life all at once. Upon seeing his companion full of life his heart soared with great happiness. After years of patiently waiting since falling from the sky, only to have his land ravaged by a catastrophic flood, *Syalutsa* was at last to have a true companion.

Taking his enlivened bride to the fireside, he was anxious to share with her all his wonderful dreams of the future, a future they would now make together. Yet, in the back of his mind he could not help but remember the terrible scream he had heard and wondered what had caused it. Just as he was about to ask his new companion why she had screamed so loudly, his eye suddenly caught, amidst the glowing embers of the fire, a charcoal covered hand, the very hand he had carved from wood.

All at once the true nature of the *Sa'ukw* woman's deception became clear. He realized that a stranger had taken the place of his beloved wooden bride, a stranger responsible for her destruction. *Syalutsa* flew into a rage at what he considered the frailties of human nature exhibited by the imposter. The carved companion of which he was so fond would never have deceived him. *Syalutsa's* years of being patient gave way to anger as he felt betrayed. He turned to the woman and yelled at her. *Syalutsa* told her to go back to where she came from because she no longer belonged there.<sup>114</sup>

As my great uncle Angus said, this story was the basis for the somewhat contentious relationship between the Sooke people and the Hul'qumi'num people. From then on, Sooke people could not come into our territory to harvest resources without explicit permission from the Hul'qumi'num people.<sup>115</sup>

This *syuth*, and others like it, continue to influence the decision-making process and govern decision-making amongst the different social groupings of the Hul'qumi'num Mustimuhw. Recounted through oral tradition, they teach the Hul'qumi'num people not only

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<sup>114</sup> This account is taken from both the narrative told to me by my Great Uncle Angus, on an interview on November 8, 2010 and Marshall, *supra* note 4 at 28-33. I chose to utilize Dan Marshall's account because this story was the last narrative shared with me during the interview with my Great Uncle and he was quite tired at the time. As a result, his narrative was not as detailed as Daniel Marshall's; however, the major points remained the same. It is important to note that whereas Daniel Marshall's account goes on to describe how *Syalutsa* eventually forgave the *Sa'ukw* woman, my Great Uncle Angus' did not.

<sup>115</sup> Interview of Angus Smith (8 November 2009).

about their traditional use sites and inherited rights, but also about their histories with other residence groups. As such, they will undoubtedly influence how Hul'qumi'num laws or legal principles are applied. For example, as my great uncle Angus inferred, some residence groups are permitted to come into the Hul'qumi'num territory and harvest resources without permission, and others require permission; however, the determination is related to the relationship between the residence groups, often articulated through the *syuth*.

According to Thom, "Certain productive resource areas are jointly owned by two or more residence groups. This commonly occurs in areas at some distance from permanent winter villages, where people have long-established amicable use and occupation of an area."<sup>116</sup> These long-established protocols for sharing resource sites amongst different kinship groups have a lot to teach me about conflict resolution and co-management in the Hul'qumi'num world. For example, Thom recounts a novel solution that Penelakut and Lyackson hunters worked out for managing the jointly held sea lion hunting area in Porlier Pass (as recorded by Barbara Lane). Both of these communities are connected through the origin story of the sea lion and their special abilities to hunt sea lions stems from their commonly held charter myth or *syuth*.<sup>117</sup> The Lyackson had a "permanent lookout" on the southern tip of Valdes Island and the Penelakut resided at theirs on the northern end of Galiano Island.<sup>118</sup>

When the lookouts sighted a sea lion, they called to their camps and canoes were immediately dispatched. There were two men in each canoe, a 'captain' who steered and a spearman. As the canoes approached, the sea lion returned to the water and the chase began. If the first man who speared the animal were a *T'ee't'qe'* [Lyackson' man, all the Penelakut canoes would have to abandon the chase and return home. If a Penelakut man struck it first, the *T'ee't'qe'* were out of the running.

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<sup>116</sup> Thom, *supra* note 6 at 283.

<sup>117</sup> *Ibid* at 284.

<sup>118</sup> *Ibid* at 283.

As soon as the first man had placed his spear, he laid his paddle across the canoe in front of him, took a little stick-and beat on the paddle while he ‘sang’ (*si’win*) to the sea lion to calm it and to make it surface again close to the canoes so that his co-villagers could also spear it.

Meanwhile, the “losing” party paddled off some distance, and then laying their paddles across their canoes they took up sticks and sang to make the sea-lion wild, so that he would break away or at least be difficult to subdue. They tried to remain unobserved but the other group was aware of the practice for they did the same thing when the situation was reversed. Proof that such singing was effective was cited: if only one group went out the sea lion was always easier to handle.

After several more of the victorious groups speared the sea-lion, they put their paddles across their canoes, beat on them with sticks, and sang to ‘intercept’ the song of the opposing group so that the sea-lion would not be ‘rough’. They ‘named’ the tongue, and lips, and hands of their opponents in order to deaden the latter’s singing and drumming.<sup>119</sup>

Again, this story demonstrates how important it is to think about the Hul’qumi’num legal tradition within the context of kinship relations and *syuth*. Both communities respected that the other had rights to that shared hunting territory; however, how those principles were operationalized were determined by the kinship relations and the *syuth*. This illustrates the importance of considering the Hul’qumi’num legal tradition within its cultural context such as its social groupings, otherwise varying legal determinations could result.

### **iii. The Village**

Early travellers in the Coast Salish world who contributed to the literature I have consulted have described another type of social organization amongst the Hul’qumi’num people – that of the village site. Again, although the ethnographic description of these sites or social grouping is not immediately relevant to my topic of Hul’qumi’num laws, the rights that flow from these sites are. Property laws are attached to these village sites, similar to the sites

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<sup>119</sup> Lane, *supra* note 21.

identified by *syuth* in the previous section. These laws and the source of these laws are relevant to my research.

As Dorothy Kennedy states: “Such villages, consisting of one or more cedar plank structures, were situated on seashores of sheltered bays and inlets and along riverbanks.”<sup>120</sup> The Saanich, Cowichan and Nanaimo are described as having removed the house planks and transported them by canoe to the seasonally-occupied sites that contained more permanent house frames.<sup>121</sup> This process was also described to me by one of my elders, Wes Modeste:

*Siil't'uhw* is cedar board. *Siil't'uhw* was placed across large canoes to create a raft. Our people would use these rafts to move from Cowichan to a place called Cowichan Gap, now called Porlier Pass. When they got to their traditional village site there, they'd build a frame structure, also called a *siil't'uhw* – a housing structure.<sup>122</sup>

The construction techniques used for these cedar plank structures reflected Hul'qumi'num legal social ordering. According to Suttles, the techniques used for these shed houses permitted the addition or removal of house sections as required – a practise that was in keeping with fluid residency options provided by the bilateral principle of descent amongst Coast Salish communities.<sup>123</sup>

According to the research, the relative permanence of village populations varied from place to place and year to year.<sup>124</sup> In his writing on the Upper Sto:lo, Duff reports that village population was quite fluid, with people moving regularly to different villages or to uninhabited locations, mostly for food and wood, but also in response to social discord within a household or village.<sup>125</sup> The corollary was that core populations of villages located in areas of abundant

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<sup>120</sup> Kennedy, *Looking for Tribes*, *supra* note 20 at 45.

<sup>121</sup> Barnett, *Coast Salish of British Columbia*, *supra* note 17 at 41, 251.

<sup>122</sup> *Hul'qumi'num Treaty Group v Canada*, (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Wes Modeste).

<sup>123</sup> Suttles, “The Shed-Roof House,” *supra* note 76 at 216.

<sup>124</sup> Kennedy, *Looking for Tribes*, *supra* note 20 at 47.

<sup>125</sup> Duff, *The Upper Stalo*, *supra* note 23 at 85.

resources would be more constant and would attract winter residents from other tribes.<sup>126</sup> It is important to note that, over the years, this fluidity has been greatly influenced by the reserve system. However, the history of these sites plays an important role in the Hul'qumi'num legal tradition because our communities still have a memory of these village sites and use them as evidence of their rights to certain resource sharing areas. For example, there was a Hul'qumi'num fishing village on the Fraser River and my community has used evidence of this site to establish their right to fish within that shared territory.

#### **iv. The Tribe**

The social grouping of the tribe is also an important unit in the study of Hul'qumi'num law. This is because it provides valuable insight into dispute resolution between Nations. In the present context, with the advent of the modern day treaty process and the need to delineate boundaries, this process has become of great significance to the Hul'qumi'num people and all tribes in British Columbia.

Historically, anthropologists working amongst the Coast Salish have found no problem with retaining quotation marks around the term “tribe” and applying it to groups such as the Squamish, Chilliwack, Lummi and Cowichan. Brian Thom describes the core territorial social unit, or “tribe” as “the broad community of inter-related residence group communities within a local region.”<sup>127</sup> He explains that this social unit is not a formal political entity, an assertion with which Kennedy agrees,<sup>128</sup> but rather “numerous kin networks that crosscut and bind descent and residence groups, resulting in the practice of territories being ‘tribal’ in a sense of intense regional interactions and connections to place.”<sup>129</sup>

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<sup>126</sup> *Ibid.*

<sup>127</sup> Thom, *supra* note 6 at 339.

<sup>128</sup> Kennedy, *Looking for Tribes*, *supra* note 20 at 48-49.

<sup>129</sup> Thom, *supra* note 6 at 339.

This is not to say that these Coast Salish “tribes” do not possess a collective identity, distinct from that of their neighbours. This distinctiveness could be based upon language or dialect; however it is always associated with a specific territory.<sup>130</sup> As a result, these larger kin networks often have a common collective identity reflected in their names, such as Cowichan, Chemainus, Sto:lo or Sooke.<sup>131</sup> As described by Thom, it is the amicable use and occupation of these places by neighbouring core territorial social units that share these characteristics that result in shared and jointly held territories.<sup>132</sup>

Again, the writings of these early travellers through the Coast Salish world provide great value to my own journey. As I think about the issue of overlapping jurisdictions, it comforts me to know that this is not a new concept for the Hul’qumi’num people. Our early social networks were based upon the idea that more than one kinship group or community could have rights to a watershed or region – this is a concept which resonates amongst our Elders today. In a large meeting attended by elders from Cowichan, Chemainus, Penelakut and Nanaimo about the “issue” of shared territory, Roy Edwards spoke of the importance of not disputing land and resources:

So my dear relatives, to all of you, you know when we come to a big potlatch, we always have our hand out to different people, doesn’t matter how far they come. We treat them with respect. That’s our Indian way, not the white people’s way. And this is something that we have to follow, we have to learn to help each other. No matter how hurt you are, the hard feelings that you have towards one another, but the thing is to compromise.

*Uy’ye’ tulch u’ sus’o’ suw ts’i ts’u watul* [Treat each other good, right and you help each other]. Those words never disappeared ever since you were young, maybe all of you have heard that. *Uy’ye’ tulch u’ sus’o’ suw ts’i ts’u watul* means many different things. *Mukw stem tsu’ thu’*

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<sup>130</sup> Kennedy, *Looking for Tribes*, *supra* note 20 at 115.

<sup>131</sup> Thom, *supra* note 6 at 341.

<sup>132</sup> *Ibid.*

*thaam u tu suleluhwst, ts'i ts'u watul ch* [Everything they told us, the ancestors or elders, help each other].<sup>133</sup>

This teaching illustrates the principle behind shared territory. Although access to territories is not granted to everyone on all occasions, as demonstrated by the story shared with me by my great uncle Angus about the people from Sooke, “the idiom of kin – directly, through marriage, or through descent group reflected in Indian names – provides the rationale through which territories are shared throughout the Coast Salish world.”<sup>134</sup> The connection between social groupings and land in the Coast Salish world is further examined in the following section which examines the importance of land and concepts of property to the Hul’qumi’num legal tradition.

### **c. Land and Property**

As stated in Chapter 2, the concept of land and place is central to the Hul’qumi’num worldview. Accordingly, I have found the research of previous travellers in the Coast Salish world who explored the concept of land to be highly relevant to my own research question respecting Hul’qumi’num law and dispute resolution. In particular, their writings have helped me to understand that the territory of the Hul’qumi’num Mustimuhw is really a textbook of their laws. Not only the ancestor and transformation stories describe obligations around property and ownership, but also the place names associated with those stories are sites of knowledge themselves.

#### **i. Land as a Legal Textbook**

Oral histories, family genealogies, names and the Hul’qumi’num language connect my people to their land. Recently, studies of landscape and place have undergone a rebirth in anthropological studies and within Indigenous communities themselves in an effort to gain a greater understanding of Indigenous concepts of knowledge and history. As Jay Miller puts it:

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<sup>133</sup> *Ibid* at 358.

<sup>134</sup> *Ibid* at 358-359.

“Every terrain was saturated with memories, which compressed generations of experience – ranging from daily routine to great crises – into useful knowledge.”<sup>135</sup> Although today there is often no physical evidence at these ancestral sites, they continue to have significance and value for the cultural identity of the Hul’qumi’num people. For an oral society, these ancestral sites are “living cultural landscapes,”<sup>136</sup> where Hul’qumi’num persons learn about and experience their relationship with the land and with those ancestors that travelled these lands before them.

Julie Cruikshank<sup>137</sup> has written about how the life histories of First Nations women living in the Yukon are intimately tied to their understanding of their mythological, storied landscape. Frederica de Laguna has likewise shown that, for Aboriginal communities in Alaska, places are vested in personal, mythical and ancestral meanings. Such understandings of place are not confined to individuals. As de Laguna has argued, personal associations with place are all “intermeshed through anecdotes or shared experiences.”<sup>138</sup> Keith Basso has also explored the ways people engage, understand and live in place, his key essays being collected in the award-winning *Wisdom Sits in Places*.<sup>139</sup> In this work, Basso examines how his Western Apache colleagues evoke place in highly meaningful ways through the practice of using place names to impart wisdom and moral teachings; the meanings reflecting the complex ways that people have formed attachments to the world in which they dwell. When Western Apache people think of or

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<sup>135</sup> Jay Miller, “A Kinship of Spirits” in Alvin Josephy Jr, ed., *American in 1492: The World of the Indian Peoples before the Arrival of Columbus* (New York: Vintage Books, 1991) at 306.

<sup>136</sup> Hul’qumi’num Treaty Group, *Shxunutun’s Tu Suleluxwtst In the footsteps of our Ancestors: Interim Strategic Land Plan for the Hul’qumi’num Core Traditional Territory* (Ladysmith: Hul’qumi’num Treaty Group, 2005) at 13.

<sup>137</sup> Julie Cruikshank et al, *Life Lived Like A Story: Life Stories of Three Yukon Native Elders* (Vancouver: UBC Press, 1990).

<sup>138</sup> Frederica de Laguna, *Under Mount Saint Elias: The History and Culture of the Yakutat Tlingit* (Washington: Smithsonian Institution Press, 1972).

<sup>139</sup> Keith Basso, *Wisdom Sits in Places: Landscapes and Language Among the Western Apache* (Albuquerque: University of New Mexico Press, 1996).

talk about the places that the stories of their ancestors are set in, they at the same time inhabit these places and reciprocally, are being inhabited by them.<sup>140</sup>

Thom's work shows that one cannot separate the relationship between ancestors, spirits, social configurations, kin, land and property within the Coast Salish world. As he so aptly describes:

Property relationships become importantly implicated in the various phenomenally experienced encounters with place. The lands where people harvest resources, build their homes, visit, travel and otherwise dwell are frequently experienced in terms of the relationships of property people have to them. People are stewards or trespassers, hosts or visitors, knowledge bearers or outsiders with reference to any particular place. Through these different relationships to place, people experience power in different ways. The power may be that of the ancestor's presence in the land, from whom property rights in land are produced. It may be experienced as the social obligations of kin inclusion and sharing with kin the products of owned places. Power can also involve the physical exclusion of others to whom no connections of ancestry, kin or residence are recognized, from land which is owned in common but not open to outsiders. At the level of on-the-ground social rules and practices with respect to property, the power of place is activated and experienced, producing Coast Salish land tenure customary law.<sup>141</sup>

The Coast Salish landscape is "perceived within a set of cultural, historical and spiritual understandings and serves as a mnemonic trigger for ideas that have important application to conflict and wrongdoing."<sup>142</sup>

Accordingly, I would argue that place has become an archive or storage for Indigenous legal traditions. The shared meanings associated with place dictate the kinds of relations people have with other humans and non-humans who dwell with them. Mythological stories told in Hul'qumi'num communities about ancestors transformed to stone provide vivid examples of the agency that features of the land can have. In the telling of these mythical stories, stone actually

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<sup>140</sup> Keith Basso, "Speaking with Names: Language and Landscape Among the Western Apache" (1988) 3:2 Cultural Anthropology 99 at 102.

<sup>141</sup> Thom, *supra* note 6 at 270-271.

<sup>142</sup> Miller, *The Problem of Justice*, *supra* note 26 at 68.

*becomes* the ancestor embodied by it in that it is afforded respect and the potential for the power that it may hold to influence the world. Places and the features in them in essence become sentient beings with messages and laws for people to adhere to. The land becomes a legal textbook for the Hul'qumi'num Mustimuhw.

ii. **Place Names: Ancestor Stories**

In this dissertation I reviewed the literature related to Indigenous place names. This revealed that these place names could be used as a legitimate legal tool to establish title and ownership rights. Furthermore, the research demonstrated that there are rights and obligations associated with particular sites. These ideas will be examined more fully in this section.

Scholars have noted the importance of place-names as sites of knowledge.<sup>143</sup> Coast Salish people maintain a system of “Indian names,” or ancestral names, which connect the holder of the name, and their descendants, to all their ancestors previously connected to that name and ultimately to a location where an ancestor had a spiritual encounter with a nonhuman being. As discussed earlier in this chapter, the name implies rights to a location and obligations to the site and the relationship with the particular spiritual being. Accordingly, these stories associated with place are “brought out” when an individual is “given to the name” at a naming ceremony.<sup>144</sup> As Thom and Cameron describe, these names capture the ancestral relationship between humans and place and, in some cases, the transformations between them in those instances where humans were changed into salmon, cedar and other beings.<sup>145</sup>

Recent scholars, whose works I have examined in this literature review, have attempted to rethink and re-establish the connection between place names and justice. Miller writes that

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<sup>143</sup> See generally Thomas F Thornton, “Know Your Place: The Organization of Tlingit Geographic Knowledge” (1997) 36:4 *Ethnology* 295; Basso, *supra* note 139; and Thom, *supra* note 6.

<sup>144</sup> Amoss, *Coast Salish Spirit Dancing*, *supra* note 24 at 17.

<sup>145</sup> Brian Thom & Laura Cameron, “Changing Land Use in S’ólh Téméxw” in Keith Carlson ed, *You Are Asked to Witness: The Stó:lo in Canada’s Pacific Coast History* (Chilliwack: Stó:lo Heritage Trust, 1997) 163 at 167.

anthropologist Michael Kew attempted to utilize his detailed record of place names to help establish claims to title and help mediate overlapping band claims made to land within Vancouver prior to legal proceedings and McHalsie has also drawn upon place names in his effort to understand contemporary rights to Stó:lo fishing sites.<sup>146</sup> Finally, Thom describes the process he has been involved in – creating a place names inventory intended to provide an overview of the traditional territory of the Hul’qumi’num people in the context of asserting Aboriginal title and resolving land claims.<sup>147</sup> While he states that “place names are a useful and legitimate tool in this political discourse of Aboriginal rights and title” he also points out that doing so also brings with it “reciprocal, local political consequences.”<sup>148</sup> Cruikshank’s discussion of place names in land claims negotiations in the Yukon has relevance for Hul’qumi’num law. She notes these names are:

... transformed from sites of significance to authorized boundary markers demarcating neighbouring groups. Imperceptibly, named places that were formerly an assertion of multilingualism and mobility, of exchange and travel can come to divide and separate people who were formerly connected.<sup>149</sup>

The situations described above serve as a warning to me by these earlier travellers as it makes me aware of the transformations that could occur to the Hul’qumi’num legal tradition through my observations and characterizations – no matter my intent. However, this does not mean that these evolving relationships or connections should not be taken into account when consider the Hul’qumi’num legal tradition. As so aptly described by Keith Carlson,<sup>150</sup> Coast Salish people are more than just static figures who either disappeared or became frozen in time.

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<sup>146</sup> Miller, *The Problem of Justice*, *supra* note 26 at 73.

<sup>147</sup> Thom, *supra* note 6 at 227-232.

<sup>148</sup> *Ibid* at 232.

<sup>149</sup> Julie Cruikshank, *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Lincoln: University of Nebraska Press, 1998) at 20.

<sup>150</sup> Carlson, *The Power of Place*, *supra* note 28.

Rather, they are a people motivated by a series of complex social relations, which are continually changing, along with their meanings of identities, both political and cultural. Accordingly, it is to be expected that their legal traditions should change along with their changing experience.

### iii. **Place Names: Transformation Stories**

One result of the Coast Salish landscape-linked histories is to “provide a mythic charter for communities and their ownership of and attachment to particular places.”<sup>151</sup> However, there is another narrative, one concerning the mythic figure *Xeel’s* (the Transformer), that serves as the foundation for the process by which Coast Salish people develop their relationships to the land, the resources and to each other.

The canon of transformation stories is well documented in Coast Salish literature. Boas was the first ethnographer to study these Transformer stories and note their significance to Coast Salish communities.<sup>152</sup> One of the unique features of Coast Salish Transformer myths was that “in almost all cases, individuals, and very often ancestors of village communities, are transformed” into “stone of remarkable shape.”<sup>153</sup> Boas observed that this essential embedded the transformed ancestor within the landscape and suggested an important social relationship between the descendants of those ancestral figures and the places the stones are found today.<sup>154</sup>

Other ethnographers have studied the connection between these stories and social ordering amongst the Coast Salish. Hill-Tout argued that the stories were a form of totemism.<sup>155</sup> In other words, these landscapes and symbols were thought to have a relationship with individuals or groups and a system of social organization developed from these affiliations.

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<sup>151</sup> Thom, *supra* note 6 at 113.

<sup>152</sup> See generally Boas, *Indian Myths and Legends*, *supra* note 108.

<sup>153</sup> Franz Boas, “Transformer Myths” in Franz Boas, eds, *Tsimshian Mythology (in) Thirty-First Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institutions 1909-1910* (Washington: Government Printing Office, 1916) at 602-619 as cited in Thom, *supra* note 6 at 114.

<sup>154</sup> *Ibid* at 114-115.

<sup>155</sup> Charles Hill-Tout, *The Salish People, Volume IV: The Sechelt and the South-Eastern Tribes of Vancouver Island* (Vancouver: Talonbooks, 1978) at 49-50, 73, 109-113, 150-151.

Discussion has also focused on the definition of Coast Salish local groups.<sup>156</sup> Still, other scholars have theorized little about the Transformer stories themselves and simply presented them as important myths.<sup>157</sup> I agree with Thom that “these stories are an important metaphor for articulating long-standing Coast Salish connections to place, serving as powerful reminders of morality, spirit power, and ancestry.”<sup>158</sup>

According to Thom, two points have been emphasized throughout his study of transformation stories: 1) the places where things are transformed by *Xeel's* may be claimed as being owned by the descendants of the people mentioned in the story and 2) the stories of *Xeel's* are taken as literally true, that the stones and other beings transformed by *Xeel's* that may be encountered in the world today are the considered evidence of the mythic happenings.<sup>159</sup> I would add that these Transformer stories might also be used to unearth past teachings. The *Xeel's* stories shared in this dissertation often involve an interaction that can provide evidence of aspects of the Hul'qumi'num legal tradition. As Biewert describes, the texts of place, rather than being merely authoritative and literal, “question” the tellers and the listeners to produce their own understandings.<sup>160</sup> This explanation, combined with Thom's observations, supports that view that differences in transformation stories are not so much in conflict but rather a recognition that families have their own particular points of reference to place and their own teachings connected to that place, i.e. a plurality of law.

To summarize, land is the lynchpin in Coast Salish culture. It connects our people to their spiritual relations, to their histories, to their sense of self and to teachings that point the way

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<sup>156</sup> Duff, *The Upper Stalo*, *supra* note 23 at 85-86; Wayne Suttles, *Coast Salish Essays* (Seattle: University of Washington Press, 1987) at 104.

<sup>157</sup> See generally Arnett, *Two Houses Half-Buried*, *supra* note 3; Ellen Rice White (Kwulasulwut), *Legends and Teachings of Xeel's, The Creator* (Vancouver: Pacific Educational Press, 2006).

<sup>158</sup> Thom, *supra* note 6 at 115-116.

<sup>159</sup> *Ibid* at 116.

<sup>160</sup> Biewert, *supra* note 26 at 71.

to living a good life. All of these concepts are understood by each individual in his or her own way; however, they provide the tools to think through regulating our behaviours and resolving dilemmas or conflicts concerning family or community. As described by Basso, the sense of place provides guidance and meaning and a way to find commonality with those with whom one is in conflict. In this way, one's sense of place may even lead to new understandings that can be utilized in resolving problems and regulating behaviours.<sup>161</sup>

### 3.3 Conclusion

Not only are the concepts of ancestors, kinship and land interconnected with each other, but they are also connected to the legal tradition of the Hul'qumi'num people. Accordingly, although much early writing about Coast Salish people was tainted by the mistaken notion that the point was to preserve a 'disappearing' culture, it does provide a helpful backdrop to the legal tradition of the Hul'qumi'num people today. Indeed, the Hul'qumi'num legal tradition cannot be understood apart from these three foundational aspects of the Coast Salish culture. To consider legal principles in isolation from the concepts of ancestors, kinship and land, would, in essence, negate what makes this legal tradition unique.

This line of reasoning builds upon the work of other contemporary Indigenous legal scholars,<sup>162</sup> whose research is also committed to the recognition of Indigenous legal traditions within the Canadian state. In challenging Indigenous and non-Indigenous Canadians alike to integrate the legal traditions and practices of Canada's Indigenous peoples with the overall

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<sup>161</sup> See generally, Basso, *supra* note 139.

<sup>162</sup> There are a number of established Indigenous legal scholars in Canada, such as Tracey Lindberg, John Borrows, Gordon Christie, Darlene Johnstone, Paul Chartrand, Sakeg Henderson, Mark Stevenson, June McCue, Lucy Bell, Larry Chartrand and Val Napoleon. There are also a number of new and emerging Indigenous legal scholars such as Johnny Mack, Kerry Sloan, Maxine Matilpi, Dawnis Kennedy and Kinwa Bluesky. However, for the purposes of this chapter, only the work of John Borrows, Gordon Christie and Val Napoleon will be discussed.

system of Canadian law, John Borrows<sup>163</sup> argues that Indigenous law can be explained by reference to the cultures in which Indigenous peoples live. Since in the contemporary context Indigenous peoples live in a cross-cultural context, the laws that guide their lives must be drawn from the cultures that surround them.

However, even though law must be explained in the context of Hul'qumi'num culture, I am also persuaded by the cautions of those in the field to avoid reification of past practices described by ethnographers, anthropologists, linguists and historians, especially because they were not collected for the purposes of examining the legal traditions of the Coast Salish people. In heeding the advice of Gordon Christie<sup>164</sup> and John Borrows,<sup>165</sup> Val Napoleon took care to “write about Gitksan legal traditions in a way that avoided reification and reflected the actual complex practice of Gitksan law in life, from a ‘law-in-the-world’ perspective.”<sup>166</sup> This is the approach that I have taken .

As previously mentioned, Bruce Miller's work<sup>167</sup> is the only ethnographic study of Coast Salish legal traditions. *The Problem of Justice* is a comparative ethnographic and historic analysis of what he calls the “justice practices” of three Coast Salish communities in the United States and Canada. A central theme of his study is that “there are significant problems concerning the degree to which what is called *traditional practice* can be brought into the present” and that such efforts are beleaguered by misrecognition of “what traditional law and

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<sup>163</sup> See generally Borrows, *Canada's Indigenous Constitution*, *supra* note 7; John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010); John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

<sup>164</sup> See generally Gordon Christie, “Indigenous Legal Theory: Thoughts Around its Emergence” (Paper presented to the Indigenous Peoples and Governance Conference, University of Montreal, October 10 & 11, 2008) [unpublished].

<sup>165</sup> See generally Borrows, *Canada's Indigenous Constitution*, *supra* note 7.

<sup>166</sup> Valerie Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Thesis, University of Victoria, Faculty of Law, 2009) [unpublished] at 43.

<sup>167</sup> Miller, *The Problem of Justice*, *supra* note 26.

practice might have been.”<sup>168</sup> As such, they lack a “due regard for the relations of power”<sup>169</sup> that inform their expression in the contemporary juridico-political practice today. He further argues that the inclusion of these notions in the contemporary tribal legal system of Coast Salish peoples reveals the extent to which they are “[l]argely outward looking,” focusing less on the actual values and practices of contemporary tribal members than on “managing relations with the dominant society that focus conservatively on a purported period of harmony prior to contact and the establishment of treaties and reservations.”<sup>170</sup> As Miller argues, reliance on such notions, “undermine[s] the capacity of tribal governance to recognize diversity and community members’ sense of fair, just participation in their own governance.”<sup>171</sup>

While I acknowledge Miller’s concerns, my research guards against some of this valorization. I am drawing on these ethnographic and historical records not in an attempt to draw legal principles from them, but rather to help illustrate the culture in which these principles operate. This is an important distinction. As you will see in Chapters 5 and 6, the teachings and standards that I articulate are drawn from primary interviews that I conducted with community members. These community members were very frank, espousing what they heard from the Old People and sometimes describing why those customary practices would not be relevant today.

Furthermore, no legal tradition is perfect, but this does not mean that we do not acknowledge the societal context in which they operate. As Justin Richland states, “To neglect the unique cultural and legal heritage of Indigenous communities today would be to accomplish the federal goal of assimilating tribes and hammer the final nail in the coffin of sovereignty.”<sup>172</sup>

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<sup>168</sup> *Ibid* at 5 (emphasis in original).

<sup>169</sup> *Ibid*.

<sup>170</sup> *Ibid* at 11.

<sup>171</sup> *Ibid*.

<sup>172</sup> Justin Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (Chicago: University of Chicago Press, 2008).

Seneca legal scholar Robert Porter agrees: “The longer that native people deviate from organic notions of tribal justice . . . the closer they will be to losing their distinct identities. Without a persuasive justification to distinguish Indians from other Americans, it seems inevitable that extinction – as perceived by American society and maybe even by the Indians themselves – will occur.”<sup>173</sup> Citing the Indigenous scholar Vine Deloria, Coffey and Tsosie write, “[T]radition provides ‘the critical constructive material upon which a community rebuilds itself.’ Thus, only by delving into the inquiry of how our Ancestors saw the world can we truly understand the significance of our communities as they are currently constituted, appreciating both the strengths and the continuities that exist, as well as the pathologies that destroy community.”<sup>174</sup> This has been the aim of this chapter.

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<sup>173</sup> Robert Porter, “Strengthening Tribal Sovereignty through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies” (1997) 20 *Columbia Human Rights Law Review* 235 at 238-39.

<sup>174</sup> Wallace Coffey & Rebecca Tsosie, “Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations” (2001) 12 *Stanford Law and Policy Review* 191 at 199.

## CHAPTER 4

### Legal History Reflected in Land

“[T]he past is at its best when it takes us to places that counsel and instruct, that show us who we are by showing us where we have been, that remind us of our connections to *what happened here*” (italics in the original).<sup>1</sup>

#### ***“Tell us when we sold our land?”***

*In thinking about the purpose and scope of this research project, my mind also turned to consider why this work is needed? Why is it that Indigenous legal traditions, and Hul’qumi’num tradition more specifically, are in need of recognition? In other words, why aren’t they recognized already? What was the point in history when these traditions lost their influence and did they ever lose their influence within the lives of the Hul’qumi’num Mustimuhw themselves? This chapter sets out to answer some of these questions.*

*I have had the opportunity to observe and participate in many meetings with our Elders and negotiators as they have attempted to negotiate the land issue within Hul’qumi’num Territory. In almost all of these meetings, when discussing land and jurisdictional concessions proposed by the governments, I have heard the Elders say, “Tell us when we sold our land? Explain to us when we lost jurisdiction over our territory.” They have questioned why they are being asked to prove ownership, when in their memories they have never given up the land or stopped practicing their laws upon these lands.*

*This chapter is my response to their questions. I want to demonstrate to the readers that these questions by my Elders are not unfounded. I want to examine the legal history within my territory and demonstrate how my people have always maintained ownership and jurisdiction over their lands. It is my hope that retelling this history will garner recognition for the legal*

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<sup>1</sup> W Chapman, *Preserving the Past* (London: Dent, 1979) in K Basso, *Wisdom Sits in Places: Landscapes and Language Among the Western Apache* (New Mexico: University of New Mexico Press, 1996) at 4.

*tradition of my community and demonstrate the need for reconciliation within the Coast Salish world.*

#### **4.1 Introduction**

The purpose of this chapter is to show that the Hul'qumi'num legal tradition existed and operated with full force and authority in the Coast Salish world prior to contact. Not only did these laws and practices exist at the time of contact, but also the Hul'qumi'num Mustimihw had an expectation that they would continue to operate and influence legal decisions even after contact. However, this has not always been the case and as such, Hul'qumi'num communities have continuously resisted the imposition of foreign laws within their territories, through physical protests, speeches, formal petitions and acts of incremental self-determination, such as drafting legislation. This fact is well-documented, both on paper and in the land itself.

This chapter will examine the legal history of the Hul'qumi'num Mustimuhw in three different time periods: 1) pre-colonial legal landscapes; 2) legal landscapes of colonization and 3) contemporary legal landscapes. This is appropriate because Coast Salish territory acts as a clearinghouse for knowledge, values and legal traditions. The section on pre-colonial legal landscapes focuses on the two main sources of law during this time period: i) The First Ancestors and ii) The Transformer. The section on the colonial legal landscapes focuses on Hul'qumi'num resistance and illustrates that the Hul'qumi'num Mustimuhw did not unequivocally accept the imposition of this new legal tradition. There were acts of resistance during the following periods: a) James Douglas Era; b) Fraser River Goldrush; c) Confederation; d) E&N Railway and e) the Cowichan Petition. Finally, the section dealing with contemporary legal landscapes explores how the lack of recognition of Hul'qumi'num laws and practices has led to a need for reconciliation between these different legal traditions. This section focuses on the land

alienation that has occurred and on the international remedies sought by the Hul'qumi'num Mustimuhw.

“People affect places and places affect people in countless ways.”<sup>2</sup> As Thornton states, in order to understand places, one must understand the people who inhabit them.<sup>3</sup> I believe the converse is also true, in order to understand people, one must understand the places they inhabit. In a sense, the landscape, or place, has the potential to be an integral part of every individual's sense of being, not just that of the Hul'qumi'num Mustimuhw, Coast Salish First Nations, or Indigenous peoples. Understanding landscape is also a key to understanding Indigenous legal traditions. This chapter will introduce the concept of history in Salish legal thought to set the stage for future discussion of the Hul'qumi'num legal tradition. In particular, it will introduce you to two very different creation stories in Hul'qumi'num territories: *Kwu Yuweenuh Hwulmuhw* (“The First Ancestors”) and the development of the colony of Vancouver Island. Both stories take us deeper into the landscape and places that are central to my thesis.

One cannot deny the special relationship that Indigenous peoples maintain with the landscapes they have inhabited since time immemorial. The teachings shared with me by my Elders have helped reinforce this understanding. My uncle George Harris shared these thoughts with me:

I want to let you know that when I speak, I speak from my heart – for my nation and for my people. The land is an inheritance that I received from our ancestors. Part of that inheritance includes the traditions and sacred and ceremonial rights that go with the land and our culture. I want to speak from the perspective of an Indigenous person of the land. I come from this land. My ancestors come from the land. I am now a living being for this generation but my ancestors are connected to the land and I

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<sup>2</sup> Thomas F Thornton, *Being and Place Among the Tlingit* (Seattle: University of Washington Press, 2008) at 6.

<sup>3</sup> *Ibid.*

appreciate what they've given me and what they've left behind for us.  
You can't separate land and culture.<sup>4</sup>

Because the Hul'qumi'num legal tradition is intimately connected to the lands of the Coast Salish world, I believe that it is possible to trace the legal history of the Hul'qumi'num people through examining their territories. Changes in the lands of the Coast Salish world mirror the changes in our laws and jurisdiction. As Roger F. McDonnell observed about the efforts of Indigenous peoples to codify customary law,

as the relationships to the state are perceived to change, so too do the customs that ... [a] culture group stress. ... We must bear in mind that our focus on custom possesses a strong relationship, rather than substantive, dimension.<sup>5</sup>

As the lands of the Coast Salish world has developed, so too have the legal traditions of the Hul'qumi'num Mustimuhw.

In the remainder of this chapter, I will illustrate the connection between the culture and history of the Hul'qumi'num people by describing their "legal landscapes," meaning the way the inhabitants have interacted with the lands as a result of laws and jurisdiction. The history of jurisdictional conflict is embedded in the lands in the Coast Salish world. *Swuq'us*, or Mt. Prevost, serves as a reminder to my people of a time when our laws governed this territory; the scars left on the landscape from land alienation remind us of a time when outsiders were fighting for control of our territory; the reserves and accompanying poverty serve as a reminder today that we still have not achieved self-determination. It is my hope that by examining the changes in this lands, you will begin to understand the work I hope to accomplish in my dissertation – realization that it is only through respect and recognition of the Hul'qumi'num legal tradition and

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<sup>4</sup> *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of George Harris).

<sup>5</sup> Roger F McDonnell, "Contextualizing the Investigation of Customary Law in Contemporary Native Communities" (1992) *Canadian Journal of Criminology* 299 at 301.

conflict resolution processes that true reconciliation can occur and our territories made whole again.

## 4.2 Pre-Colonial Legal Landscapes: “Those Who Fell From the Sky”

### a. Sources of Law

What is the nature of the Hul’qumi’num legal tradition? What categories of laws are fundamental to the tradition? Where do these categories find their roots? In this chapter I will argue that understanding legal history is relevant to understanding current Hul’qumi’num law. Increasing one’s knowledge of Hul’qumi’num legal history “can lead to a better appreciation for their contemporary potential, including how they might be recognized, interpreted, enforced, and implemented.”<sup>6</sup> However, in understanding this history we must remember that Hul’qumi’num laws contain differing interpretations. Individuals hold different views about the character and practice of law. I have in fact read and listened to many varying accounts about the source of Hul’qumi’num laws.

Prior to conducting my primary research, I had read accounts that seemed to suggest that *Xeel’s* (“The Transformer”) was the source of Coast Salish law.<sup>7</sup> I believed that as he travelled throughout the Coast Salish world, rewarding the good and punishing the transgressors, he was also developing the legal tradition of the Hul’qumi’num Mustimuhw. Through my discussions with my Elders, I have come to understand that this is not true. *Xeel’s* is not the singular source of our *snuw’uyulh*.

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<sup>6</sup> John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23 [Borrows, *Canada’s Indigenous Constitution*].

<sup>7</sup> Bruce Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* (Lincoln: University of Nebraska Press, 2001) at 188 [Miller, *Problem of Justice*].

In his book, *Canada's Indigenous Constitution*, Professor Borrows develops a taxonomy of different sources of Indigenous law.<sup>8</sup> One such source is the sacred. As he describes, divine laws are fixed laws, given by the Creator, for the world to follow.<sup>9</sup> According to my understanding, this is the primary source of our *snuw'uyulh*. Arvid Charlie explained it to me in the following way: “We were here long before *Xeel's* came here. Some people are saying we come from *Xeel's* but no, he got here way after.”<sup>10</sup> Willie Seymour supported this understanding: “It's hard to say the origin. They had to come with the First People or else otherwise they wouldn't exist.”<sup>11</sup> Therefore, *snuw'uyulh* and the inherent legal principles that generate from it, have their origin in The First Ancestors of the Hul'qumi'num Mustimuhw.

However, despite the words of my Elders, I am not quick to dismiss the notion that there are sources of the Hul'qumi'num legal tradition in addition to The First Ancestors. Although I agree that the origins of our legal tradition began with The First Ancestors, I also believe that the sources of our legal tradition evolved, and continue to evolve, as our relationships with others within the Coast Salish world developed. For example, when the transformer *Xeel's* arrived in our territory, I believe that his actions also influenced the legal tradition. Similarly, as newcomers arrived in the Coast Salish world, their interaction with the Hul'qumi'num Mustimuhw also resulted in new deliberative law-making processes.

In this section I describe two important sources of the Hul'qumi'num legal tradition: 1) *Kwu Yuweenulh Hwulmuhw* – “The First Ancestors” and 2) *Xeel's* – “The Transformer”, which operated within the Coast Salish world prior to the introduction of British law. You will read about ancestors and individuals who significantly influenced and continue to influence our legal

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<sup>8</sup> Borrows, *Canada's Indigenous Constitution* *supra* note 6 at 23-58.

<sup>9</sup> *Ibid* at 14.

<sup>10</sup> Interview of Arvid Charlie (23 June 2010).

<sup>11</sup> Interview of Willie Seymour (23 June 2010).

traditions. Further, I will illustrate how these ancestors and individuals' teachings are reflected in the lands of the Coast Salish world.

*i. Kwu Yuweenulh Hwulmuhw – “The First Ancestors”*

In Coast Salish culture, oral traditions about The First Ancestors of local communities provide some of the basic cultural material by which people develop and express their relationship to the land and each other – in a sense, their legal tradition.<sup>12</sup> Through these stories, ancestors are associated with and embodied in the land. The telling of these stories, along with the experience of these beings at these places, brings the legendary people to life.<sup>13</sup> In essence, these places *become* these ancestors: they serve as “living” legal scholars. They are places where the Hul’qumi’num legal tradition can be “applied, studied, perfected and taught.”<sup>14</sup>

As one travels through the Cowichan Valley, the places where these First Ancestors fell are marked by contemporary village sites and stone landmarks. For example, *Syalutsa’* was the first ancestor to fall from the sky. He fell to the warm ground of *Quwutsun* near present-day Koksilah Ridge. His younger brother, *Stuts’un* was the second ancestor to be dropped from the sky. He landed in between the two majestic peaks of *Swuq’us* (Mt. Prevost). If you look carefully at the mountain called *Swuq’us* (Mt. Prevost), you can see the face of *Stuts’un* in the profile of the mountain (depicted in the picture below).

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<sup>12</sup> The laws associated with these First Ancestors and *Xeels* will be examined more closely in chapters 5 and 6.

<sup>13</sup> T Ingold, “A Circumpolar Night’s Dream” in Ingold, *The Perception of the Environment: Essays in Livelihood, Dwelling and Skill* (London: Routledge, 2000) at 92.

<sup>14</sup> JH Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2d ed (Stanford, CA: Stanford University Press, 1985) at 1.



The places where these First Ancestors dropped from the sky serve as a reminder to the Hul'qumi'num communities of their historic and continuing relationships to each other. Just as the First Ancestors of the original communities were interrelated through kin, so are their living descendants. As my great uncle Angus Smith said:

Where you dropped is where you belong ... Particular areas were peculiar to certain groups or families, where our ancestors were dropped on earth. They were carrying the cultural teachings ... Several peoples would go up the Cowichan River to the lake gathering their food. They knew where food was available. They gathered elk, deer and trout at the lake. Each place was designated to them. The cultural teachings were shown them, instructing them what was good for their life. It was showing the first people what they could use. It was only from the Elders; they would decide as they would go up to the Lake area. That's the way it was with our ancestors; that's why the Cowichan people carry this tradition. All the places have names.<sup>15</sup>

In essence, the kin networks formed through these First Ancestors serve as a link between the present-day, more politically autonomous residence groups, i.e. First Nations or *Indian Act* bands, throughout the Vancouver Island Coast Salish communities.

Many of the First Ancestor stories, while not as widely known as some would prefer, continue to be taught today. However these stories vary greatly in their recounting, a reflection

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<sup>15</sup> *Hul'qumi'num Treaty Group Newsletter*, 1:10 ( May 1998) at 2.

of the continuing tradition of property relations and the internal challenges these relations present.<sup>16</sup> Mr. and Mrs. Bob of Westholme told the First Ancestor story that I am going to share with you below to Diamond Jenness in 1935. Brian Thom reproduced it in full in his dissertation,<sup>17</sup> and I am drawing upon it because unlike other versions of the First Ancestor stories, it is silent on where the ancestors fall, emphasizing instead important teachings of moral behavior and respectful treatment of kin.

The first men appeared at Sooke and Westholme. Their weapons were bows and arrows and spears (*smaknans*), and with these they wandered about the country. *St'uts'un* of Westholme wandered down to Sooke, where he sighted smoke. He investigated it and discovered a man there named *Ti'qamuxw*, who displayed his power by changing the insects on his head to human beings. So now there were many people living at Sooke. *St'uts'un* stayed with *Ti'qamuxw* for a time, calling himself his younger brother; but he did not care to take one of *Ti'qamuxw* insect women to wife, lest other people should scorn him. So he returned to Westholme and planned to carve a wife for himself out of cedar. He carved an image of a woman, seated, then shot some mountain goats, rolled its wool into yarn and attached the yarn to a spindle, which he placed in the image's hand. Every day thereafter he wandered to the woods, returning at the evening to see if his image had come to life and spun the wool.

Now *Ti'qamuxw* had a daughter who did not always obey him. He warned her that someone would come and carry her away as punishment. She decided that she would go and find this person, and wandered away, accompanied by two slave women, each carrying a wooden dish and some dried fish. After wandering for many days she arrived at *St'uts'un*'s place at Westholme. She did not enter the house, but hid in the woods to see who was living there.

Early in the morning *St'uts'un* rose, lit his fire, ate, and went away to the woods. The girl and her two slave women entered his house, and seeing the image, threw it into the fire. As they poked it to make it burn up quickly it made a noise as if crying; finally it was consumed. The girl then sat down in the place of the image, and

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<sup>16</sup> Brian Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World* (PhD Thesis, McGill University Department of Anthropology, 2005) [unpublished] at 85-92.

<sup>17</sup> *Ibid.*

told her two slave women to hide; then, if *St'uts'un* killed her, they were to return and tell her father.

*St'uts'un* came home at evening, threw his catch onto the floor, and glanced at the image. The girl was sitting there, spinning the yarn. At first he thought it was the image come to life and began to question her. Presently he discovered his mistake and asked her where she came from. "I have come from Sooke." "What did you do with my image," he asked. "I threw it in the fire." "You have brought some slave women with you." "Yes. If you don't kill me I will show you them." She called in one of her slave women, who prepared her fish likewise. So the girl married *St'uts'un*.

In time she bore a daughter, then another daughter, and finally a son, all of whom grew up very fast. She put the boy under the charge of the second girl. One day she heard the boy crying and called out "Why is he crying?" The girl answered from outside "Oh, he is just crying for no reason"; but really she was stabbing him with wooden pins carved with the head of a *tsinqw'a* (double-headed snake) and was lapping up the blood. Finally the girl ate the boy, and wandered away to the forest, refusing to stay at home. People were increasing at this time, but every time a woman gave birth to a baby this girl would devour it. Her mother's people came from Sooke to visit them, and said to her father "Your daughter is not doing right. Why don't you stop her," but her father said, "I can't. She has become a *stl'eluqum* (supernatural monster)."

Now the elder girl announced that her sister had carried off a number of children whom she was going to roast and eat. *St'uts'un* ordered his people to make a lot of forked sticks and sent his eldest daughters to watch her sister. The cannibal girl told her sister to keep away and not prowl around her. Her sister said, "My father has sent me to bid you dance first on one side of the fire, then on the other. You must close your eyes as you dance or you will become blind; and you must hold up your breasts." The girl began to dance round the fire with her eyes closed. Then the people pushed her with their forked sticks into the fire. She screamed for someone to pull her out, but they only threw more wood on the fire until she was burned. The soot that flew into the air became birds.

The older girl now said to the people, "I shall not return to my parents but remain up here in the woods. But I shall not eat little children, as my sister has done. Instead, I shall show you how to make goat's wool blankets; and if a woman dies, I shall take care

of her children.” Then she began to sing, and as she sang a hurricane arose that blew down many trees. So she passed from sight into the woods.

*St’uts’un* had now lost his three children and was afraid to have any more, lest they too should become *stl’eluqum*; so he sent his wife back to her father at Sooke.<sup>18</sup>

As you may recall, this is a version of the same story shared with me by my great uncle Angus and recorded in the previous chapter. The different accounts emphasize the point made by Julie Cruikshank that the contexts of different acts of telling stories bring out differently situated meanings.<sup>19</sup> While my great uncle’s version was being told in response to a question about disputes over property, the Bob’s account appears to discuss relations between in-laws. Through recounting these two versions of the same narrative, I have revealed how First Ancestor stories can be utilized to establish teachings on a variety of issues.

Although the next chapter will examine the teachings of the Hul’qumi’num Mustimuhw in greater detail, I will begin to introduce them to you through the First Ancestor story shared above. Several Hul’qumi’num teachings are demonstrated by the experience of *St’uts’un*. The first is that of *si’emstuhw* or respect. *Ti’qamuxw*’s daughter did not have respect for her father: she refused to listen to him, she wandered away and she married a man without her father’s permission. *Ti’qamuxw*’s daughter also did not have respect for *Stuts’un* or his property: she burned the wooden carving of *Stuts’un*’s. The importance of respect was illustrated by what happened when *Ti’qamuxw*’s daughter had her own children. Her daughter became a *stl’eluqum*, and as a result, *Ti’qamuxw*’s daughter lost her son, both her daughters and her husband. This story also demonstrates the connection between spirituality and law, as the negative consequences felt by *Tiqamuxw*’s daughter may have been caused by her destroying the wooden

<sup>18</sup> *Ibid* at 94-96.

<sup>19</sup> Julie Cruikshank, “The Social Life of Texts: Editing on the Page and in Performance” in Laura Murray & Karen Rice, ed, *Talking on the Page: Editing Aboriginal Oral Texts* (Toronto: University of Toronto Press, 1999) 97.

figurine of the woman, which we know from Angus Smith's account contained latent spirit power.

The teaching of *thu'it*, or trust, was also illustrated in this First Ancestor story. *Stuts'un*, who appears to have done no wrong, also loses his entire family as a result of his wife's actions. However, *Stuts'un* was at fault as well, for trusting *Ti'qamuxw*'s daughter and choosing to marry her, even after he realized that she had trespassed and destroyed his wooden figurine. Arguably, he should have realized at the outset that she was not trustworthy and that no good could come to him by marrying her.

Finally, the teaching of *sts'lhnuts'amat*, or kinship, and its role in resolving disputes is also present in this account. The actions of *Ti'qamuxw*'s sister teach the Hul'qumi'num Mustimuhw that disputes are never only between individuals, but rather between kin. She recognized the mistakes that her sister had made, and was willing to make amends for them. She chose to stay in the woods and promised to look after any children whose mothers' passed on. Essentially, she was making restitution for her sister's actions. As examined more fully in Chapter 6, this is a vital principle of dispute resolution in the Coast Salish world.

## **ii. *Xeel's* – The Transformer**

Another source of Hul'qumi'num laws emanate from the stories about *Xeel's*, the Transformer. As Brian Thom has written,

While First Ancestor stories provide a mythic charter for communities and their ownership of and attachment to particular places, another narrative canon provides the foundation for the process by which Coast Salish people develop relationships to the land, the resources and to each other. These stories are found in *syuth* about the Transformer *Xeel's* and the people he encountered.<sup>20</sup>

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<sup>20</sup> Thom, *supra* note 16 at 113.

Although I agree with Thom about the purpose of the *Xeel's* stories, in my conversations with Elders it has been stressed to me that the First Ancestor stories also provided guidance for developing and maintaining relationships (as evidenced in the previous section). However, the *Xeel's* stories built upon and further developed those teachings laid down by the First Ancestors. Again, this demonstrates the living nature of the Hul'qumi'num legal tradition.

*Xeel's* is a figure considered to be an agent of the sun,<sup>21</sup> or actually was *Sum'shathut* (the sun)<sup>22</sup> (in some of my conversations I have heard him likened to Jesus Christ). He travelled throughout the Coast Salish world at the end of the time of the First Ancestors, rewarding those who worked hard, were struggling, and most importantly, were of good intent, and punishing individuals, families and animals that were lazy, stingy, neglecting their families, lacking gratitude, doing wrong or had ill intent.<sup>23</sup> They were punished by being permanently turned into stone, animals, plants, and the wind by *Xeel's* powers.<sup>24</sup>

Through his encounters, the Hul'qumi'num Mustimuhw also learn about the teachings of reciprocity, sharing, gratitude, humility and respectful relations with each other, animals, nature and the land. I will recount one of *Xeel's* encounters which was shared with Beryl Cryer by Siamtunaat (Mary Rice):<sup>25</sup>

Long, long ago, all the people thought that the sun- who was named Sum'shathut – made all things. He made the world, but he didn't finish it, and there was nothing on it – just ground and water. Then Sum'shathut came down to the world to finish things. He came looking like a man, and his name was *Xeel's*. Well, he went about fixing things, making lakes and rivers, and all things that grow, and then he made

<sup>21</sup> See generally Diamond Jenness, *The Faith of Coast Salish Indians* (Victoria: The British Columbia Provincial Museum, 1955).

<sup>22</sup> See generally Jenness, *supra* note 21; Chris Arnett, ed, *Two Houses Half-Buried in Sand: Oral Traditions of the Hul'q'umi'num' Coast Salish of Kuper Island and Vancouver Island* by Beryl Mildred Cryer (Vancouver: Talonbooks, 2008) [Arnett, *Two Houses*].

<sup>23</sup> See generally Arnett, *Two Houses*, *supra* note 22; Crisca Bierwert, *Brushed by Cedar, Living by the River: Coast Salish Figures of Power* (Tucson: University of Arizona Press, 1999); Jenness, *supra* note 21; Thom, *supra* note 16.

<sup>24</sup> See generally Bierwert, *supra* note 23; Jenness, *supra* note 21; Thom, *supra* note 16.

<sup>25</sup> Arnett, *Two Houses*, *supra* note 22 at 175-177.

animals and all things like that. In just a few places he made people, not many though, as I have told you before. Now there were some places where he could not put a river or lake for the people to drink from, and so, do you know what he did? He put his foot down on the rocks, and he told the water to come up and there under his foot, the fresh cold water came bubbling up! I have often got water from some of those springs made by *Xeel's*.

Over at Plumper Pass, there is one of those springs, I have seen it, it is just the shape of a big, big foot – about two feet long, and wide and deep enough to dip a bucket; but even in the very hot summers that spring is always full of water.

There is another spring over on Thetis Island, but that has been changed, made bigger.

Well, after *Xeel's* had put a few people in different places, he went over near Nanaimo to a place called 'Jack's Point,' and there one day, when the water was far out, he went along the rocks, and made a big salmon. That fish is there today, made of stone, living against the rocks, with its mouth a little open, as though it was swimming. Now, you know that black bird, the raven? – *Spaal'* we call him. Well, when *Xeel's* was making that fish, *Spaal'* came along and said: 'What are you making that thing for?' *Xeel's* told him!

"Before long, poor Indians will come this way looking for food to eat, and when they see this salmon, they will know that here is a good fishing ground; and this salmon I am making will bring other salmon here, so that there will always be lots of fish to be caught, and, do you know!" added Siamtunaat, "that has always been a good fishing places, the Indians can always catch salmon by Jack's Point!"

Now, as that man – *Xeel's* – went along he saw all sorts of people, sick ones and blind ones, humpy, and lame ones like that poor granddaughter of mine, and he made them all well – if they were good, but if he saw any bad people, those he turned to stone – all bad animals were turned into stone, too. All along the Islands, wherever you go, if you look at the rocks, you will see stone people, stone fish, stone animals – why there is a stone dog in a little hole up on the high rocks of Kuper Island, and where ever those things are seen, there you may know that *Xeel's* passed, long, long ago.

He went to all the little islands, and into every bay, no place was passed by. One day, as he was going along past *Q'ulits'* (Chemainus Bay), he saw a man very busy on the beach.

“What are you doing?” he asked. The man showed him two big knives that he had made. “I am making these knives very sharp!” he said. “There’s a man called *Xeel’s* coming this way, he is turning all the people into stone. I don’t like the way he acts, and I’m going to wait here for him, and kill him!”

“You are going to kill this man?” asked *Xeel’s*, “and you have not even seen him? Maybe the stories that you heard are not true!”

The man laughed, “I don’t like the sound of him! He said, “a man like that is better dead, as soon as I see him I will kill him!” Then *Xeel’s* got angry. He took the two knives that the man had made, and put them, one on each side of the man’s head. “Now,” he said, “because of the boldness that is in your heart, you will always wear these things on your head, and as you get older, they will grow longer, and small ones will grow from them like the branches of a tree. Go now! From this day you must always jump as you run, and your name will be *Ha’put*; and all people will hunt you that they may kill you for food.”

As *Xeel’s* spoke, the man turned into a great buck, with long, sharp horns coming from his head, where the knives had been put; and, as *Xeel’s* gave him his name, he bounded away into bushes, the first of all the deer.

Then *Xeel’s* went on and he came to those narrows near Nanaimo, Dodd Narrows. At one place along there was a spring of good water, but no one could go near it, for it belonged to a great devilfish that lived beside it. Not far from this spring there lived an old man and his grandson, a boy, fourteen years old, but very small, for he had never grown. These two had to paddle a long way to get their water because the devilfish tried to kill them if they went near his spring. One day they were out fishing, when they met a man.

“Can you give me a drink of water?” asked the man. The old man shook his head. “There is a spring just over there,” he said, pointing to the rocks, “but no one may use it, as a devilfish kills all who go near!” “I will drink from that spring!” said the man, “can you lend me a bucket to carry some water in?” “We have no bucket,” said the old man, “and you must not try and drink or you will surely be killed.” But the man laughed and paddled to where the spring bubbled its cool, clear water among the rocks.

“Since I have no bucket, I will use a large clam shell,” he said, and picked some big shells from the beach. Now he dipped them in the water, but, every time he brought the shell full of water up to his mouth, a hole came in the bottom and all the water ran out. Then, out from the rocks came the great devilfish. Straight to the man he came, holding out

his long arms to catch and kill him, but the man did not move, only reached out his hand, and taking the great creature, tore it in pieces and threw them back into the sea. “Come and drink!” he called to the old man and the boy. “See! The devilfish is dead! I have broken him in pieces.”

“Who are you?” questioned the old man, as he and the boy paddled to shore. “How is it, that you, a man alone, could kill that wicked devilfish? Many together have tried, but no man has been able to catch him! Surely you must be that *Xeel’s*, who we have heard was coming this way, helping those in trouble, and punishing those that are bad!”

The man nodded his head. “Yes!” he told them, “I am *Xeel’s*.” He looked at the small boy, and he turned him into a big strong boy, who could help his old grandfather, and not have to be taken care of as though he were a small child. All the way along it was the same. *Xeel’s* took away the bad and helped the good.

Again, I would like to briefly discuss some of the Hul’qumi’num teachings illustrated in this *Xeel’s* story, as an introduction to the concepts discussed more fully in the following chapters. The teachings of *thu’it*, trust, and *nu stl’i ch*, love, were demonstrated in the encounter that occurred at *Q’ulits’* (Chemainus Bay). The man on the beach did not trust *Xeel’s* or his actions. He had heard that he had been transforming people and decided that he was not a man to be trusted prior to meeting *Xeel’s* and prior to gaining a greater understanding of why *Xeel’s* was performing these transformations. Accordingly, the man was not acting in a trustworthy manner himself. This was not in keeping with Hul’qumi’num laws and practices.

Also, the man was not demonstrating love and compassion towards *Xeel’s* by planning to kill him, based only on what he had heard from others. Treating an individual with compassion, or showing them love, is a principle that is used to govern conduct within the Hul’qumi’num communities. If the man had been drawing upon this teaching in his decision-making processes, he would not have been preparing to kill *Xeel’s*. It is for these failures to abide by these teachings that the man was transformed into a deer.

The encounter at Dodds Narrow teaches the Hul'qumi'num Mustimihw about the teachings of *sts'lnnuts'amat*, or kinship. The young boy, although feeble, recognized that he had a responsibility to care for his elder grandfather. Despite the long distance, he still worked towards getting access to water to help sustain his grandfather's health. He loved and respected him. Because he was conducting his life in a manner that recognized the importance of maintaining his kinship relations, *Xeel's* transformed him into a healthy and strong young man – a young man capable of providing for his family.

The stories recounted in this section provide further support to the argument that the teachings and processes of the Hul'qumi'num Mustimihw deserve recognition. Prior to colonization the laws articulated by our First Ancestors and *Xeel's* operated with great force. They were exercised within a context where the Hul'qumi'num exercised full jurisdiction. There were no colonial laws conflicting with these laws, thereby diminishing their operation.<sup>26</sup> When settlers arrived, resources and inter-personal relationships were already governed by an existing legal tradition. This was reflected in the lands. Our ancestor *Syalutse'* and the other First People fell from the sky, leaving their footprints all over the traditional territory. *Xeel's* work can be seen all along the coast and valleys of the Coast Salish World; stone monuments and animals infuse the lands. These landmarks, which proclaim Coast Salish senses of place, reflect the teachings of the Hul'qumi'num legal tradition. They serve as reminders to my people of the manner in which they are to conduct themselves.

### **4.3 Legal Landscapes of Colonization: The Great Land Grab**

But there are also other stories embedded in the territory of the Coast Salish world. These landscapes tell a different story – one of a relationship with *Hwulunitum* (non-Indigenous) settlers.

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<sup>26</sup> This is not to say that all families interpreted these laws in exactly the same way.

Well, up at Kulleets Bay (Chemainus Bay) there lived an old, old woman, so old that not even the oldest of our people could tell when she had been young; and this woman had dreams ...

One day she told my grandfather that in her dreams she had seen a great canoe coming to our land. It was tall – tall and longer than two war canoes, and it moved without paddles! It had trees growing on it, and on these trees were wings, white and shining as a sea gull’s wings. The men in this canoe were strange, too, for they had black faces, and their hair was so (here she crooked her gnarled old fingers to indicate curls). My grandfather laughed when he heard this story, but that he too, had a dream. He saw the great canoe that the Kulleet woman had seen, but when he looked up, and up to where men were walking, he saw a stranger sight than the woman had told of, for these men had white skins, and fire and smoke were coming from their mouths, and on their bodies were not blankets, but some tight coverings!<sup>27</sup>

Upon first glance, these stories remain the dominant feature in the Hul’qumi’num lands today.

The effects of colonization and settlement are seen throughout the territory. For example, there is barely any remaining Crown land in southern Vancouver Island and what is left has been logged beyond recognition. This serves as a reminder to the Hul’qumi’num Mustimuhw that 150 years later, the relationship between these two peoples has yet to be reconciled.

#### **a. James Douglas Era**

Although people of European descent had been coming to the northwest coast of North America since the late 18<sup>th</sup> century,<sup>28</sup> until the early 1860s Hul’qumi’num communities had remained largely undisturbed by colonial settlement policies. Between 1850 and 1854 Governor James Douglas negotiated 14 “land-sale agreements” with First Nations in and around Fort Victoria, Nanaimo and on the north Island at Fort Rupert. These agreements, commonly referred to as the “Douglas treaties,” purportedly extinguished Aboriginal title to certain areas within these First Nations territories and allowed settlers to take possession of lands for farming and

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<sup>27</sup> As told by Siamtunaat to Beryl Mildred Cryer in Arnett, *supra* note 22 at 56.

<sup>28</sup> Wayne Suttles, *Handbook of North American Indians – Northwest Coast, Volume 7* (Washington: Smithsonian Institution, 1990) at 470.

natural resources. No treaties were ever signed with the Hul'qumi'num communities. However, there is evidence to suggest that some of the Cowichan asked Douglas for a treaty soon after he had made the first Fort Victoria treaties in 1850, but Douglas refused because the Cowichan were too far away from the established colonial settlements.<sup>29</sup>

Despite the fact that their territories were some distance from the established colonial settlements, the Hul'qumi'num Mustimuhw still encountered conflicts with the settlers during this time period. One such example was the killing of livestock and attack on Fort Victoria in 1844 – a conflict that arose over conflicting ideas about property law. When British settlers came to Fort Victoria, they brought with them livestock from Company posts to the south and let them out of the fort to graze.<sup>30</sup> In British culture, allowing one's animals to graze on land symbolizes ownership [or at least a property interest of some kind, such as a grazing lease] of the land, yet this may not have been interpreted by the Indigenous peoples of the area to be the case.

Brian Egan describes this phenomenon in the following way:

The symbols of markers that the English had to indicate or recognize possession of land were certainly not universal. While the act of releasing livestock to graze on open land around Fort Victoria may have been a marker of property to other Englishmen, it was likely not intelligible as such to other cultures, including to the indigenous residents of this place.<sup>31</sup>

In early 1844, a number of the Company's livestock went missing, and it was soon discovered that the animals had been killed by a Cowichan hunting party in preparation for a feast.<sup>32</sup> Roderick Finlayson, a Hudson's Bay Company officer, farmer, businessman and

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<sup>29</sup> See generally Foster & Grove, *supra* note 29. In this article the authors argue that there was a “treaty of sorts” made at Cowichan in 1862; however, it was not formally recorded nor honoured. See also Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002) at 21 [Harris, *Making Native Space*].

<sup>30</sup> Brian Francis Egan, “*From Dispossession to Decolonization: Towards a Critical Indigenous Geography of Hul'qumi'num Territory*” (PhD Thesis, Carleton University, 2008) (ProQuest Dissertations and Theses) at 115.

<sup>31</sup> *Ibid* at 123.

<sup>32</sup> *Ibid* at 115

politician, was determined to bring the perpetrators to account, as well as teach the local Indigenous groups a lesson regarding the penalty for interfering with white man's property, regardless of where it was found.<sup>33</sup> When his demand that the guilty parties be brought forward for punishment produced no results, Finlayson cut off trade with the groups.<sup>34</sup>

Cowichan Chief Tzouhalem, on the other hand, refused to acknowledge that the white settlers' cattle had any special status. His response to the demands for compensation was: "The Indian law is this: The animals which walk on our lands belong to those who have the skill to kill them."<sup>35</sup> After Finlayson cut off trade, the Cowichan people formed an alliance with other Indigenous groups and led an attack on Fort Victoria.<sup>36</sup> In response, Finlayson fired a canon at an empty house belonging to an indigenous person. The house was demolished by canon fire and the residents soon returned to negotiations to resolve the dispute. Oral history relates that they paid for the cows in the end and peaceful relations were re-established.<sup>37</sup> Finlayson expressed satisfaction with the outcome, because he felt that the Indigenous groups had been taught that they could not interfere with the white men or their property.<sup>38</sup> Accordingly, the "training" of local Indigenous peoples to colonial ways had begun.

Another conflict arose when on November 5<sup>th</sup> 1852, a Hudson's Bay shepherd named Peter Brown was murdered. Arguably, this conflict, and subsequent trial, represents the first, clear application of English criminal law and procedure to an Indigenous person accused of

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<sup>33</sup> *Ibid* at 116.

<sup>34</sup> *Ibid*.

<sup>35</sup> Joe Jack, "Chief Tzouhalem of Cowichan", online: < <http://www.joejack.com/mounttzouhalem.html>>.

<sup>36</sup> Egan, *supra* note 30 at 116.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid*.

murder, and an equally clear rejection of the Indigenous laws and procedures that would otherwise have applied.<sup>39</sup>

Brown's associate assumed that the crime had been committed by two young men, one Cowichan man, *Sque-is*, and one Sne-Nay-Muxw man named *Siam-a-sit*, who were both at Brown's hut when the sheep were driven out to pasture. Upon hearing the news of Brown's death, James Douglas immediately stopped all sale of gunpowder to Indigenous peoples. Douglas then sent an expedition after the men who had fled north to Nanaimo. He employed a British frigate, the *Thetis*, captained by Captain Augustus Kuper, along with a naval brigade of 130 blue-jackets and marines and 20 more men from the Victoria Voltigeurs. This frigate was towed by the steamer *Beaver*, which carried Douglas himself, the Voltigeurs and twenty Royal Marines. Douglas noted that this expedition constituted the "finest display of force he had witnessed in the Indian country."<sup>40</sup>

Arriving in Cowichan Bay on January 6, 1853, Douglas sent a messenger to the Cowichan chiefs asking them to a meeting as soon as possible, which was subsequently arranged for the following morning. When 200 Cowichan warriors arrived, a confrontation seemed imminent but Douglas raised his hand and said:

"Hearken, O Chiefs! I am sent by King George, who is your friend, and who desires right only between your tribes and his men. If his men kill an Indian, they are punished. If your men do likewise, they must also suffer. Give up the murderer, and let there be peace between the peoples, or I will burn your lodges and trample out your tribes."<sup>41</sup>

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<sup>39</sup> Hamar Foster, " 'The Queen's Law Is Better Than Yours': International Homicide in Early British Columbia" in Jim Phillips, Tina Loo & Susan Lewthwaite, eds, *Essays in the History of Canadian Law Volume V: Crime and Criminal Justice* (Toronto: University of Toronto Press, 1994) 41 at 61 [Foster, "The Queen's Law"]

<sup>40</sup> Barry Gough, *Gunboat Frontier: British maritime authority and Northwest coast Indians, 1846-90* (Vancouver, BC: University of British Columbia Press, 1984) at 51.

<sup>41</sup> *Ibid* at 53.

Soon after, the Cowichan brought forth the accused.<sup>42</sup> The force then went on to capture the second accused near Nanaimo. When the people were asked to surrender Siam-a-sit, they consented at first, but then offered to ransom his life by a payment of furs, which was rejected by Douglas.<sup>43</sup> He sent out a landing party who took the Chief of the village as a hostage until they learned that the suspect had escaped the village. The landing party engaged in a lengthy chase and captured Siam-a-sit, in a wood near a creek that came thereafter to be known as Chase River.<sup>44</sup>

Both men were tried aboard the *Beaver*, and sentenced to death by a jury made up of naval officers. Face with this foreign proceeding, the mother of Siam-a-sit begged Douglas to hand her husband instead, because ‘he was old and could not live long ... and one for one was Indian law.’<sup>45</sup> Siam-a-sit’s mother recognized that restitution had to be made, but offered the life of a chief for that of a shepherd. But this offer was not accepted and on the afternoon of 17 January 1853, both men were hanged on Protection Island outside of Nanaimo Harbour at a place still known as Gallows.

As this demonstrates, very early on in the contact history conflict arose as a result of the differing and often competing legal traditions of the Hul’qumi’num Mustimuhw and the British colonizers. The actions of government official and speedy trials and subsequent executions in front of family and community members, suggests the assertion of colonial law in the heart of the Hul’qumi’num territory and the breaching of Hul’qumi’num laws. English law, not Hul’qumi’num law, would govern relations between these two groups, and Douglas reported

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<sup>42</sup> *Ibid* at 53. Egan’s account of this story, *supra* note 30 at 185, posits that the Hul’qumi’num leaders may have offered a slave instead of the accused, which appeased both sides of the argument. However, whether or not Douglas knew that the individual brought forward was a slave is debateable.

<sup>43</sup> *Ibid*.

<sup>44</sup> Foster, “The Queen’s Law” *supra* note 39 at 62.

<sup>45</sup> Charles Alfred Bayley, “Early Life on Vancouver Island”, Victoria, British Columbia Archives (BCARS E/B/B34.2) at 20 cited in Foster, “The Queen’s Law” *supra* note 39 at 63.

with some satisfaction that the execution had made ‘a deep impression on [the] minds [of the Indians].’<sup>46</sup>

### **b. Fraser River Gold Rush**

While the Hul’qumi’num people had been successful in deterring the forces of colonialism from entering its territory for a period of time after the conclusion of the Fort Victoria Treaties, the overwhelming impact on Hul’qumi’num lands and the Pacific Northwest of the Fraser River gold rush brought dramatic changes to First Nations people.

One of the most significant results of the Fraser River Gold Rush was that the Crown Colony of British Columbia was proclaimed by James Douglas at Fort Langley on November, 19<sup>th</sup> 1858.<sup>47</sup> After Vancouver Island, this was the second British colony to be established on the Pacific Coast. With Fort Victoria consisting of fewer than three or four hundred settlers at the time, the arrival of over 30,000 gold seekers was an extraordinary development.<sup>48</sup> Although the majority of this huge influx of people was felt particularly along the corridors of the Fraser and Thompson Rivers, once the tide of immigration had subsided many of these colonists began to search for places in which to settle. As the Fort Victoria Treaties had already established settlement in the agriculturally rich lands of Victoria, Saanich, Sooke and Metchosin, the next “vacant space” to occupy was the traditional lands of the Hul’qumi’num peoples.<sup>49</sup>

In 1858 and 1859, close to ten thousand acres were applied for in the Cowichan region by nineteen different purchasers.<sup>50</sup> None of these lands had been ceded by the Hul’qumi’num communities to the colony of Vancouver Island; nevertheless, the colonial government began a series of surveys that ultimately placed the traditional world of the Hul’qumi’num peoples within

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<sup>46</sup> Foster, “The Queen’s Law”, *supra* note 39 at 63.

<sup>47</sup> See generally Cole Harris, *The Resettlement of British Columbia* (Vancouver: UBC Press, 1997).

<sup>48</sup> Daniel Marshall, *Those Who Fell From the Sky* (Duncan, BC: Cowichan Tribes, 1999) at 109.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

a pattern of grids that criss-crossed the valley floor in an attempt to impose European notions of land ownership.<sup>51</sup> This pattern of grids was one of the first indicators to the Hul'qumi'num people that these newcomers did not intend to abide by their teachings of respect and sharing, and their application to their customary land tenure system.

Although Hul'qumi'num land tenure was not a matter of exclusive use and occupancy, this didn't mean that boundaries didn't exist prior to colonization. Family-owned lands and resources were well known:

Lots of people say that the Indians didn't own the land because it wasn't surveyed. But they had it surveyed by landmarks, rivers, creeks, mountains and rocks – That sort of thing.<sup>52</sup>

*Luschiim*, one of my Cowichan elders, describes this concept as describing land-use areas in “metes and bounds.”<sup>53</sup>

Although there were hunting and gathering areas that were accessible to everyone, access to privately-owned resources was restricted and the penalty for unauthorized trespassing, at least in the first half of the nineteenth century, was harsh.<sup>54</sup> An early description of Hul'qumi'num property rights comes from the son of a noble Quamichan woman and an Englishman named John Humphreys who settled in the Cowichan River delta around 1856. He described:

Every family had its own hunting and fishing grounds, and the tract of land which each one claimed was in proportion to the size of the family, if it was a large family it had a large tract of land, and vice versa. Sometimes one family had to its credit many miles of land, for its hunting and fishing purposes. If one Indian found another man poaching on his land he immediately shot and killed him as it was within the law to

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<sup>51</sup> *Ibid.*

<sup>52</sup> Robert Akerman, personal communication, cited in Chris Arnett, *The Terror of the Coast: Land Alienation and Colonial War on Vancouver Island and the Gulf Islands, 1849-1863* (Burnaby, BC: Talonbooks, 1999) at 23 [Arnett, *Terror of the Coast*].

<sup>53</sup> *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Arvid Charlie). It is interesting to note that this is a common law legal expression. It describes how land boundaries are determined by a sort of “dead reckoning” before precise surveys can be done. Some legal descriptions are still in metes and bounds today.

<sup>54</sup> Arnett, *Terror of the Coast*, *supra* note 52 at 23.

do so. There were very few laws but what there were, were strictly kept, as the punishment for breaking them was very strict. Also every man could get nearly all the game he wanted on his own property and consequently did not have to trespass on his neighbour's land.<sup>55</sup>

However, although recognition of family ownership was important, access to family-owned resources was not denied to those who followed protocol. Often all one had to do was ask for permission and you would be granted access to resources. *Ts'ules*, William Charles Seymour, described access to territory as follows:

There are traditional hunting boundaries in our territory. In the past, if someone wanted to hunt in our traditional territory, they had to seek permission to make it up the river. Even then, if they didn't have the knowledge to get up the river, they would have to have someone guide them.<sup>56</sup>

The fact that permission was not asked prior to the creation of these boundaries by colonizers was a contravention of the Hul'qumi'num law. Although sharing was a legal principle followed by the Hul'qumi'num Mustimuhw, the principles of respect and trust required a request to be made and permission granted. As the following sections demonstrate, Hul'qumi'num communities expected their legal traditions to be considered in the development of this new relationship between the Hul'qumi'num Mustimuhw and the newcomers to their territories. However, this did not occur. Instead, British law would be used, not only as a vehicle through which colonizing powers secured control of their territories and people, but also to justify the colonial projects themselves.

In 1859, Oliver Wells was sent to carve out a number of land districts, those of the Hul'qumi'num communities of Cowichan, Shawnigan, Comiaken, Quamichan and Somenos. In addition to providing colonial authorities with a larger and more correct survey of the terrain,

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<sup>55</sup> *Ibid.*

<sup>56</sup> *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of *Ts'ules*).

Wells offered the opinion that the traditional lands of the First Nations contained enough good land within the Hul'qumi'num territory to provide farms for a population of from 500 to 600 families, at an average of about 100 acres each".<sup>57</sup> Wells was also charged with laying out Indian Reserves in the area. In his survey report he acknowledged the Hul'qumi'num presence in the following sentences:

Along the rivers there are nine Indian villages, as follows: - three Clemelematus, two Comiaken, one Taitka, one Quamichan, one Somenos, and one Koksilah. The number of families, after careful investigation, has been set down at 250, and the whole population at about 1,000 to 1,100 souls. The Indians have shown throughout a perfectly friendly disposition, and a strong desire to see the white men settled among them. Their services may prove of utility to the early settlers by way of cheap labour.<sup>58</sup>

After the survey of the Cowichan Valley in 1859, Douglas began to fear the reaction of the local tribes to settlement in their traditional lands. The Governor wrote to Lord Lytton of the Colonial Office in Britain that the these Nations believed,

that their lands are to be immediately sold and occupied by white settlers, an impression which it is difficult to remove and that gives rise to much contention amongst themselves about the disposal of their lands; one party being in favour of a surrender of a part of their country for settlement; while another party comprising nearly all the younger men of the Tribe strongly oppose that measure and wish to retain possession of the whole country in their own hands, and I anticipate much trouble in the adjustment of those disputes before the land can be acquired for settlement.<sup>59</sup>

This representation of the Hul'qumi'num Mustimuhw and perspective is worth noting because it suggests that there were differences in opinion regarding the land in the territory. Some individuals wanted to keep a portion of the lands and be compensated for what they gave up and others were unwilling to give up any ownership of the land. Although these initial and

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<sup>57</sup> Oliver Wells, "General Report of the Survey of the Districts Shawnigan, Cowichan, Comiaken, Quamichan, and Somenos," in *Vancouver's Island. Surveys of the Districts of Nanaimo and Cowichan Valley* (London: George E. Eyre and William Spottiswoode, 1859) at 11 cited in Egan, *supra* note 30 at 165.

<sup>58</sup> *Ibid.*

<sup>59</sup> Douglas quoted in JE Hendrickson, "The Aboriginal Land Policy of Governor Douglas, 1849-1864" (November 1988) [unpublished, archived at *BC Studies Conference*, 4-6] cited in Marshall, *supra* note 48 at 110.

inaccurate surveys were eventually discarded, the ground was laid for the beginnings of substantial white settlement.

On March 1<sup>st</sup> 1860, Douglas delivered a speech to the colonial legislature of Vancouver Island and stated that:

The House of Assembly will have to provide means for extinguishing the native Title to Lands in the Districts of Cowitchen, Chemainus, and Saltspring Island, which are now thrown open for settlement. The purchase should be effected without delay, as the Indians may otherwise regard the settlers as trespassers and become troublesome.<sup>60</sup>

Soon after the Governor's speech members of the Vancouver Island Assembly attempted to petition the Duke of Newcastle for the extinguishment of Aboriginal title; however, the British government believed that this was the responsibility of the colonial government. Douglas also agreed that the extinguishment of Aboriginal title should occur as quickly as possible due to the extreme pressure created by non-native settlement upon traditional lands such as in the Cowichan Valley. This sentiment became ever more urgent as violence began to erupt within the territory. One such notable conflict occurred between the Lamalchi villagers of Kuper Island and the colonial authorities in 1863 over the murder of Frederick Marks and Caroline Harvey and the subsequent destruction of Lemalchi Village on Kuper Island. The incident involved the Cowichan and the Lemalchi Village of Kuper Island, who according to Commander Mayne, were "unwilling to sell, still less to be ousted from their land."<sup>61</sup> On 8 April 1863, settler Frederick Marks and his daughter Caroline Harvey were murdered by a group of Penelakut – two men, Palluk and Allwhenuk, and two women, Semallee and Koltenaht, who came from the village of Lemalchi.<sup>62</sup>

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<sup>60</sup> "Opening of the House of Assembly," *Victoria Gazette* (2 March 1860) at 2 cited in Marshall, *supra* note 48 at 111-112.

<sup>61</sup> Gough, *supra* note 40 at 140

<sup>62</sup> Egan, *supra* note 30 at 175.

Upon learning of their deaths, Governor Douglas took immediate action, and sent the frigate “the *Forward*” on April 15<sup>th</sup> to various settlements on the east coast of Vancouver Island in search of the accused.<sup>63</sup> On the April 25th, the *Forward*, captained by Lascelles, arrived at Lemalchi Bay, Kuper Island:

Lascelles knew that several Indians who were involved in the murders were there and that the Lemalchi intended to resist...Lascelles sent a message to shore stating that he wished to speak to the chief and to do so on board ship. The chief replied that he would neither board the ship nor surrender the murderers. Through Iomo, a half-breed Cherokee interpreter hired at Cowichan, Lascelles told the chief that if he was not on board before the red flag which was hoisted for the purpose was lowered (thereby giving a quarter of an hour to comply) Lascelles would fire on the village. The chief was not to be intimidated. With defiant pride he told the British that he was not afraid of them.

At the end of the appointed time, Lascelles hauled down the flag and fired into the village. The Lemalchi immediately deserted it. They speedily clustered thickly on two points at the extremity of the bay...The ships guns “knocked the village down as much as possible”...Next morning, after returning from the night’s anchorage at Chemainus Bay, the gunboat fired into every part of the island with the hope of dislodging the Indians from the woods. Lascelles completed the destruction of the village with a few shot and shell.<sup>64</sup>

After a long and protracted search, the colonial authorities found and captured two Chemainus chiefs when it was learned that they were harbouring Acheewun, the main suspect in the murders. However, Acheewun had fled the night before, and accordingly the Chemainus people offered up his family: his father-in-law, uncle, wife and child in his stead.<sup>65</sup> In the meantime, an accomplice of Acheewun had been captured and provided key evidence as to his

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<sup>63</sup> Gough, *supra* note 40 at 140.

<sup>64</sup> *Ibid* at 141-142.

<sup>65</sup> *Ibid* at 143.

whereabouts, which produced the arrest of several more accomplices but only after a great chase was Acheewun himself captured:

In all, the authorities took eighteen Lemalchi prisoner. They included Acheewun, two suspects and an accomplice in the murder of Marks's daughter, two suspects in the murder of Marks, and seven known to have been on Pender Island when the murder was committed. They also included Acheewun's sister, a suspect's wife, and three hostages detained for having harboured Acheewun and the murderers at Chemainus. *Acheewun clearly was not guilty of murder.* He was, however, charged with aiding and abetting those who were guilty of resisting authorities at Lemalchi Bay. Six of his relatives were incarcerated by the authorities: his father-in-law, uncle, wife, child, sister and sister-in-law...At the trials, begun 17 June, four Indians including Acheewun were found guilty of complicity in the celebrated double murder and were executed on a scaffold erected in front of the police barracks.<sup>66</sup>

This trial was widely regarded as a miscarriage of justice. In an effort to punish and subdue the Lamalchi, the village was destroyed and in 1864 James Douglas forbade any settlement on this site.

Writing to Newcastle, Douglas expressed his view with regard the proprietary rights of the Hul'qumi'num communities:

As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain Districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary Tribes, as national wrongs; and the sense of injury might produce a feeling of irritation against the Settlers, and perhaps disaffection to the Government, that would endanger the peace of the country.<sup>67</sup>

However, Douglas' request for a £3000 loan from the Imperial government for the final settlement of First Nations land claims to Vancouver Island was rejected. But the land title issue had not disappeared with Imperial refusal of a loan. This was illustrated by the actions of the Cowichan peoples, who in 1861 removed survey posts from the Reserve boundaries in order "to

<sup>66</sup> *Ibid* at 145-146. Emphasis added.

<sup>67</sup> Letter from Sir James Douglas to Newcastle (25 March 1861) at 126 ff cited in Marshall, *supra* note 48 at 112.

keep their claim to the land.”<sup>68</sup> As Royal Navy Commander Richard Charles Mayne acknowledged, “Although it has been surveyed it cannot yet be settled, as the Indians are unwilling to sell, still less be ousted from their land.”<sup>69</sup>

Despite some acknowledgement of the Indigenous possessory rights to villages sites and gardens etc. by the colonial and Imperial governments, Douglas nevertheless imposed his land settlement policies on Hul’qumi’num traditional territory. While the majority of these peoples were absent fishing on Fraser River, Governor Douglas, Surveyor General Pemberton, and the colony’s Attorney General joined with the white settlers aboard HMS *Hecate* in “The Cowichan Expedition,” which landed in August 1862.<sup>70</sup>

All previous attempts by the white settlers to enter the Hul’qumi’num territory had usually met with resistance, so it is of no surprise that they arrived when my ancestors were away. The *British Colonist* spoke in flattering, yet deceitful, terms of the colonial government’s good intentions:

The few natives at present in the district (the major portion of the tribe being absent fishing) agreed without hesitation to the surrender of their lands to the Government, with the exception of their village sites and potato patches, being informed that when the absent members of the tribes had returned to their homes in the autumn, compensation for the lands taken up by the settlers would be made at the same rate as that previously established – amounting in the aggregate to the value of a pair of blankets to each Indian – the chiefs, of course, coming in for the lion’s share of the potlatch. The Indians, one and all, expressed themselves as perfectly content with the proposed arrangement, and even appeared anxious that settlers should come among them.<sup>71</sup>

To have trespassed upon Hul’qumi’num lands when the majority of the peoples were on the Fraser fishing was certainly bad enough, but to insist that the few Hul’qumi’num people who

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<sup>68</sup> Marshall, *supra* note 48 at 113.

<sup>69</sup> RC Maynes, *Four Years in British Columbia and Vancouver Island: An account of their Forests, Rivers, Coasts, Gold fields, and Resources for Colonisation* (London: John Murray, 1862) at 152.

<sup>70</sup> Marshall, *supra* note 48 at 113.

<sup>71</sup> “The Cowichan Expedition,” *British Colonist* (22 August 1862) cited in Marshall, *supra* note 48 at 113-115.

remained “agreed without hesitation to the surrender of their lands ... with the exception of their village sites and potato patches”, was a sleight-of-hand that bordered on the absurd.<sup>72</sup> As one can recall from the previous chapter, the Fraser River was a summer fishing settlement for the Hul’qumi’num Mustimuhw; therefore, it was not unusual for the community to be there during this time. When the Hul’qumi’num Mustimuhw returned from fishing, no compensation was ever paid for the lands taken up by these “first settlers”, even though the evidence supports the notion that a treaty of sorts was made at Cowichan in 1862 based on the similarities between this event and the events at Fort Victoria in 1850.<sup>73</sup>

At the date of this writing the government has still not fulfilled its promise. Close examination of the “Committee on Public Expenditure” Report, 3 May 1864, reveals that \$9700 had been budgeted in 1863 and 1864 for the express purpose of extinguishing First Nations’ claims to the Cowichan, Chemainus and Saltspring Island Districts, monies that were never spent.<sup>74</sup> One can assume that with the full impact of the 1862 smallpox epidemic having taken its horrific toll on the tribes, the colonial government held back these funds, perhaps believing that they were witnessing the end of a people. However, a counter argument is that Douglas held back these funds to punish the Cowichan for their resistance and the killing of Peter Brown and wounding of Thomas Williams and other incidents. In addition, as the colonial government continued to procrastinate on Douglas’ original promise, white settlers began to make their own lease arrangements with Cowichan peoples for the use of Reserve lands, the majority of the Cowichan Valley having been claimed by Europeans.<sup>75</sup> The traditional territory of the Hul’qumi’num Mustimuhw had been illegally appropriated by the colony, an action

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<sup>72</sup> Marshall, *supra* note 48 at 115.

<sup>73</sup> See generally Foster & Grove, *supra* note 29.

<sup>74</sup> Marshall, *supra* note 48 at 116.

<sup>75</sup> *Ibid* at 120.

subsequently bolstered by the arrival of HMS *Hecate*, and the limited reserve lands left behind in the wake of 1862 were also ultimately curtailed.

Despite these events, arguably Douglas' land policy was the highwater mark in the history of the Hul'qumi'num Mustimuhw land grab. Douglas' clearest statement of his land policies came in his letter to Indian superintendent of the day, I.W. Powell, written ten years after he had left office.<sup>76</sup> Powel had inquired as to whether Douglas had followed an acreage formula in setting out reserves, and Douglas replied that he had not:

The principle followed in all cases was to leave the extent and selection of the land entirely optional with the Indians who were immediately interested in the Reserve. The surveying Officers having instructions to meet their wishes in every particular, and to include in each Reserve, the permanent Village sites, the fishing stations, and Burial Grounds, cultivated land, all the favourite resorts of the Tribes; and, in short, to include every piece of ground, to which they had acquired an equitable title through continuous occupation, tillage, or other investment of their labor. This was done with the object of securing to each community their natural or acquired rights, of removing all cause for complaint or the ground of unjust deprivation of the land indispensable for their convenience or support, and to provide, as far as possible, against the occurrence of agrarian disputes with the white settlers ... Moreover, as a safeguard and protection to these Indian Communities, who might, in their primal state of ignorance and natural improvidence, have made away with the land, it was provided that these Reserves should be the common property of the tribes, and that the title should remain vested in the Crown, so as to be alienable by any of their own acts ... [and finally] contemplating the probable advance of the Aborigines in Knowledge and intelligence, and assuming that a time would certainly, arrive, when they might aspire to a higher rank in the social scale, and feel the essential wants and claims of a better condition, it was determined to remove every obstacle from their path, by placing them in the most favourable circumstances for acquiring land, in their private and individual capacity, apart from the Tribal Reserves. They were, therefore, legally authorized to acquire property in land, either by direct purchase at the Government Offices, or through the operation of the pre-emption

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<sup>76</sup> Harris, *Making Native Space*, *supra* note 29 at 43.

laws of the Colony, on precisely the same terms and conditions, in all respects, as other classes of Her Majesty's subjects.<sup>77</sup>

Soon after his retirement, most of his Native land policy was abandoned. This was due, in part, to the fact that he failed to clearly state this policy until years after he had retired and his successors had been left with no real defined position on the topic.<sup>78</sup>

### c. Joseph Trutch Era

Following Douglas's retirement in 1864, Joseph Trutch, the new land commissioner, continued to reshape the colonial policies, initiated by Douglas, around land and Aboriginal people. Arguably, the policies he instituted forever altered the course of history in British Columbia. As colonial land commissioner, Trutch believed that Indigenous peoples should be relieved of as much territory as possible so that *Hwulunitum* (non-Indigenous) settlers could 'properly' develop the colony's lands and resources.

Joseph Trutch had come to British Columbia in 1859 with eight years' experience as a surveyor and farmer south of the 49<sup>th</sup> parallel. His interest in the gold colony in the early years was in building roads and bridges, surveying townships and establishing farms, and in amassing a personal fortune. To him, the colony was an area of land requiring development. This became even more apparent once the wave of immigration had subsided and many of these speculators began to search for places in which to settle. Consequently anything, or more importantly anyone, who stood in the way of that development had to be moved.

During his tenure as Commissioner of Land and Works, Trutch had a huge impact on Indian land policy. Under his guidance, in 1866, the colonial legislature prohibited Indigenous

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<sup>77</sup> Letter from Sir James Douglas to Powell (14 October 1874), Ottawa, National Archives of Canada (RG 10, vol 3611, file 3756-1 (reel C-10106)) in Harris, *Making Native Space*, *supra* note 29 at 34-44.

<sup>78</sup> *Ibid.*

peoples' rights of preemption. In areas of white settlement, Indigenous peoples were restricted to their reserves. These changes were not lost on the Hul'qumi'num Mustimuhw. On November 14, 1866, a number of Hul'qumi'num chiefs travelled to Victoria to meet with the new Governor, Mr. Seymour. Although Governor Seymour was not available, the chiefs, about one hundred men of the tribes, assembled at the Mission School and made formal speeches to the Bishop of Columbia, Archdeacon Gilson, the Rev. A.C. Garrett, the Rev. J. Reynard, and Mr. H. Guillod, Indian Catechist.<sup>79</sup> Soucahlelzip (Comiaken Chief) captured many of the concerns in his speech:

We rejoice to see the New Chief, (Mr. Seymour). This joy made us come to see him, and moreover, we wanted to ask him not to allow the White man to take away our land. We wish the White Man not to be too near our homes. Three white men live on the border of our land: these men, one of them especially, possess much cattle and many pigs- and although the Indians have fenced their lands these break in and destroy our crops. So we have no potatoes, and no food. These same white men cut wood on our lands, and thus the Indians have to fetch their wood from a great distance.

When Mr. Seymour returns we wish him to send a Chief with power to mark out the boundary of the Indians' lands, so that we may strongly fence, and enclose them. We wish also to be paid for the lands taken by the white men: other tribes have had Indian claims allowed, why not we? The lands we occupy we do not wish to give up: for the rest, we wish to be paid.

From times beyond memory my fathers have dwelt at Cowitchan – there they died, there they are buried. I also would be buried there; there I wish my sons, and my sons' sons to succeed me. We love our land and cannot give it up. The River up which the Salmon runs and the rich soil on both sides of it, where we plant potatoes we wish to keep. Lands outside these lots we should be pleased to see the White man occupy: Indians and Whites dwelling apart, and a distinct boundary preventing their interfering with each other.<sup>80</sup>

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<sup>79</sup> Foster & Grove, *supra* note 29 at 60.

<sup>80</sup> Copy sent to W Seymour, "Speeches of Indian Chiefs, November 14, 1866 about their lands" (10 Dec 1866) Victoria, BC Archives of Diocese of British Columbia, cited in Foster & Grove, *supra* note 29 at 60.

This speech indicates that the chiefs had expectations that the Hul'qumi'num legal tradition, especially as it related to land tenure and conflict resolution, was to be applied. Again, the chiefs expressed that their interests in land need to be respected. Although they acknowledged that the non-Hul'qumi'num individuals had an interest in the land and that their territories could be shared, they also declared that these territories should not encompass areas that were important for ancestral and spiritual purposes. As demonstrated in the previous chapter, this is due to the fact that these places are essential for maintaining connections to the territory.

Trutch was also the first colonial official of considerable importance to explicitly deny the application of Aboriginal title in the colony. In an 1870 memorandum to the governor, in response to a letter from the secretary of the Aborigines Protection Society in England, Trutch stated the following:

The title of Indians in the fee of the public lands, or any portion thereof, is distinctly denied. In no case has any special agreement been made with any of the tribes of the Mainland for the extinction of their claims of possession; but these claims have been held to have been fully satisfied by securing to each tribe, as the progress of settlement of the country seemed to require, the sue of sufficient tracts of land for their wants of agriculture and pastoral purposes.<sup>81</sup>

This denial of Aboriginal title appears to be consistent with the de facto denial of Aboriginal title on the Mainland of British Columbia, evident in the extension of the right to preempt unsurveyed Crown lands. But there was still the issue of the Douglas purchase treaties on Vancouver Island, and their recognition of Aboriginal title. Nevertheless, in response to this problem, Trutch argued that Douglas had arranged

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<sup>81</sup> Ministry of Aboriginal Affairs, "Report of the Government of British Columbia on the subject of Indian Reserves" in *Papers Connected with the Indian Land Question, 1850-1875* (Victoria, BC: Richard Wolfenden, Government Printer, 1875) at 11  
online: < [http://www.archive.org/stream/papersconnectedw00britiala/papersconnectedw00britiala\\_djvu.txt](http://www.archive.org/stream/papersconnectedw00britiala/papersconnectedw00britiala_djvu.txt)>.

agreements with the various families of Indians ... for the relinquishment of their possessory claims in the district of the country around Fort Victoria, in consideration of certain blankets and other goods presented to them. But these presents were, as I understand, made for the purpose of securing friendly relations between those Indians and the settlement of Victoria, then in its infancy, and certainly not in acknowledgement of any general title of the Indians to the land they occupy.<sup>82</sup>

Trutch also altered the boundaries of the reserves established under Douglas's authority during this time. The reasoning behind the reductions was simple and consistent with Trutch's overall perspective on Indigenous peoples: they were more bestial than human and they held lands that they would not and could not develop in a productive way. Such a sentiment was expressed by Trutch in his report on the Lower Fraser Indian reserves in August 1867:

The Indians really have no right to the lands they claim, nor are they of any actual value or utility to them; I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them either to Government or to individuals.<sup>83</sup>

Accordingly, during his tenure Trutch adjusted many reserves in Kamloops and the Lower Fraser so that Indigenous families received a maximum of six to ten acres each.<sup>84</sup> In May 1867, Surveyor General Benjamin W. Pearse was sent to the Hul'qumi'num territory to re-survey the Indian reserves. Compared to the approximately 45,000 acres of outstanding agricultural land set aside for colonial settlement, the 1867 survey confirmed boundaries that reduced the Cowichan Reserve lands to a mere 2705 acres.<sup>85</sup> However, in all cases, the Hul'qumi'num communities fervently protested these further curtailments to their traditional

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<sup>82</sup> Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia 1849-1989* (Vancouver: UBC Press, 1990) at 40.

<sup>83</sup> *Ibid.*

<sup>84</sup> Harris, *Making Native Space*, *supra* note 29 at 56-62.

<sup>85</sup> Marshall, *supra* note 48 at 129.

lands and in a limited number of cases were successful in having them re-confirmed as reserve land.<sup>86</sup>

Trutch's denial of Aboriginal title and, in particular, his depiction of the Douglas purchase treaties as mere friendship agreements would prove to be remarkably durable as the colony moved into provincehood. To many non-Indigenous peoples, Trutch's views were persuasive because they were consistent with their interests and with those of the government. They felt there was no better way to reinforce non-Indigenous interests in the land than by denying Aboriginal rights and title. If Aboriginal title did not exist, there was no interest in the land that had to be purchased. Furthermore, the reserves set aside for Indigenous peoples, like the Hul'qumi'num, should not be seen as recognition of Aboriginal title or of the surrender of title to the land adjacent to reserves. Reserves were viewed as nothing more than "gifts" from the Crown to Indigenous peoples.<sup>87</sup>

This was not the manner in which the Hul'qumi'num Mustimuhw viewed or continue to view reserves. My elder Laura Sylvester likens reserve-lands to a prison and stated:

We can't get out of the prison that we're in. We have to get out of that prison. We need to be free to roam the land the way we used to. We need to be able to build like we used to and harvest like we used to. We need to be able to fish up north and down south. We have to be able to clam dig up north and down south.<sup>88</sup>

As evidenced by the statement above, the creation of reserve lands contravened the Hul'qumi'num Mustimuhw customary land tenure practices. As discussed in the preceding chapter, Coast Salish concepts of property are more fluid and allow for interests in land to be created and diminished through a complex system of social ordering based upon the building

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<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid* at 41.

<sup>88</sup> *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Laura Sylvester).

connections and maintaining relations. In essence, the reserve system severed these relationships, reducing the Hul'qumi'num property interests to small parcels of land, in areas which did not take into account their ancestral or historical connection to place.

**d. Hul'qumi'num Peoples “Join” Canada**

In 1871, the United Colony of British Columbia had joined Canada as a new province and responsibility for Indigenous people was transferred to the federal government. Article XIII of the *Terms of Union* stipulated the transference of authority:

The charge of the Indians, and the trusteeship and management of the lands reserve for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the union.<sup>89</sup>

The extension of Canadian sovereignty to the Pacific Coast was undertaken without any political participation from Indigenous peoples, even though the Indigenous population was in a substantial majority compared to the European presence. Indigenous peoples most likely viewed the new authority with hope, as the Canadian government had recognized Aboriginal title in negotiations with Indigenous leaders throughout the 1870s, where an eighty (80) acres per family minimum was judged the accepted norm in Ontario; it was even higher in what would become the Prairie provinces, in some cases as high as 640 acres. As this illustrates, from the time of Confederation, up until today, Indigenous land policy as a function of white settlement continue to be practiced in British Columbia largely to the exclusion of Indigenous interests.

As tensions and conflict remained high within the Hul'qumi'num territory, the provincial and federal governments appointed a three-man *Joint Indian Reserve Commission* in 1876 to resolve the “Indian Land Question.” The Commission members arrived in the Hul'qumi'num Territory on January 19, 1877, almost six years after Confederation and over the course of one

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<sup>89</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

month interviewed Hul'qumi'num peoples and settlers in an attempt to solve these seemingly irreconcilable differences. In their final report they noted the extreme difficulty of arriving at a viable solution to the impasse:

a strange system of mismanagement has from the first existed. The Reserves originally assigned to them by ex-Governor Douglas have been from time to time cut down by successive Governors (especially, it would appear, by the late Governor Seymour) in such-wise that great dissatisfaction had arisen and all confidence in the sincerity of the Government seemed to have been destroyed. A strong party among the Indians, we had reason to privately know, were leagued together with the view to urging the Commissioners to restore to them the lands that had been alienated. But in anticipation of their argument the Dominion Commissioner, in accordance with the tenor of his instructions, informed the Indians at the outset that, while the Dominion Government in unison with the Provincial Government, were solicitous to promote the interest of the Indians, and to satisfy them in every reasonable way, no interference with the vested interests of the White settlers could be permitted.<sup>90</sup>

The Indian Reserve Commissioners later told the federal Minister of the Interior that they had satisfied the Hul'qumi'num people.<sup>91</sup> However, Joint Commissioner Gilbert Malcolm Sproat subsequently discovered that many of the older Cowichan individuals had seriously considered murdering the Commissioners over their dissatisfaction with the Joint Commission.<sup>92</sup> In one of his communications with the Superintendent General of Indian Affairs, Sproat summarized the complaints of the Hul'qumi'num Mustimuhw to the Commission:

(No. 1) They complained that Governor Douglas had paid Indians both North and South of them their lands, namely the Soake, Esquimalt, Victoria, Saanich, Nanaimo, Fort Rupert Indians, but that the Cowichan Indians had not been paid.

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<sup>90</sup> "Report of the Proceedings of the Joint Commission for the Settlement of the Indian Reserves," Ottawa, National Archives of Canada (RG 10, Vol. 3645, F7936) cited in Marshall, *supra* note 48 at 131.

<sup>91</sup> *Ibid* at 131.

<sup>92</sup> *Ibid*.

(No. 2) They complained that the land which they were told was theirs did not include all the land previously pointed out to them on the spot by Governor Douglas.

(No. 3) They complained that from these lands, described as theirs, sections had been cut off, and that they had not been paid for these sections.

(No. 4) They complained that several Governors made promises to them and that for years these promises were not fulfilled, and then only by a small donation sent through Mr. Morley.

(No. 5) They complained that they had heard that white men had bought the fishing station on the lower Fraser River where they had always been accustomed to get their winter food.<sup>93</sup>

It is clear from this summation that the Hul'qumi'num Mustimuhw expected their laws to be taken into account by these colonial officers. They felt that the teaching of trust had been broken. They felt that their land tenure system was not being respected. They took issue with the fact that their territory was not being shared with them. As the following observation by Sproat suggests, they were prepared to utilize not only their own laws, but the laws of the colonizers in order to resolve this issue. The Halalt, Sproat observed

had to a small extent been guilty of the very serious offence of fencing in as their own, a portion of land legally owned or occupied by white men. The deliberate overstepping the boundaries of other men's lands, and enclosing portions with some vague notion of holding these portions by force, is a practice on the part of the Indians which should be checked at any costs.<sup>94</sup>

Throughout the remainder of the 1870s, until the turn of the century, the Hul'qumi'num people continued to actively voice their claim to the land, their sovereignty over which had never been extinguished. However, additional settlement and economic development further

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<sup>93</sup> *Ibid.*

<sup>94</sup> Sproat's Report from Chemainus (18 January 1877) Ottawa, National Archives of Canada (RG 10, vol 11028, file T-3967) cited in Egan, *supra* note 30 at 214.

circumscribed the traditional territory of the Hul'qumi'num Mustimuhw. The main culprit was the development of the E&N Railway.

**e. E&N Railway**

The issue of Aboriginal title in the Hul'qumi'num territory was further complicated by a clause in *The Terms of Union*, which specified as one of its conditions the construction of a Railway. Clause 11 states:

11. The Government of the Dominion undertakes to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and, further, to secure the completion of such railway within ten years from the date of the Union.

And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government, may deem advisable in furtherance of the construction of the said railway, throughout its entire length in B.C. (not to exceed, however, twenty (20) miles on each side of the said line) as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-west Territory and the Province of Manitoba. Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and provided further that until the commencement, within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the railway, the Dominion Government agree to pay to British Columbia, from the date of the Union, the sum of \$100,000 per annum, in half-yearly payments in advance.<sup>95</sup>

The struggle and the negotiations carried out in an effort to secure the construction of the Esquimalt and Nanaimo Railway added many poignant chapters to the colonial history of

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<sup>95</sup> *Constitution Act, 1867*, *supra* note 89.

Vancouver Island and is perhaps the most significant to the Hul'qumi'num territory and their jurisdiction. The Island Railway, from Victoria to Nanaimo, was something Victorian politicians and businessmen were delighted by. They viewed it as an opportunity to increase settlement along the east coast of Vancouver Island. It would also make it easier to “develop” or exploit the area’s valuable natural resources – timber, coal and minerals.

The deal struck in 1883 called for the construction of a railway between Esquimalt and Nanaimo, a distance of about 120 kilometres comprising 1,900,000 acres of land, with the Federal government contributing \$750,000 towards construction costs.<sup>96</sup> The Province agreed to help subsidize the railway through a land grant. A specific area of land on southeast Vancouver Island, land through which the railway would run, would be first transferred to the Dominion, with the Dominion subsequently transferring the land to the company that built the railway line. The agreement also contained other provisions, such as the transfer of 3.5 million acres of provincial Crown land in the Peace River region to the Dominion government, which were unrelated to the Island Railway project but which were vital to the agreement. The 3.5 million acres in the Peace River district was required by the Dominion government in part to make up for the poor quality of the land included in the land grant associated with the CPR line through British Columbia.<sup>97</sup>

Through the *Settlement Act*<sup>98</sup> of March 28, 1884, and the *Dominion Lands Act*<sup>99</sup> which complemented it, the deal struck in 1883 was completed. The extent of this land grant is described as follows and illustrated below:

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<sup>96</sup> MA Ormsby, *British Columbia: A History* (Vancouver: The MacMillan Company of Canada Ltd, 1958) at 290.

<sup>97</sup> Egan, *supra* note 30 at 241.

<sup>98</sup> *An Act relating to the Island Railway, the Graving Dock, and the Railway Lands of the Province*, SBC 1884, c 14.

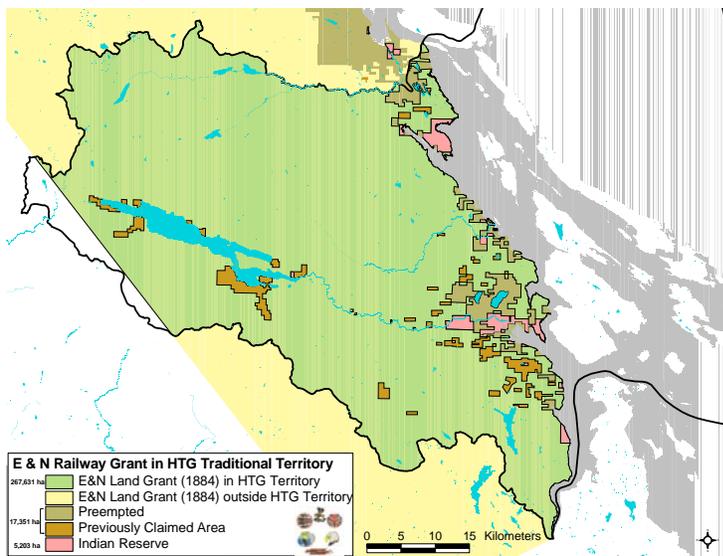
<sup>99</sup> *An Act further to amend and to consolidate, so amended, the several Acts respecting the Public Lands of the Dominion therein mentioned*, SC 1883, c 17.

A Reserve on a tract bounded by on the South, by a straight line drawn from the head of Saanich Inlet to Muir Creek, on the Straits of Fuca;

On the West by a straight line drawn from Muir Creek, aforesaid, to Crown Mountain;

On the North by a straight line drawn from Crown Mountain towards Seymour Narrows, to the 50<sup>th</sup> parallel of latitude, to a point on the coast opposite Cape Mudge; and

On the East, by the coast line of Vancouver Island to the point of commencement.<sup>100</sup>



The grant also included subsurface and foreshore rights.

However, none of these grants made mention of Aboriginal title and rights in the areas affected by the land grant. Apart from the exclusion of Indian reserves from the grant, the agreement did nothing to protect existing Indigenous land and resource uses. It simply did not recognize any Aboriginal rights to lands and resources beyond the Indian reserves, despite the opinion of the Dominion Minister of Justice in 1875 who pointed out that the failure to make

<sup>100</sup> Notice, (1883) BC Gaz I, 192. (Note: This was not as actually conveyed in the first land grant).

provision for Indian lands might prove embarrassing to the government.<sup>101</sup> On the other hand, *The Vancouver Island Settlers Rights Act* did contain provisions to protect the rights of non-Indigenous settlers, what the legislation referred to as “bona fide squatters,” who had occupied and “improved” land within the boundaries of the E&N land grant for at least one year prior to the agreement coming into effect. These “squatters” would be permitted to buy up to 160 acres of land, at one dollar an acre, in the four years after the agreement came into effect.<sup>102</sup>

The agreement also required a corporate body, The Esquimalt and Nanaimo Railway Company, be constituted in order to undertake the construction of the railway. In April 1884, the Esquimalt and Nanaimo (E&N) Railway Company was formally established, with James Dunsmuir, an influential businessman, appointed president and holding almost half of the company’s shares. With provincial and federal legislation in place and with the Esquimalt and Nanaimo Railway Company formed, Dunsmuir wasted no time in starting to work on the railroad.

Once the rail line from Esquimalt to Nanaimo was completed, the government of Canada transferred the land to the E&N Railway Company. This grant, made in 1887, effectively privatized the vast majority of the Hul’qumi’num territory on Vancouver Island. Once they owned the land, the E&N Railway Company began subdividing it into parcels and selling it off to *Hwulunitum* (non- Indigenous) settlers and other private interests who sought to exploit the wealth of natural resources found in the area. One brochure published by the company in 1896 advertised a “large area of land for farming on Vancouver Island to be sold on easy terms,” at a

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<sup>101</sup> See generally Canada, Special Committees of the Senate and House of Commons Meeting in Joint Session, *To Inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their Petition Submitted to Parliament in June 1926* (Ottawa: F.A. Acland Printer to the King’s Most Excellent Majesty, 1927) online: <<https://ia902306.us.archive.org/13/items/CCindiansBCclaims1927rep00uoft/CCindiansBCclaims1927>>.

<sup>102</sup> *The Vancouver Island Settlers’ Rights Act*, SBC 1904, c 54, ss 1-4.

price of \$3 to \$3.25 per acre.<sup>103</sup> It also advertised the sale of “tracts of valuable timber” within the railway belt.<sup>104</sup>

In 1905, the Canadian Pacific Railway (CPR) Company purchased the E&N Railway Company for \$2.33 million.<sup>105</sup> It was a transaction that included all the railway assets and most of the unsold land it had been granted. However, by the time of this sale, the E&N Railway Company had already sold off approximately 138,000 hectares of the original land grant for a total of \$1.44 million.<sup>106</sup> By purchasing the E&N, the CPR paid \$1.25 million for 566,580 hectares of land.<sup>107</sup> In 1910, Dunsmuir severed his final connection to the E&N Railway by selling his coal mining interests in the grant area for over \$11 million.<sup>108</sup>

Over the decades, the original E&N rail line was extended in a number of directions – to Cowichan Bay, Lake Cowichan, Courtney, Alberni – to provide access for the exploitation of resources, in particular timber, found on these lands. It passed through three reserves in the Hul’qumi’num area: Cowichan No. 1 in the Cowichan Valley, Halalt No. 2 in the Chemainus Valley and Oyster Bay No. 12 near Ladysmith. In each case, Hul’qumi’num resistance to the railway was ignored and the *Indian Act* (1880) and the *Consolidated Railway Act* (1879) was used to further expropriate the lands of the Hul’qumi’num Mustimuhw.

#### **f. The Cowichan Petition**

The Cowichan Petition to King Edward of Great Britain represents the most notable and well-documented instance of the Hul’qumi’num peoples’ resistance and efforts at negotiation and demands for restitution. Beginning in 1901, Hul’qumi’num leaders began to operationalize

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<sup>103</sup> Egan, *supra* note 30 at 263.

<sup>104</sup> Hul’qumi’num Treaty Group, *The Great Land Grab in Hul’qumi’num Territory* (Ladysmith: Hul’qumi’num Treaty Group, 2007) at 14, online: <<http://www.hulquminum.bc.ca/pubs/HTGRailwayBookSpreads.pdf>>;

<sup>105</sup> Egan, *supra* note 30 at 263.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

a plan to bypass the provincial and federal governments to resolve the land question within their territories by petitioning King Edward VII. Earlier forms of resistance to colonial settlement had now given way to methods of political protest white politicians would recognize. The Hul'qumi'num pressured colonial politicians using tactics most familiar to them, tactics such as petitioning governments and sending official delegations to meet with provincial, federal, and Royal representatives. As this action demonstrates the Hul'qumi'num legal tradition was changing and adapting to best meet its citizen's needs.

A visit from Prince Arthur, the Duke of Connaught and the King's nephew, to Victoria in 1906 provided the impetus for increased political organization in the Coast Salish world. Chiefs *Suhiltun* (Quamichan), *Tsulpi'multw* (Khenipsen), *Kakiel* (Comiaken), *Queoqult* (Clemclemeluts), and *Ta-kat-sahl* (Koksilah) took the opportunity to prepare and sign an address which pledged their allegiance to the Crown.<sup>109</sup> This address was the first in a series of events that reshaped the political map of the Coast Salish Nations and acted as a catalyst for province-wide organization that resulted in three chiefs travelling to Buckingham Palace.

During a number of large potlatches, it was decided that the Indigenous people of British Columbia would send a delegation to England to petition the monarchy to resolve the land issue. Fearing any attempts by government to thwart their plan, preparations were conducted in secrecy and only revealed at the time of departure. Three chiefs were chosen to make the journey on behalf of all the Indigenous peoples in the province – Chief Joseph, *Kayapalánexw* (Capilano) of the Squamish Tribe, Chief Charlie, *Tsulpi'multw* of the Cowichan Tribes, and Chief Basil David of the Bonaparte Tribe.<sup>110</sup>

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<sup>109</sup> Marshall, *supra* note 48 at 146-47.

<sup>110</sup> *Ibid* at 149.

The delegation took with it two things to give to the King: 1) a formal petition and 2) a song. The appeal to the King reads in part:

We bring greetings to your majesty from thousands of true and loyal hearts. ... In other parts of Canada the Indian title has been extinguished, reserving sufficient land for the use of the Indians, but in British Columbia the Indian title has never been extinguished, nor has sufficient land been allotted to our people for their maintenance.

Many years ago Sir James Douglas came to our country and told us that he had been sent by her majesty the late Queen Victoria whom we learned to love as a mother, and for whom we continue to mourn. Sir James Douglas told us that large numbers of white people would come to our country, and in order to prevent trouble, he designated large tracts of land for our use, and told us that if any white people encroached upon those lands he would remove them, which he did, and that we should receive remuneration for the lands settled upon by the white people; but when we asked for anything we were refused. But when Sir James Douglas was no longer governor other white people settled upon our lands, and titles were issued to them by the British Columbia governments. We have appealed to the Dominion government which is made up of men selected by the white people who are living on our lands, and, of course, can get no redress from that quarter. We have no vote. If we had it might be different. ... The government acknowledges that portions of our land was given to the white people, and other portions were given to us, which is quite true, but they took the very best of our land and gave us rock and gravel.

[W]e are persuaded that your majesty will not suffer us to be trodden upon, or taken advantage of. We leave ourselves in your majesty's hands, and trust that we may be able to return to our people with good news.

We cannot tell your majesty all our difficulties, it would take too long, but we are sure that a good man, or some good men, will be sent to our country who will see, and hear, and bring back a report to your majesty.<sup>111</sup>

The song that was brought can be found in the file attached to this document.

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<sup>111</sup> "'Indians' Petition to King Edward: Full Text of Appeal Which Will Be Laid at Foot of the Throne," *Victoria Daily Colonist* (6 July 1906) 8, online: <<https://ia801900.us.archive.org/0/items/dailycolonist19060706uvic/19060706.pdf>>.

I think it is poignant that the delegation chose to carry these two items with them on their journey. They demonstrate the continual evolution of the Coast Salish legal tradition. As I have been taught, it is customary to bring a gift with you when visiting another territory. Preferably, that gift should be from the territory that the visitor is from – as is the song. The delegation abided by this custom by bringing with them the gifted song reproduced above. However, the Chiefs also recognized the strength of a written petition. They knew that it would hold sway with the King and produce a written record upon which they could draw on during their legal struggles at home. They were pulling from both legal traditions to secure their rights.

Their strategy was a success in having obtained a personal audience with the highest constitutional authority in the land. Upon returning to British Columbia, the three Chiefs spoke of the outstanding issues of traditional land and resources claims with renewed vigor and confidence. They asserted that they had the personal guarantee of the King that action would be taken to resolve this issue.<sup>112</sup>

If James Douglas' promise was never fulfilled, as noted in the petition, now the Hul'qumi'num people believed that they had something better, the King's promise, which they expected would supersede all others. For example, some Cowichan peoples, who were subsequently arrested for placing nets illegally in the Cowichan River, refused to acknowledge a summons that requested their appearance before the court arguing that their chief, presumable *Tsulpi'multw*, "had it from the King himself that the white people had nothing to do with the

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<sup>112</sup> The evidence is mixed with regard to the 1906 delegation and it now seems highly unlikely that King Edward VII made such a promise. Before meeting with the King, the delegates were instructed that no petitions could be laid before the King, and that if they did have grievances His Majesty had no control over British Columbia Lands. However, in studying the history of this delegation, Keith Carlson has argued that the delegates may have assumed such promises had been made because communications and promises did not have to be in the same form in Salish society as they did in Edwardian England to be considered legitimate and valid. See generally, Keith Carlson, "Rethinking Dialogue and History: The King's Promise and the 1906 Aboriginal Delegation to London" (2005) 16:2 Native Studies Review 1.

Indians.”<sup>113</sup> Hul’qumi’num leaders began to reassert their grievances more strenuously, and in essence, reclaim the land in the many letters, petitions, and addresses prepared for white audiences.

However, the assurance that the King was supposed to have provided did not yield immediate results for the Hul’qumi’num Mustimuhw. The Hul’qumi’num leaders responded by drafting a further series of addresses to King, culminating in the famous “Cowichan Petition of 1909.”<sup>114</sup> In this petition, the Cowichan made the first use in British Columbia of the *Royal Proclamation of 1763* as a legal argument for settling claims.<sup>115</sup> It was also this petition that requested that the Cowichan traditional land and resource claims be submitted directly to the Judicial Committee of the Privy Council in Britain, the highest court in the land.<sup>116</sup> In doing so, they were placing the claim to Aboriginal title “squarely on British Law”<sup>117</sup>, emphasizing that the Hul’qumi’num Mustimuhw lands were never ceded to or purchased by the Crown nor was the Indian title otherwise extinguished, and that their title had been wrongfully repudiated and ignored by the Government of the Province of British Columbia.

The result of this and a great deal of further political maneuvering was the Royal Commission on Indian Affairs in the Province of British Columbia (1913-1916) (“The McKenna McBride Commission”). Though the federal government requested that land claims issue be

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<sup>113</sup> “The King and the Indians,” *Victoria Daily Colonist* (20 October 1906) 4, online: <<https://ia601001.us.archive.org/22/items/dailycolonist19061020uvic/19061020.pdf>>.

<sup>114</sup> See generally Hamar Foster & Benjamin L Berger, “From Humble Prayers to Legal Demands: The Cowichan Petition of 1909 and the British Columbia Indian Land Question” in Hamar Foster, Benjamin L Berger & AR Buck, *The Grand Experiment: Law & Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2008) 240.

<sup>115</sup> “Indians Send Petition to King,” *Victoria Times* (2 October 1909) online: <<https://ia601003.us.archive.org/12/items/dailycolonist19061002uvic/19061002.pdf>>.

<sup>116</sup> *Ibid.*

<sup>117</sup> Hamar Foster, “*We Are Not O’Meara’s Children: Law, Lawyers and the first Campaign for Aboriginal Title in British Columbia, 1909-1928*” (University of Victoria: Victoria) online: <<http://www.law.uvic.ca/calder/foster.pdf>> at 10.

addressed as part of the joint provincial-federal Commission's mandate, B.C. Premier Richard McBride vetoed this.

When the Royal Commission finally made its appearance in Hul'qumi'num territory, in the stone church atop Comiaken Hill on May 27, 1913, Chief *Tsulpi'multw* spoke, reminding the commissioners of the King's promise given to him at Buckingham Place in 1906. Standing before the Royal Commission with Chiefs *Suhiltun*, *Kukhalt*, and *Quiochqult*, *Tsulpi'multw* began by reiterating the King's promise:

I am glad to see you gentlemen today, and I thank you for speaking favourably towards us. I went to the King a few years ago to try and get some settlement from the King, and when I got there, the King gave me this photograph. His Majesty promised to do something for us, and said he would send somebody out to look into the matter. The King told me that I need not feel very sorry about these things, as, if there was anything that he could do anything [sic] for me, he would do it. His Majesty promised to give each male Indian on the reserves, 160 acres of land, as the land belonged to us Indians. I hope you will take what I say into consideration, and do what you can for us.<sup>118</sup>

Furthermore, Chief *Suhiltun* took further action to illustrate to the Commission that the land question was still outstanding in Hul'qumi'num territory. The late elder Wes Modeste shared the following with me:

I come from a long line of hereditary chiefs. My great-grandfather, *Sahiltun*, was a hereditary chief. He participated in the meetings that were held during the McKenna-McBride Royal Commission at the location of the historic stone church. During these hearings, *Sahiltun* removed the Union Jack flag from the Commission's table to debunk the idea that wherever they planted the flag, the land belonged to the Crown.<sup>119</sup>

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<sup>118</sup> Statement of Chief Charlie *Tsulpi'multw* on his visit to King Edward VII. Testimony before the *Royal Commission on Indian Affairs in the Province of British Columbia*, 27 May 1913 in Marshall, *supra* note 48 at 160. The picture referred to was an autographed portrait of King Edward VII received during the 1906 trip.

<sup>119</sup> *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Wes Modeste).

Almost 100 years have elapsed since the McKenna-McBride Commission, and 150 years since HMS *Hecate* arrived, and there is still no satisfactory settlement of the Aboriginal rights of the Hul'qumi'num Mustimuhw. As you will see in the next section, this relationship between these two peoples is still being worked out and defined today. Like a *Xeel's* transformation tale, these events have caused tremendous transformation to our landscape.

#### **4.4 Contemporary Landscapes: Communities Broken**

Today, 150 years after contact, the wound has not healed. The E&N Railway, its tracks stitched across our traditional territory, serves as a daily reminder to my people of the attempts by colonizers and their accompanying legal systems to sever us from our land – to destroy the keystone of our *snuw'uyulh*.

##### **a. Impacts of Land Alienation**

Arguably, the most significant and long-term impact of the land grants described in the previous section is the creation of private-ownership interests within the territory. Because of the E&N land grant, which included almost 270,000 hectares of land in Hul'qumi'num territory, almost 85% of our traditional territory is now considered “private” land.<sup>120</sup> A few large forestry companies now own most of this private land – almost 200,000 hectares, or 60% of the entire territory.<sup>121</sup>

It is difficult to overstate the impact of this privatization on Hul'qumi'num communities. The E&N land grant removed vast areas of land from our jurisdiction. In the words of one of our

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<sup>120</sup> Hul'qumi'num Treaty Group, *supra* note 104 at 18.

<sup>121</sup> *Ibid.*

Elders, August Sylvester, “That’s our private land ... They need to hear that the land they are sitting on, the land where my ancestors lived and are buried is our private land.”<sup>122</sup>

In economic terms, we lost access to and influence over resources that had fed our communities for countless generations. Tim Kulchysky describes the effect of private land alienations on shellfish harvesting:

Our community used to consume shellfish all the time. Our elders used to consume shellfish exclusively. Now, if we were to eat it every day it would be very expensive because it’s very difficult to access. If I was to go harvesting shell fish, basically I would have to travel by motor boat to get to an area that I know is clean and where there are sufficient numbers of shell fish species to harvest for my family. My generation down, my age group down, doesn’t know the taste [of] seafood, sea urchins are the best example. If you don’t develop a taste or appreciation for sea urchins, you’re not going to eat it. There is no access to green urchins in Cowichan. If you want to harvest green urchins you have to drive three hours by boat, which means you have to have a boat and pay for fuel – you have to have both the financial resources and the time to collect these resources.

Our traditional shellfish harvesting areas have been severely polluted. We visited our territory under water and in our survey you can see the impact of the mills and effluent practices. The best example is Cowichan Bay. Almost all of Cowichan Bay is excluded from shellfish harvesting and we know that this is because of the level of fecal coliforms in the water. The amount of sewage deposited into the bay has severely affected its water quality. If that’s not an example of private lands affecting our cultural practices, then I don’t know what are.

I was fortunate enough to work with our community on a harvest practices study and, for the most part, all of our community has been impacted by access to resources and resource use. In a sense, the resources harvested are so limited that most of the community is completely exposed to a poor western diet – not even a decent western diet. And we can see the results in health problems such as heart problems, diabetes, and all kinds of issues. If you visit our health department you will realize that our community is suffering from this change to a western diet.<sup>123</sup>

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<sup>122</sup> *Hul’qumi’num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit August Sylvester).

<sup>123</sup> *Hul’qumi’num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Tim Kulchsky).

As these private lands became “developed,” fences and locked gates went up to block our entry to places where we’d always hunted, harvested plant foods and gathered other resources to meet our material needs. As *Ts’ules* (Williams Seymour) describes:

There are places where I’ve been shown to hunt, up in the Shawnigan division, where you have to pay a fee. The gatekeeper for the logging companies charges a fee for cars to get through the gates. Other areas I’ve done hunting, some of them are gated completely and the gates are open at certain times and closed at certain times. As a result, I don’t go out hunting anymore.<sup>124</sup>

For over a century we’ve seen the natural wealth leave our territory, making others wealthy at our expense. All the best timber is now gone, making it difficult to carry on important traditions such as canoe-building and carving. Even finding wood to renovate and heat our longhouses is difficult.

Getting wood is also a big issue to the Hul’qumi’num people – especially for the bighouse. We have three bighouses within Cowichan and each and every year we have a struggle getting wood. We need wood to last for the entire bighouse season – from October to April – but wood is scarce today. It’s getting less and less every year because of lack of trees/timber on reserve lands. Most people don’t even have timber within their property and those that have timber want to keep it for as long as possible.

We are trying to switch to woodstoves because it makes it easier to make do with less wood, but this is a big change from traditional times when we would have open fires.

We also have to try and build what we can out of the smaller timber we have for our longhouses. In the older days, we selected nice big timber for our longhouses. Now we don’t have the opportunity. We lack cedar products for the posts, beams, rafters and shakes.

Many people are being turned away at special ceremonies because our longhouses are too small for our villages now. Some of our relatives from the mainland and the United States get to the door and have no place to sit, so we have to send our family members home to make room

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<sup>124</sup> *Hul’qumi’num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of William Seymour).

for our visitors. Some of these ceremonies provide a special healing for the village – so it's a big sacrifice to turn people away. It is sad.

We also don't have access to cedar logs for our canoes. My father used to talk about canoes 100 ft long – big enough for four families to travel in. Canoes were very important for people up and down the coast. They were our primary mode of travel. We used to have hundreds of canoes to take us to Kulleet Bay and our fishing villages up the Fraser River.

We don't have any old growth in our territory and we also don't have access to cedar. Companies won't give up cedar logs because of the price – a nice cedar tree could cost \$10,000 and it could cost another \$10,000 to transport it to your property. So you're looking at \$20,000 before you even start making the canoe. Our canoe builders don't have access to the logs they need to build the canoes they want to – like the eleven man.

We are using different techniques now to build our canoes. Instead of using one full log for one canoe, we cut the log into board strips and then more than one canoe can be made out of one log. These are stripped canoes. We have to resort to this modern technology in order to preserve the cedar.<sup>125</sup>

The effects of deforestation can be seen in the picture below, taken by the Hul'qumi'num Treaty Group in 2007.

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<sup>125</sup> *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Wayne Charlie).



The loss of these lands also affects our cultural life. We are prevented from using areas of great cultural importance, including bathing sites, burial grounds and other special places. Many of these sites have been destroyed by development and are now lost to us forever. As my Uncle George Harris explained to me:

[M]any of the places I go to for the spiritual strength is in the bush, not only the streams, but in the bush and wood areas. Sometimes I even go to the beaches. You have to remember that all of the elements are included in our sacred ceremonial rights ...

Both the streams and the land are important elements to the sacred and ceremonial rights that I have. One of our elders, at one time, taught me that our forests and our trees are like cathedrals and that we should pray and mediate in the forests to gain the spiritual strength that we need. The forests help us maintain the sacred and cultural inheritance of the *siyowin* mask.

A lot of the time I feel that many of these areas are no longer accessible to us because of over-development, because of industry, residential and business development. Some of them are no longer usable because of pollution that's taken place in the waters and on the lands. Other places are no longer accessible because they are on private lands; therefore, if we try to access those places we are considered trespassers.

Some of these sites are so important to us, but yet we are denied access to them. Some of them have mythical legends or stories that belong to them that are important to the nation, to the people and to the community as a whole. This affects our culture.

How has not being able to go to these places impact me? Sometimes when I go, initially, I feel bad. I feel hurt that some place has been developed or that there's "No Trespassing" signs. It does have an impact on me individually, not to be able to access the land we've been dispossessed of or taken away without or consultation or consent. Never once did they ask, "Why is this land important to you?" Never once did they make some kind of accommodation to allow us access to the land or to our sacred sites. So it has impacted me individually. Lots of times, in the end, I don't go anymore. I don't try. Once you've been told, "Don't go," you just don't go. You consider that area lost.<sup>126</sup>

The lack of access to and benefits from these lands and resources undermines our cultural practices, beliefs and legal traditions. Furthermore, it has contributed significantly to the poverty of our communities in today. One only has to drive down the dirt roads of one of my community's reserves to witness the Third-World conditions that my community is living in. Homes are run-down and abandoned, garbage strewn throughout yards and dogs roam unattended. This is a far cry from the beauty that comes to mind when I described the pre-contact landscape of my community. The teachings of our First Ancestors and *Xeel's* have been pushed to the back of our minds, replaced with colonial policies and government legislation – the effects of which still scar our landscape. However, hope still remains that we can unleash ourselves from government's tight grasp and restore our landscapes and with it, our legal traditions embedded our territories.

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<sup>126</sup> *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of George Harris).

### **b. Hul'qumi'num Petition to the Inter-American Commission**

In an attempt to have their legal traditions and rights to land recognized and respected, the Hul'qumi'num people have petitioned another body – The Inter-American Commission. In a similar vein to the leaders who travelled to England in 1906 and the lawyer, O'Meara, along with another lawyer, JMM Clark of Toronto, who took the 1909 Cowichan Petition to London on their behalf, Chiefs, elders and lawyers representing the Hul'qumi'num communities have travelled to Washington, D.C. in an effort to petition the Inter-American Commission to hear their grievances and send a third-party observer to comment on the situation of the Hul'qumi'num people in British Columbia. They have done so because after thirteen years of futile negotiations in the B.C. Treaty Process, the Hul'qumi'num people are no closer to having their title and rights recognized and respected than their ancestors were in 1906.

Drawing on international human rights law and its application to Indigenous peoples, the Hul'qumi'num communities have alleged that their right to property has been violated. Article XXIII of the American Declaration affirms the human right to “own such private property as meets the essential need of decent living and helps to maintain the dignity of the individual and of the home.”<sup>127</sup> The right to property affirmed in Article XXIII of the American Declaration and other human rights instruments, especially when considered in light of the fundamental principle of non-discrimination, embraces those forms of individual and collective landholding and resource use that derive from the traditional land tenure system of the Hul'qumi'num peoples.

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<sup>127</sup> OAS, Inter-American Commission on Human Rights, *The American Declaration of the Rights and Duties of Man*, Article XXIII, Res. XXX (1948). Similarly, OAS, Inter-American Commission on Human Rights, American Convention on Human Rights, Article 21, OR OEA/Ser.L/V/I.4 Rev. 9 (2003) also secures the right to property. *The Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3d Sess, UN Doc A/810 (1948) at Article 17 recognizes property rights as well.

As discussed in the previous chapter, Hul'qumi'num patterns of use and occupancy correspond with a system of customary rules that determine individual and collective entitlements to land and natural resources. For the Hul'qumi'num Mustimuhw, this customary land tenure system and the usages it sanctions gives rise to forms of property that are no less essential to a decent living and dignity of the home than formal State-granted property rights are for others. These property rights are embraced and affirmed by Article XXIII of the American Declaration. Accordingly, the Hul'qumi'num leaders are arguing that under the jurisprudence of the inter-American system, Canada is obligated to recognize and protect these rights through appropriate measures. Whatever the precise character of these rights or of the limitations that may reasonably be placed upon them, their existence cannot simply be ignored by Canada's government; otherwise they are not rights at all.

The Hul'qumi'num people are also utilizing international law to argue that their right to restitution<sup>128</sup> has been violated by the refusal of the Canadian government to settle their land claims. As the Inter-American Court explained in the *Case of Yake Axa v. Paraguay* ("Yakye Axa"),<sup>129</sup> the state is obligated to recognize the property rights of Indigenous peoples, even when their ancestral Indigenous lands have been granted by the state to private individual owners. Otherwise, the Court warned, the state's failure to recognize and protect Indigenous peoples' property rights in their lost traditional lands "could affect other basic rights such as the right to cultural identity and the very survival of the Indigenous communities and their members."<sup>130</sup> Because of this over-riding human rights concern for the cultural survival of Indigenous peoples, the Court held that, when the State must determine whether communal ancestral land rights or

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<sup>128</sup> The right to restitution refers to the right to lawful recovery of one's property interest.

<sup>129</sup> *Case of Yakye Axa v. Paraguay* ("Yakye Axa"), Judgment of June 17, 2005, Inter-Am. Ct. H.R. Ser. C. No. 125 (2005).

<sup>130</sup> *Ibid* at para 147.

current individual land rights held by private owners will prevail in the same property, it could be necessary to restrict the right to individuals' private ownership of property in order to preserve "the cultural identity of a democratic and pluralistic society."<sup>131</sup>

The jurisprudence of the Inter-American system has clearly established and affirmed that the right to property belonging to Indigenous peoples in their traditional lands includes the right to restitution, even when those lands have been confiscated and granted by the State to good faith third party purchasers.<sup>132</sup> Otherwise, the cultural survival of an Indigenous community would be at risk until the State took effective measures to provide redress for its taking of the lands and resources belonging to those peoples.

The Hul'qumi'num people are arguing that Canada has violated their property rights by confiscating their traditional lands for the benefit of private third parties and without recognizing any right of restitution belonging to the Hul'qumi'num as established under the jurisprudence of the Inter-American system and general principles of international law. Canada has repeatedly insisted that Hul'qumi'num title and property rights in so-called "private lands" have been extinguished by the nature of fee simple grants from the State to third parties. However, at a minimum, to make that extinguishment lawful under international law, Canada must provide restitution for the expropriation of those lands belonging to the Hul'qumi'num communities. To date, no Canadian court has ever awarded any form of restitution or payment of just compensation to the Hul'qumi'num or any other First Nation in British Columbia for such extinguishments. Canada, despite repeated requests to do so, has refused to even consider discussing the issue of fair compensation for the taking of Hul'qumi'num property rights in so-

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<sup>131</sup> *Ibid* at para 148.

<sup>132</sup> *Case of Mary and Carrie Dann v. United States* ("Dann"), Inter-Am. C.H.R., Case No. 11.140, Report No. 75/02 (December 27, 2002) at para 30; *Case of Sawhoyamaya v. Paraguay* ("Sawhoamaxa"), Judgment of March 29, 2006, Inter-Am. Ct. H.R. Ser. C. no. 146 (2006) at paras 131-34; *Yakye Axa* at para 151.

called “private lands” in treaty negotiations with the Hul’qumi’num Treaty Group. This effectively means that the Hul’qumi’num peoples are left without any effective remedy for the taking of their traditional territory by the State outlined in the previous section.<sup>133</sup>

Faced with this unsatisfactory result, the Hul’qumi’num communities have put their efforts into petitioning the international community to support them in their endeavour to re-establish their footprint within their traditional territory. Although it remains to be seen if they will have more success than their ancestors did in 1906, it is of significance to note the continued struggle of the Hul’qumi’num people to have their interests recognized and legal traditions followed within the Coast Salish world.

#### **4.5 Conclusion**

Life in the Coast Salish world is rooted in ancient memories and history; however, the legal traditions of the Hul’qumi’num Mustimuhw are no more static than the landscape itself. Just as the rivers shift their courses and scour new channels with the onset of development, Hul’qumi’num members shift, navigate and scour a world shaped by interactions between their legal tradition and the Canadian legal tradition. At times their laws have been dominant, at other times they have been concurrent and at many times they have been ignored in favour of more “familiar” laws and practices. However, as this chapter has demonstrated, at all times their laws have remained in place.

As the next two chapters will demonstrate, issues of tradition and cultural survival expressed by community members today must be understood within the contours of colonial

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<sup>133</sup> On June 26, 2014 the SCC rendered its decision in *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 and made a declaration of Aboriginal title for the Tsilhqot’in Nation. While Aboriginal title theoretically existed in Canada prior to this decision, this is the first time an indigenous group can actually claim the full protection for their lands rights in Canadian courts. This decision has huge implications for the Hul’qumi’num Nations who, like the Tsilhqot’in never ceded their lands through surrender or treaty. Although the Hul’qumi’num First Nations are still pursuing a negotiated agreement, this decision will be of immense importance if they choose to litigate.

processes since cultural identity is a far more complex subject than simple dichotomies about “good” traditions and “bad” modernity would suggest. Members of the Hul’qumi’num communities utilize many of the tools and concepts provided through the Canadian legal system. However, their incorporation of such things may just as easily serve to strengthen rather than weaken cultural identity. If place is central to culture and identity among Hul’qumi’num Mustimuhw, the environmental degradation of places will affect Indigenous peoples and their laws and practices in complex ways other Canadians may not fully appreciate.

## CHAPTER 5

### What is Law?

#### Working Towards an Understanding of the Hul'qumi'num Legal Tradition

All collective human life is directly or indirectly shaped by law. Law is, like knowledge, an essential and all-pervasive fact of the human condition.<sup>1</sup>

#### *“Finding my Own Voice as I Seek to Move Forward”*

*Before you read further, I must acknowledge that this has been the most difficult chapter to write in my dissertation. The challenges have come from within, as I have struggled to overcome my own fears and prejudices concerning the learning journey that I am currently embarking on. I have been overwhelmed at times with the significance of this chapter. I have often worried that my initial analysis of this subject matter is too trite. I fear I will do a disservice to my community – which is so supportive of this research. I have also struggled with my “role” in my learning journey. Am I merely a scribe? Is there a place for me within this research to form my own connections and draw my own conclusions about the Hul'qumi'num legal tradition? How do I ensure that the integrity of the teachings from my Elders remains intact, while balancing my obligations to the academic community? As you read through this chapter, I will explain how I worked through these initial concerns.*

*As I started to write this chapter, I began by exploring the different legal theories that exist in the world. I felt that it was important to ground this discussion in an existing legal theory in order to bring legitimacy to my research. After an initial scan of the literature, I felt that the theory of legal pluralism was the most appropriate legal theory in which to position my research. After all, wasn't this exactly what I was trying to accomplish with this project – a*

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<sup>1</sup> Niklas Luhmann, *A Sociological Theory of Law* (London: Routledge, 1985) at 1.

*recognition that parallel systems of law (Coast Salish and Western) can coexist within one geographical framework?*

*With this thought in mind, I began an extensive literature review. However, the more I read about legal pluralism, the more questions I had. I found myself stuck in a perpetual cycle – research, read, research, read.<sup>2</sup> I struggled with the literature. In my mind, this was the “appropriate” legal theory in which to situate my research; however, very few of the articles and books actually supported my views. Rather than bringing clarity to my research questions, I found the materials confounded these questions. Although the concepts embedded within this theory are related to my research project, they aren’t entirely on point.*

*As I struggled to extricate myself from the massive amounts of articles and books I acquired, my thoughts turned to my own experiences with “law” in my own life. As described in previous chapters, I am a multi-faceted individual. Not only am I “multi-ethnic,” but I’m a spiritual person, an academic, a wife, a mother, a daughter, a sister, a female, etc. I am a member in each of these cultural systems of social ordering. By virtue of my membership within these social orders, I have certain obligations and responsibilities to maintain and guidelines and rules to adhere to.*

*But can these obligations, responsibilities, guidelines and rules be considered laws?*

*What makes something a law? More importantly, what influences the way I order my life? While*

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<sup>2</sup> Jean-Guy Belley, “Law as *Terra Incognita*: Constructing Legal Pluralism” (1997) 12 Can JL & Soc 17; G Christie, “Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Tradition” (2007) 6 Indigenous LJ 12; Danielle M Conway, “Indigenizing Intellectual Property Law: Customary law, Legal Pluralism, and the Protection of Indigenous Peoples’ Rights, Identity, and Resources” (2008-2009) 15 Tex. Wesleyan L Rev 207; John Griffiths, “What is Legal Pluralism?” (1986) 24 Journal of Legal Pluralism 1; Luhmann, *supra* note 1; Sally E Merry, “Legal Pluralism” (1988) 22 Law and Society Review 869; Sally F Moore, “Law and Social Change: the semi-autonomous social field as an appropriate subject of study” (1973) 7 Law and Society Review 719; Keith Richotte Jr, “Legal Pluralism and Tribal Constitutions” (2010) 36:2 William Mitchell Law Review 447; Mitra Sharafi, “Justice in Many Rooms Since Galanter: De-Romanticizing Legal Pluralism Through the Cultural Defense” (2008) 71 Law & Contemp Probs 139; Boaventura de Sousa Santos, “Law: A map of misreading: Toward a post-modern concepts of law (1987) 14 Journal of Law and Society 279; Brian Z Tamanaha, “The Folly of the “Social Scientific” concept of Legal Pluralism” (1993) 20 Journal of Law and Society at 192; Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44:1 Osgoode Hall LJ 167.

*considering these questions, I found the words of Leon Sheleff in his discussion of customary law to be quite enlightening:*

... [T]here will always be patterns of behaviour that will follow the contours of norms that are extra-legal, there will always be subjects who will respond to obligatory demands that stem from non-governmental sources, there will always be interactions that will be determined and disputes that will be resolved by standards and procedures that emanate directly from the life of the people and the reality of their society.

[T]he history of law is replete with such examples of ‘people law-making’, of *vox populi* making itself heard above the din of formal proclamations. But such processes are not just relics of the past; they are an ongoing fact of social life, often providing practical guidance for family interactions and effective solutions for problematic situations in a more satisfying manner than that provided by the formal legal system.<sup>3</sup>

*Upon reflection, most of the “laws” that I abide by on a daily basis are the “people” made laws of the various cultural systems that I belong to. These socio-legal obligations, standards and procedures have the greatest impact upon my daily interactions and disputes.*

*This recognition has had a profound impact on how I approach the question: “What is law?” We all adhere to different, but parallel systems of law in our daily lives and yet the majority of us somehow manage to navigate our way through the sometimes conflicting obligations, standards and procedures that each of them impart on our lives. For example, within a 24- hour period, we all decide on priorities. In my own personal deliberations there are expressions of different points of view based on my membership in various socio-legal systems, and sometimes I may place greater importance on one legal tradition and sometimes on another, particularly over my lifetime. At times I may manipulate the information of one particular tradition, or possibly traditions, in order to decide on my personal conduct. Therefore, I have*

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<sup>3</sup> Leon Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London: Frank Cass, 1999) at 3-4.

*come to the conclusion that law cannot be separated from the societies in which they arise, whatever they may be.*

*Arguably, we must all decide upon the constraints different legal traditions place upon us, though some may feel greater or lesser degrees of conflict dependant on their social context. Some of us may readily accept the constraints, and may oppose the idea that individuals have ‘choice of law’ decisions to make in their lives; while others may resist the restraint more readily, and may struggle over their choices.<sup>4</sup> But somehow, each of us manages to work our way through these often competing obligations attached to membership in different legal orders. Recognizing that these obligations are in fact “laws,” and that we have experience in managing competing norms within and between them, helps us recognize that it is possible to reconcile differences that may arise between the Western legal system and Coast Salish legal traditions.*

## **5.1 Introduction**

Legal theorists have always attempted to define law. This is evident in the various schools of jurisprudence – from positivism,<sup>5</sup> to natural law,<sup>6</sup> to post-modernism,<sup>7</sup> legal pluralism<sup>8</sup>

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<sup>4</sup> See generally Charles Taylor, *Sources of the Self: The Making of the Modern Mind* (Cambridge, Mass: Harvard University Press, 1989) at Chapter 7.

<sup>5</sup> See generally Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (London: UCL Press, 2004); Jules Coleman, *The Practice of Principle* (Oxford: Clarendon Press, 2001); Jules Coleman, ed., *Hart’s Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001); Robert P George, ed, *The Autonomy of Law: Essays in Legal Positivism* (Oxford: Clarendon Press, 1996); HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961); Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001); Wilfrid Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).

<sup>6</sup> See generally John Finnis, ed, *Natural Law* (Aldershot: Ashgate, 1991); Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969); Robert P George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Oxford University Press, 1992) [George, *Natural Law Theory*]; Robert P George, *In Defense of Natural Law* (Oxford: Clarendon Press, 1999); Mark C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006).

<sup>7</sup> See generally Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century’s End* (New York: New York University Press, 1995).

<sup>8</sup> See generally Griffiths, *supra* note 2; Merry, *supra* note 2; Brian Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Sydney Law Review 375; Sheleff, *supra* note 3; Webber, *supra* note 2.

and Indigenous legal theory.<sup>9</sup> Each school has in some form attempted to confront the question of the meaning of law in their different ideological pursuits.<sup>10</sup> However, the issue of ‘What is law?’ has never been resolved in legal philosophy and there are compelling arguments that it is incapable of resolution.<sup>11</sup>

Despite this challenge this chapter will explore this question of ‘What is law?’ in relation to the Hul’qumi’num legal tradition with the goal of developing a basis for understanding these laws and practices. I hope to lay a foundation for a more formal recognition of this legal tradition, both within and outside the Coast Salish world. In order to do so, I will first examine the relationship between law and culture. In order to fully understand the Hul’qumi’num legal tradition, one must contextualize these laws and practices within broader Coast Salish cultural considerations. The remainder of this chapter will deal with the two major categories of law within the Hul’qumi’num legal tradition: 1) *snuw’uyulh* and 2) family law-making. First, I will describe different aspects of *snuw’uyulh* as related to me by Elders. In advancing an understanding of this concept I will discuss how these laws are transmitted. I will explain how *snuw’uyulh* is a condition generated through law. Finally, I will discuss seven teachings, which work together to achieve *snuw’uyulh*. These teachings are: 1) *Sts’lhnuts’amat* (“Kinship/Family”); 2) *Si’emstuhw* (“Respect”); 3) *Nu stl’i ch* (“Love”); 4) *Hw’uywulh* (“Sharing/Support”); 5) *Sh-tiiwun* (“Responsibility”); 6) *Thu’it* (“Trust”); and 7) *Mel’qt*

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<sup>9</sup> See generally John Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 R.D. McGill 629 [Borrows, “With or Without You”]; John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Canada’s Indigenous Constitution*]; John Borrows, *Drawing Out Law: A Spirit’s Guide* (Toronto: University of Toronto Press, 2010) [Borrows, *Drawing Out Law*]; Richotte Jr, *supra* note 2; Tom G Svensson, “Indigenous Rights and Customary Law Discourse: Comparing the Nisga’a and the Sámi” (2002) 47 *Journal of Legal Pluralism* 1.

<sup>10</sup> See generally Brian Tamanaha, “A Non-essentialist Version of Legal Pluralism,” (2002) 27 *Journal of Law and Society* 5, citing Adamson Hobel’s description of the myriad attempts by social scientists and legal theories to define what law is as “the quest for the Holy Grail” in Adamson Hobel, *The Law of Primitive Man* (Cambridge, MA: Atheneum, 1954) at 18.

<sup>11</sup> See generally Brian Tamanaha, “An Analytical Map of Social Scientific Approaches to the Concept of Law” (1995) 15 *Oxford Journal of Legal Studies* 501.

(“Forgiveness”). I will develop these concepts through relating stories and showing application to real world events. In particular I will share an example of a conflict involving my own family which illustrates how one might apply these teachings to a legal issue. In examining the category of family laws, I will explain how legal pluralism is recognized within the Hul’qumi’num legal tradition, and how this tradition allows for varying customs and practices within the Coast Salish World. I will also discuss the sources of family laws and give examples of how these laws operate within our communities.

The maintenance of social life depends on the ability of people to create rules to guide them in their everyday activities. In most situations, the rules themselves will represent a common denominator of shared values and practices. They may be enumerated in many different ways. Within most traditions laws may be couched within an *a priori* declaratory framework. They may also be articulated through retroactive adjudicatory decisions made in relation to specific disputes. Legal systems also operate through implied agreements and customary norms of behaviour.<sup>12</sup> The legal literature is rife with explanations of state, legislative, judicial, *and* customary practices.<sup>13</sup> I am arguing that this literature should be extended to apply to Hul’qumi’num law. Some of our laws come in the form of *a priori* declarations, others in the form of adjudication, and yet other Hul’qumi’num laws are implicit within our society, or they flow from customary practices. We must not let conventional understandings of formal state law overshadow the obligatory and rules created outside of Parliament, Courts, and other state-constituted bodies.<sup>14</sup> As stated by Borrows, “Laws arise whenever inter-personal interactions create expectations and obligations about proper conduct.”<sup>15</sup>

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<sup>12</sup> Sheleff, *supra* note 3 at 3.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Borrows, *Canada’s Indigenous Constitution*, *supra* note 9 at 7.

A leading American jurist, Justice Oliver Wendell Holmes supported that view when he stated, “The life of the law has not been logic, it has been experience.”<sup>16</sup>

“A legal tradition ... is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the ways law is or should be made, applied, studied, perfected, and taught.”<sup>17</sup> Understood in this manner, a legal tradition is an aspect of general culture,<sup>18</sup> and can be viewed as encompassing practices and norms that are not explicitly captured or recognized by a national legal system. Sometimes different legal traditions exist within other legal traditions.<sup>19</sup> In some cases they support each other; in others they oppose each other.<sup>20</sup> This is referred to as legal pluralism: ‘the simultaneous existence within a single legal order of different rules applying to identical situations.’<sup>21</sup>

It is interesting to note that legal pluralism, as an academic concept, is closely related to the Western world’s colonial past – the unitary myth of law was challenged by the coexistence in the “civilized” colonial societies of multiple Indigenous systems of “primitive law.” Sally Engle Merry notes, “Early twentieth century studies examined Indigenous law ways among tribal and village people in colonised societies in Africa, Asia and the Pacific. Social scientists (primarily anthropologists) were interested in how these people maintained social order without European law.”<sup>22</sup> Having found its roots in the ‘exotic’ remote corners of the world, by the 21<sup>st</sup> century, the concept of legal pluralism seems to have transcended geographical boundaries. Today it is

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<sup>16</sup> Sheleff, *supra* note 3 at 5.

<sup>17</sup> JH Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2d ed. (Stanford, CA: Stanford University Press, 1996) at 11.

<sup>18</sup> Borrows, *Canada’s Indigenous Constitution*, *supra* note 9 at 7.

<sup>19</sup> H Patrick Glenn, *Legal Traditions of the World*, 3d ed. (New York: Oxford University Press Inc, 2007) at 345.

<sup>20</sup> *Ibid.*

<sup>21</sup> Andre-Jean Arnaud, “Legal Pluralism and the Building of Europe,” cited in Borrows, *Canada’s Indigenous Constitution*, *supra* note 9 at 8.

<sup>22</sup> Merry, *supra* note 2.

no longer confined to “exotic societies” but rather serves as a general tool to understand law in all its complexity. As Sally Engle Merry points out, “the intellectual odyssey of the concept of legal pluralism moves from the discovery of Indigenous forms of law among remote African villagers and new Guinea tribesmen to debates concerning the pluralistic qualities of law under advanced capitalism.”<sup>23</sup> The academic world no longer ignores the fact that “every society is legally plural, whether or not it has a colonised past.”<sup>24</sup>

In applying these insights to our own country, Borrows has argued that “it could be said that Canada is a legally pluralistic state: civil law, common law, and Indigenous legal traditions organize dispute resolution in our country in different ways.”<sup>25</sup> Long before Europeans arrived in our territory, Hul’qumi’num Mustimuhw developed social, political and spiritual customs to guide our interactions and relations. These customs developed into a system of laws. Many of our people are still guided by these laws. They use them today to govern their relationships with each other, the environment and with other First Nations communities.

However after Europeans arrived in our territory, another system of laws was introduced. That system of law attempted to transform, subordinate and ultimately eliminate our governance. It sought to undermine our relationships with each other, our environment and other First Nations. Although Hul’qumi’num Mustimuhw were the earliest practitioners of law within our territory, our laws have often been ignored or overruled by non-Hul’qumi’num laws. Hul’qumi’num laws were generally not applied because of their “perceived incompatibility with, or supposed inferiority within, the legal hierarchy.”<sup>26</sup> One could also argue that there was a

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<sup>23</sup> *Ibid* at 869.

<sup>24</sup> *Ibid*. See also Harold J Berman, *Law and Revolution: The Formation of Western Legal Tradition* (Cambridge, USA: Harvard University Press, 1983). Berman argues that pluralism has been one of the specific characteristics of the Western legal tradition.

<sup>25</sup> Borrows, *Canada’s Indigenous Constitution*, *supra* note 9 at 8.

<sup>26</sup> *Ibid*.

misunderstanding about the nature of Hul'qumi'num laws. One could also take a more sinister view and argue that the Hul'qumi'num legal tradition was denigrated because it conflicted with colonial power. However, it is important to note that the vitality of a legal tradition does not depend solely on its historic acceptance or how it is viewed by other traditions.<sup>27</sup> As a result, the very existence of a Hul'qumi'num legal tradition warrants accommodation within Canada's legally pluralistic state.

This chapter explores the framework of the Hul'qumi'num legal tradition in its contemporary context, focusing specifically on two fundamental categories of Hul'qumi'num laws: 1) *snuw'uyulh* and 2) family laws. Throughout this research I was constantly aware of the challenges involved with the recognition of Indigenous legal traditions.<sup>28</sup> In particular, I was concerned with the challenges of intelligibility (the ability to foresee the consequences of a given act) and accessibility (the ability to learn and find laws) of the Hul'qumi'num legal tradition.<sup>29</sup> However, I was also concerned that by focussing on accessibility and intelligibility, I was ultimately “stripping” this legal tradition of everything uniquely Hul'qumi'num. It is my hope that the end result of this chapter strikes a balance between the internal struggles within.

I have utilized a taxonomy of teachings and explicit legal rules to help explain the plurality of laws with the Coast Salish world. I have drawn upon the voices of my Elders to explain these concepts. It is my hope that this broader “codification” does not result in a positivistic reduction of the Hul'qumi'num legal tradition. Finally, I have drawn upon a recent dispute that my family has gone through in my attempt to illustrate these legal principles in

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<sup>27</sup> Robert Cover, “Nomos and Narrative” (1983) 97 Harvard Law Review 4 at 9.

<sup>28</sup> See generally Borrows, *Canada's Indigenous Constitution*, *supra* note 9 and G Christie, “Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions” (2007) 6 Indigenous LJ 13.

<sup>29</sup> Borrows, *Canada's Indigenous Constitution*, *supra* note 9 at 138, 142.

action. I would like to share that story with you now so that you can reflect on it throughout the remainder of this chapter:

As stated in my introductory chapter, I am a member of Cowichan Tribes and for the greater part of my life; I grew up on-reserve in Cowichan Bay. However, for as long as I can remember, my family has always had a strained relationship with our neighbours to the south of us. In order to understand this dispute, I need to share with you more of my family history.

My grandmother and great-grandmother (whose traditional name I hold) were both from Snuneymuxw; however, both of them married into Cowichan. In particular, my grandmother married into my neighbour's family.

My grandmother and her husband lived together for some time and had two children together, my late aunt and uncle. However, due to the abusive nature of the relationship, my grandmother left the territory and travelled to Washington State to live with family.

When she was in Washington State, she met my grandfather. My grandfather had come to Washington State from Mexico and was working on the migrant farms. They began a relationship and my father was born.

After my grandfather passed away, when my father was in his early teenage years, my grandmother decided that she wanted to go home to Cowichan. She and my father returned to the Cowichan Valley – where my father still resides and where my grandmother resided until her passing.

The conflict which arose between my family and my neighbour's family concerns the parcel of land on which I grew up. My grandmother's first husband held the certificate of possession (CP) to that land until his passing. At that point, the CP passed to my late uncle (my aunt had already passed on).

Pursuant to the *Indian Act*, when my uncle passed on, the land was transferred to my father (my grandmother had since passed). This transfer of land has been, and continues to be, an issue with our neighbours. They argue that the land belongs to their family and because we have no "blood" ties to their family, or the Cowichan community for that matter, we have no "legal" right to the land.

As you read through the legal concepts embedded in this chapter I will attempt to illustrate their application to this dispute from my own understanding.<sup>30</sup> I will illustrate that the Coast Salish legal tradition is a living tradition, capable of addressing contemporary legal concerns. I hope you will recognize that these legal categories, and the teachings which emanate from them, are accessible and intelligible. I trust you will also see that that the concepts embedded within our laws are not that far removed other legal systems in the world today.

## 5.2 The Relationship between Law and Culture

I have recently come to see that law is not only a matter of ideas. Law is also a practice – an activity. While law certainly draws from and mingles with ideas, both local and global, at the end of the day law must be applied in particular contexts. Law comes to life in peoples’ lives, not just their minds. As such, to be persuasive, law cannot be separated from the societies from which it arises. It must make sense in its ‘place.’ Law cannot be separated from its surrounding culture. In thinking about the ‘grounded’ nature of law, I have gained further insight about law’s character from discussions with Professor Borrows. In his book, *Canada’s Indigenous Constitution*, Professor Borrows suggests that law cannot be understood apart from culture. He writes:

Law is ‘a culture of argument’ that ‘provides a place and a set of institutions and methods where this conversational process can go on, as well as a second conversation by which the first is criticized and judged.’ ...Canada’s other legal traditions are also embedded in a culture of argument. Each contains a degree of ambiguity that requires judgment beyond its initial formulation. This is why every legal system employs different methods of interpretation to help bridge ambiguities.<sup>31</sup>

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<sup>30</sup> The interpretation of how this dispute could be resolved according to Hul’qumi’num laws and practices is my own understanding and subject to my own interpretation of the teachings that have been shared with me. I expect that as others think about and come to an understanding of the Hul’qumi’num legal tradition, they may have other ideas about how this issue could be resolved. I welcome these differing opinions, as I believe that reconciliation involves a process of coming to a new, shared understanding.

<sup>31</sup> Borrows, *Canada’s Indigenous Constitution*, *supra* note 9 at 118.

The thesis of Professor Borrows' book is that Indigenous law can be explained by reference to the cultures in which Indigenous peoples live. Since in contemporary circumstances Indigenous peoples live in cross-cultural contexts, the laws guiding their lives must be drawn from the cultures that surround them.

I have been influenced by at least two legal cultures: the common law and Hul'qumi'num laws. Since I live in a bi-juridical space, my Elders taught me that I have obligations to follow Canadian law and our *snuw'uyulh*. As explained in Chapter 1, *snuw'uyulh* refers to "our way of life" or "living a good life." It helps regulate our relationships and resolve our disputes. It contains standards and practices for judgment and decision-making. It is intimately connected to our culture. In fact, I would go so far as to argue that it encompasses the basic normative principles upon which our culture is based. All of our practices and institutions stem from the guiding principles of our *snuw'uyulh*.

Another Coast Salish group, the Sto:lo used the word *sxwóxwiyám* to describe their law.

Herb Joe, a Sto:lo Elder talked about the *sxwóxwiyám* in the following way:

Old stories about who we are as a people. They all talk about the connectedness of us all, including all of those that walk on four, those that crawl on ground, those that swim and those that fly. And all that our creator gave us here in the form of mother earth, it's all connected. All connected. And that's what *sxwóxwiyám* is all about. It gives us what our ancestors give us. It's the legacy, if you will, that our ancestors left us. And if we were to study *sxwóxwiyám*, understand *sxwóxwiyám*, and then live by *sxwóxwiyám* we'd be very healthy people. So that's to me what *sxwóxwiyám* is all about (Schaepe 006, 15).<sup>32</sup>

This quotation resonates with me because it is similar to what I know about the *snuw'uyulh*.

There are other terms for law amongst the Coast Salish people. However, each word discusses

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<sup>32</sup> Herb Joe in Dave Schaepe & Stó:l! Nation Treaty and Research Department on behalf of Nooksack Indian Tribe. "Stone T'xwelátse Repatriation Report: Supplement 1." Unpublished report for submission to The Burke Museum of Natural History and Culture, February 2006, as cited in Emmy-Lou Campbell, *The Transformative Power of T'xwelátse: A Collaborative Case Study in Search of New Approaches to Indigenous Cultural Repatriation Processes* (MA Thesis in Dispute Resolution, University of Victoria, May 2010).

our relationships and connections to one another and the wider world. Thus, it should come as no surprise when Hul'qumi'num laws reference and apply specific cultural ideas and practices – our law (like the common law) is a cultural phenomenon.

Since our culture is still alive, and carried on by our Elders and others, our *snuw'uyulh* did not disappear. It was not erased when the first settlers arrived in our traditional territories. Rather, these laws, teachings and traditions are lived in present day through stories, songs, *a priori* declarations, post-hoc adjudicatory decisions, and innumerable other practices and customs. Receiving, pondering and applying these laws in my own daily life has been a transformative experience – one vital to this research project. I would like to share that experience with you now, in hopes that you will gain a greater understanding of this concept and its importance to the Hul'qumi'num legal tradition.

Prior to beginning my primary research, the topic of “law” or “law-making” frequently arose. I remember having discussions with colleagues about Hul'qumi'num laws. I recall learning that the Hul'qumi'num word which most closely resembled law was *snuw'uyulh*. However, I never really turned my mind towards the application of *snuw'uyulh*. In fact, I must confess that in my early months of my research, I took it for granted that this concept would be able to be easily discerned and codified in a manner easily recognizable to those familiar with the Canadian legal system. I also overlooked how “invested” I had become in Canada's legal system – it had unfortunately become my “measuring stick” for all legal traditions.

This mistake led me to significantly struggle with my research project for the first three years. Although I undoubtedly believed in the existence of a Hul'qumi'num legal tradition, I laboured to validate that system by drawing comparisons with more Western legal traditions.

For every Hul'qumi'num legal concept I unearthed, I wanted to find a corresponding Canadian legal concept. I became both frustrated and apprehensive when I was unsuccessful.

My fears were most pronounced when I presented at conferences. I remember one presentation in particular. I was to speak before the Indigenous section of the Canadian Bar Association on First Nation shared-territory issues. My presentation focused on a story of a dispute between two Coast Salish families, from two distinct First Nations, and the protocols surrounding the return of a piece of ceremonial regalia. I wanted to demonstrate to the audience that Coast Salish communities have been dealing with shared-territory issues, and conflict of law issues, for many years. I wanted to stress that we have our own systems in place for resolving these conflicts and that any process developed to resolve these conflicts needs to acknowledge these existing systems.

However, as I entered the conference room and saw the number of senior and junior lawyers, I was overcome with fear. I worried that my presentation did not even speak about "law". I was concerned that the audience would view my presentation as merely "story-telling." I quickly found John Borrows, my research supervisor, who also presented at the conference. I shared my fears with him. He reassured me I was explaining and practicing "law." He reminded me that "story-telling" was an appropriate way to share these "laws." In that moment I realized that I would not foster recognition and reconciliation if I did not explain and apply this legal tradition.

This experience was a milestone in my research project. When I describe this journey with friends and family, I tell them that it is similar to a "rebirth" of sorts. The first few years broke me down. Looking back I can see that this was necessary. I needed to be frustrated. I

needed to question my assumptions. I needed to jettison some false beliefs. I needed to feel lost. I needed to be open to the teachings that I would receive from my Elders and family members.

It wasn't long after my experience at the CBA conference that I began my primary research. If all my secondary research had broken me down, my primary research built me up. In sitting with my Elders and receiving their guidance, I gained a great love and appreciation for the existing legal traditions of my people. It has changed the way in which I view the concept of "law." It has changed the way I order my life. It has brought new understandings of my own responsibilities and obligations. It has not only helped me understand this research project, but my legal obligations in life more generally. It has broadened my understanding of conflict resolution and as a result, has helped me to find balance and harmony within my own, sometimes conflicting, social obligations.

But I anticipate that some will still wonder whether these teachings and traditions are law? I think they are, and so do most Elders that I have worked with. The fact that we regard the *snuw'uyulh* as creating obligations and rights is significant in discerning its legal character. However, I realize that those not familiar with (or subject to) this system may not regard *snuw'uyulh* as law. Yet, it is possible to discern legal rules or laws within such teachings, and they do more than merely reinforce societal norms. Morris S. Arnold, a legal historian and U.S. federal court judge, had this to offer about the character of early medieval law, which I feel is equally as relevant to the questioned status of Hul'qumi'num law:

there can be commonly held social assumptions about the way a moral world is ordered, founded on logic and experience, that people accept in their daily dealings with each other, and this entirely apart from whether there are places to resort to for their systematic and dependable vindication. This natural law, as we may call it, counts, it seems to me

and despite Austin, as much for law as the product of the most sovereign decree ever could.<sup>33</sup>

Furthermore, there are social and environmental consequences for not following these laws. I will demonstrate this in greater detail in this chapter by examining how *snuw'uyulh* is transmitted and implemented. I will also explore the sources of *snuw'uyulh*. Finally, I will utilize oral histories and a personal story to describe the teachings and legal practices that emanate from this category of Hul'qumi'num law.

### 5.3 *Snuw'uyulh*

#### a. Transmission of *Snuw'uyulh*

In this section, I will discuss the words of my Elders, in particular, Arvid Charlie, Willie Seymour and my great uncle Angus Smith to illustrate how our *snuw'uyulh* is taught, refined and studied. In my discussions with my Elders about Hul'qumi'num laws, many of them spoke about the concept of *snuw'uyulh*. However, in prefacing their comments, they expressed to me that the teachings of *snuw'uyulh* begin while in the womb and are fostered and built upon even after death. Arvid Charlie expressed this concept to me in the following way: “We are almost putting the cart ahead of the horse when it comes to *snuw'uyulh* ... The teachings start at a very early age. So you understand the values of *snuw'uyulh* at an early childhood, and it gets deeper and broader as you're putting on age.”<sup>34</sup> He shared a portion of his own learning journey with me:

The teachings of the unborn child, to the unborn child, that's when teachings begin. That's where values are learned – right at the beginning ... The very first thing I can remember was laying with my Grandfather. He always laid me on the right I arm ... Teaching me language ... How to put the word into different tenses. That was the beginning of the value of

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<sup>33</sup> Morris S Arnold, “Towards an ideology of the Early English Law of Obligations” (1987) 5 Law and History Review 505 at 508 in Hamar Foster, “One Good Thing: Law, Elevator Etiquette and Litigating Aboriginal Rights in Canada” (2010) 37 Advoc Q 66 at 86.

<sup>34</sup> Interview of Arvid Charlie (23 June 2010).

knowing the language for me. Also, at that same time he started walking us through the forests, me and my sister Myra. He started by naming the trees. I didn't know there was value in that at the moment. As we started naming the trees, he started to say what they were for. Eventually he taught me about the medicines. When to harvest them and what's harvestable all year round ... The value of knowing what you can survive on. Along with it, has been said many times, don't waste it. The value of not wasting. There's more to it. If I've got a surplus of something I can give to somebody, maybe that person won't give me anything right away. But maybe in ten years he will give me something in return ... That is one of the values of our ways ... The values are there in everywhere we look at in our life.<sup>35</sup>

As Arvid's journey demonstrates, within the Hul'qumi'num legal tradition it is, at times, difficult to designate specific actions or teachings as strictly legal. The information conveyed is layered and fulfils more than a legal purpose. Furthermore, law is not necessarily command, or a decision, but something which permeates and guides all forms of action within the Hul'qumi'num community. It is very loosely akin to regulation. In the example above, Arvid illustrates how language is connected to *snuw'uyulh*. As a result, as soon as language instruction begins in one's life, so does their instruction in the Hul'qumi'num legal tradition. This concept is true of other social practices within the Coast Salish world as well. Law is intertwined with hunting practices, fishing practices, cooking practices, medicinal practices, etc. Its transmission cannot be separated from other practices of the Hul'qumi'num Mustimuhw.

Willie Seymour supported the notion that teachings begin with the unborn child and extend beyond death. He said:

We know that *snuw'uyulh* begins with the unborn child or an expectant mother. The expectant mother receives the disciplines on how to be physically, emotionally, spiritually, and mentally in balance to have that child ... You know our *snuw'uyulh* goes right to death and beyond.<sup>36</sup>

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<sup>35</sup> Interview of Arvid Charlie (16 June 2010).

<sup>36</sup> Interview of Willie Seymour (23 June 2010).

As this statement suggests, law is inextricably interwoven with all the beliefs of the Hul'qumi'num Mustimuhw and cannot be separated from the Hul'qumi'num worldview without transformation occurring. Spiritual beliefs, such as ancestral connections beyond death, are vital to the culture of the Hul'qumi'num people. As such, law finds its place in both the physical and spiritual worlds of the Hul'qumi'num Mustimuhw.

Joe Norris also shared his experiences with learning the teachings of *snuw'uyulh* with me:

It's really important to look at our teachings today. Looking back, when my grandmother was talking to me about a child being conceived, and in the fourth month, God puts the soul into the baby. When you're carrying a child, that's when it starts to kick, so that's when the teachings begin – you start talking to the child the mother was carrying. So she said I was very alert when I was born because I recognized their voices. When my grandfather spoke to me, I knew who he was. So that's the teachings. It goes all the way back to that time. All the way back that era and how our Elders taught. So you always knew who you were and walked with dignity ... It's taken me 67 years to really come full circle in the teachings that were given to me. So it's not overnight. It takes time.<sup>37</sup>

These Elders are saying that understanding law is a process. While I undoubtedly would refer to them as “experts” in the Hul'qumi'num legal field, they themselves acknowledge that they still have a lot to learn about Hul'qumi'num laws. Again, how does this relate to the accessibility and intelligibility of this legal tradition? Some may argue that it that it makes it inaccessible to all those who have not received instruction on the principles from birth. Others may argue that it may be considered unintelligible, especially if instruction continues to death and beyond. I would argue that these are not valid critiques because other recognized legal traditions also struggle with these same realizations. All legal traditions are “living” in the sense that they are constantly evolving and responding to change. They are all full of ambiguity. As such, practitioners of this legal tradition are also constantly learning. The fact that new laws

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<sup>37</sup> Interview of Joe Norris (16 June 2010).

continue to emerge does not make the legal tradition inaccessible, it simply requires effort on the part of its citizenry to ensure that they are following that tradition.

Similarly, although these Elders expressed to me that traditionally teaching began in the womb, that practice is not integral to the legal tradition. Although it may be considered the preferred practice, as the discussion below will indicate, Hul'qumi'num Elders recognize the importance of passing on these traditions, in whatever manner or form necessary. They recognize that transmission is necessary for the continuance of these legal traditions.

For a variety of reasons, I have not received the teachings of *snuw'uyulh* since birth.<sup>38</sup> In fact, my desire to seek out these teachings began in law school and only matured with this research project. On the other hand my turning to these laws was somewhat of a re-birth. In this limited way I can say that I have been learning these laws since my birth. However, I must also clearly acknowledge that my re-birth is only in the recent past. My new knowledge and recently enacted practices are layered over a treasured prior understanding of law. This recognition has weighed heavily upon my heart and has made me apprehensive about this chapter. I realize that it will provide readers with a very limited understanding of *snuw'uyulh*. As expressed by my Elders, *snuw'uyulh* covers many complex and intricate topics. It is difficult to document all of the teachings of *snuw'uyulh*. Such a task would require many lifetimes of dedicated labour (as is the case with the common law).

However, I have been encouraged by my Elders to share their thoughts and my limited understanding of *snuw'uyulh*. In my last meeting with my great uncle Angus he spoke these words to me:

When I'm sitting here all by myself, I often wonder who is going to carry all this work for us – To make things right.

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<sup>38</sup> My grandmother passed away when I was quite young and as a result, I did not have the opportunity to learn these teachings from her.

You've got a name and you're the one that's going to do this kind of work ... Somebody's got to be there to help her. Help our people with this kind of work because we need it.<sup>39</sup>

I feel an immense amount of gratitude for my Elders who shared these same sentiments with me. They willingly gave of their time to teach me about our *snuw'uyulh*. They have a great desire to encourage younger generations to seek in-depth understandings of *snuw'uyulh*. They want them to learn from the Elders in our communities. I have often worried about the inadequacy of my small gifts, and words of thanks are inadequate to express the gratitude I feel. Nevertheless, I have come to recognize that the Elders are also grateful for my research interests and activities. In closing our gathering, Willie Seymour spoke these words to me:

I thank you for your commitment – For your commitment to traditional teachings and academics. You know, I always say, we have the tools in each hand. We are much superior than any other race in our territory because we take the academics and the holistic ways and use them together like nobody else can.<sup>40</sup>

I recognize that this learning process is a journey – one which will take my entire life to complete. I know that it is unlikely that I will ever learn, or understand as much as I'd like to; I know that it will be a continual process of seeking. So even though this dissertation will likely be my final piece of writing to qualify for an advanced degree at a post-secondary institution, I feel that it marks the beginning of a research agenda that will last a lifetime. In this respect, I am not so very different from those who dedicate their life to learning the common law or other legal traditions. Each legal tradition is complex, and must be learned and practiced within its proper context over many life times to facilitate social order.

I share these thoughts for two main reasons. First, this discussion on *snuw'uyulh* is entirely preliminary and is not a comprehensive account of all the teachings this concept entails.

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<sup>39</sup> Interview of Angus Smith (8 November 2009).

<sup>40</sup> Interview of Willie Seymour (16 June 2010).

Teaching and instruction within the Hul'qumi'num community take place incrementally.

Therefore, it would be ignorant for me to assume that in these initial discussions with my Elders they chose to disclose all their understandings of *snuw'uyulh*. I am cognizant of the fact that they shared with me only what they felt I was ready to hear. As such, I have much more to learn about this integral concept.

Secondly, I want the readers to be aware that I expect that my personal understanding of the Hul'qumi'num legal tradition, especially *snuw'uyulh*, will continue to grow and transform through the years. The thoughts and understandings I share in this dissertation may change or become more concrete as I gain a deeper understanding. The concepts I share at this time represent where I am on my personal learning journey – the beginning.

That being said, I invite the reader to join with me and begin their own learning journey of the Hul'qumi'num legal tradition. One of the strengths of this legal tradition is its flexibility. It lends itself to multiple interpretations of legal concepts and teachings. As you read through this chapter, you may find yourself drawing different conclusions about the legal tradition of the Hul'qumi'num Mustimuhw. Explore your own personal interpretation. Seek out answers with our Hul'qumi'num Elders. One of the goals of this research project is to bring about a greater recognition of the Hul'qumi'num legal tradition. As my own learning journey has taught me, personal interaction and reflection on these concepts is one of the greatest ways to accomplish this goal.

**b. *Snuw'uyulh* – A “Condition” Generated through Law**

During one of our discussions, I posed the question to Willie Seymour, “What is law for the Hul'qumi'num people?” He responded with the following words, “So, when we talk of laws

it's very broad, very broad in everything we do. It's all very important."<sup>41</sup> I posed a similar question to Wes Modeste and he responded:

I guess they aren't laws in the same sense as your understanding of law ... They are really talking about a way of life ... There's a type of laws that are more of a social nature and are conducted when you are among your people ... Law is perhaps more understood by the way you were brought up.<sup>42</sup>

As Wes' statement seems to imply, there is no separation of law and morals – no separation of law and anything else for that matter. Some might argue then, “Does everything in Hul'qumi'num traditions constitute law?” In this context, William Sumner, in *Folkways*, explains how law emerges from social mores; in fact, “Legislation, to be strong, must be consistent with the *mores*.”<sup>43</sup> Geoffery Sawyer notes that “there is ... a recurrent theory, attitude or assumption, manifested in both popular speech and in academic speculation, which attributes a secondary role to Law and a primary role to social behaviour conceived of as existing independently of Law.”<sup>44</sup> Along similar lines, A.S. Diamond states that law is “the distilled essence of the civilization of a people,” a factor that leads to constant change in response to societal changes.<sup>45</sup> As such, the interconnection between law and mores within the Hul'qumi'num legal tradition is similar to the development in common law countries where judges and common law people, as members of the jury, help to make the law. This recognition helps to facilitate a meaningful appreciation of this legal tradition, as it is practiced by the Hul'qumi'num Mustimuhw.

This understanding of the nature of law was further strengthened by Willie Seymour:

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<sup>41</sup> Interview of Willie Seymour (16 June 2010).

<sup>42</sup> Interview of Wes Modeste (23 June 2010).

<sup>43</sup> William G Sumner, *Folkways: a study of the sociological importance of usages, manners, customs, mores, and morals* (Boston: Ginn, 1906) at 55 cited in Sheleff, *supra* note 3 at 81.

<sup>44</sup> Geoffrey Sawyer, *Law in Society* (Oxford: Clarendon Press, 1964) at 170.

<sup>45</sup> AS Diamond, *The Evolution of Law and Order* (London: Watts, 1951) at 303.

*Snuw'uyulh* is incorporated into everything ... The old people used to say, do you want an easy life or a hard life? You want an easy life; you listen to the traditional ways, the traditional laws. You're going to be kind to people. You're going to help people. You're going to support people. You want a tough life? Then you go and challenge people and you will become known for that.<sup>46</sup>

It is interesting to note the use of the word “challenge” in this statement. This raises the question about the role of change in tradition, if challenges are seen as creating a hard life. This static description of tradition would seem to suggest a very rigid legal tradition. However, one of the very strengths of a legal tradition based on a close conception of laws and morals is its flexibility. This flexibility is essential for its vitality and for the continuing viability of the culture. I have tried to rectify this dichotomy by suggesting that there are two fundamental categories of Hul'qumi'num laws. Although the fundamental teachings associated with *snuw'uyulh* may be considered universal, such that they must always be considered in regulating behaviour or resolving disputes, the application of those teachings to family laws make them more fluid. What this means is that the teachings surrounding *snuw'uyulh* are those which serve as a baseline against which a Hul'qumi'num person organizes his or her life with those around them.<sup>47</sup> They form the foundation for enacted or official laws.<sup>48</sup> Family laws, on the other hand, are those laws which are more easily discernable because of their public nature or their enacted status. These concepts will be explained in greater detail in the remainder of this chapter.

These general descriptions of *snuw'uyulh* supports John Borrows' hypothesis that law cannot be separated from culture.<sup>49</sup> As my Elders have told me, *snuw'uyulh* is a way of life – not

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<sup>46</sup> Interview of Willie Seymour (23 June 2010).

<sup>47</sup> Lon L Fuller, “Human Interaction and the Law” in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, revised ed, (Portland: Hart Publishing, 2001) 231 at 254.

<sup>48</sup> *Ibid.*

<sup>49</sup> Borrows, *Canada's Indigenous Constitution*, *supra* note 9 at 118.

merely a codification of accepted practices and sanctions. It touches on all aspects of life and cannot be separated from our relations to each other, to the natural world or to the spiritual world.

However, recognizing the intricacies and complexities of this legal tradition, how can it be applied in today's modern context? There are seven teachings that have been identified to me as comprising our *snuw'uyulh*.<sup>50</sup> These teachings are:<sup>51</sup>

- 1) *Sts'lhnuts'amat* ("Kinship/Family");
- 2) *Si'emstuhw* ("Respect");
- 3) *Thu'it* ("Trust");
- 4) *Hw'uywulh* ("Sharing/Support");
- 5) *Nu stl'i ch* ("Love");
- 6) *Mel'qt* ("Forgiveness"); and
- 7) *Sh-tiiwun* ("Responsibility").

These are key Hul'qumi'num teachings which are applied as guiding norms and values with deep roots in Hul'qumi'num custom and tradition in virtually every important area of life in the community. As such, I deem them to be similar to the Western legal concept of implicit laws or rules.<sup>52</sup> In essence, they represent a set of transcendent teachings that seek to foster harmony, peacefulness, solidarity and kinship between all living beings and nature in the world.

However, these seven teachings are not basic laws in the sense that they only have meaning within a legal framework or when applied to a legal question. Rather, when spoken of in the legal context, they describe conditions generated through law. As such, they are somewhat

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<sup>50</sup> Interview of Joe Norris (1 July 2010); Interview of Florence James (19 July 2010); Interview of Arvid Charlie (23 June 2010); Interview of Willie Seymour (23 June 2010).

<sup>51</sup> Translations provided by Florence James via email on August 7, 2010.

<sup>52</sup> Fuller, *supra* note 47 at 254.

similar to the Western concept of natural law.<sup>53</sup> They describe “an objective moral reality” constructed from a set of authoritative legal rules.<sup>54</sup> In a sense, *snuw’uyulh* is a state or condition and the Hul’qumi’num legal tradition encompasses all the animating norms, customs and traditions that produce or maintain that state. As a result, Hul’qumi’num “law” functions as the device that produces or maintains the state of *snuw’uyulh*. The seven teachings articulated to me by my Elders, provides the Hul’qumi’num Mustimuhw with the framework of thinking, planning, and decision-making so that right choices lead to “living a good life.”

This notion of a legal tradition built on teachings is not exclusive to the Hul’qumi’num people. Legal theorists have long debated the importance of normative principles in judicial decision-making.<sup>55</sup> In describing the nature of law, in particular constitutional law, Frank R. Scott stated:

... every legal change involves a choice of values, a selection of objectives ... Changing a constitution confronts a society with the most important choices, for in the constitution will be found the philosophical principles and rules which largely determine the relations of the individual and of cultural groups to one another and to the state.<sup>56</sup>

Perhaps the major difference between the Western and the Hul’qumi’num legal tradition is that the Hul’qumi’num people more explicitly embrace the fluidity of their legal traditions. Because *snuw’uyulh* applies to all aspects of Hul’qumi’num culture, these concepts are not just legal concepts. Many of them apply to spiritual and normative practices as well. They are integral to the Hul’qumi’num creation story, “Those Who Fell from the Sky.” As described in more detail later in this chapter, they are also integral to Hul’qumi’num spiritual life. In summary, they

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<sup>53</sup> Natural law is a body of immutable rules that consist of the highest principles of morality towards which humanity is striving. See generally George, *Natural Law Theory*, *supra* note 6.

<sup>54</sup> Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 160-161.

<sup>55</sup> See generally Ronald Dworkin, “Dworkin’s ‘Rights Thesis’” (1976) 74:6 Michigan Law Review 1167.

<sup>56</sup> Frank R Scott, *Essays on the Constitution: Aspects of Canadian law and politics* (Toronto: University of Toronto Press, 1977) at ix.

underlie, along with corresponding virtues,<sup>57</sup> all of Hul’qumi’num culture, including customs, traditions, philosophy, language, spirituality, sense of place and identity.

**c. The Teachings of *Snuw’uyulh*<sup>58</sup>**

**i. *Sts’lhnuts’amat* – (Family/Kinship)**

The notion of kinship is inherent to *snuw’uyulh* or “living a good life.” As described in Chapters 2 and 3, while most people recognize the importance of families, many forms of interpersonal relationships take on a special legal significance within Indigenous communities. In fact, within the Coast Salish World, individuals delve deep into a person’s lineage to try to find a kinship connection. Because kinship was, and still is, the primary vehicle through which the ethics of sharing is exercised, Coast Salish communities value strengthening their kinship ties.<sup>59</sup> Family is often viewed with the upmost importance for the Hul’qumi’num Mustimuhw. Family is what holds us in relationship as individuals and bridges us as individuals into our communities and nations.

*Snuw’uyulh*, in respect to the rule of kinship, refers to the ideal relationship among everyone in the Coast Salish world where values maintain relationships that produce harmony. In Hul’qumi’num communities, *snuw’uyulh* reinforces the kinship system through values and virtues that include respect, kindness, cooperation, friendliness, reciprocal relations and love. The Hul’qumi’num language, traditional stories, ceremonies and songs contain and reinforce values that Hul’qumi’num people express through kinship relations. These values emanate from the principle of kinship and prescribe norms and practices which Hul’qumi’num Mustimuhw must follow when interacting with all their relations – animate, inanimate and spiritual.

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<sup>57</sup> Interview of Florence James (19 July 2010).

<sup>58</sup> When these teachings were shared with me they were all give equal weight and importance to the concept of *snuw’uyulh*. As a result, the number does not connote a hierarchy of teachings.

<sup>59</sup> Brian Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property, and Territory in the Coast Salish World* (PhD, McGill University Department of Anthropology, 2005) [unpublished] at 358.

Despite colonialism's impact, Hul'qumi'num Mustimuhw learn at an early age the proprieties that perpetuate kinship solidarity. They use them to speak, act and associate with fellow Coast Salish people, and with fellow Hul'qumi'num community members and family members. Hul'qumi'num children learn their family history, genealogy and basic etiquettes. As noted earlier, they practiced them with their relatives and other Hul'qumi'num people at a very early age. Conflict between relations is to be avoided or dealt with at the earliest possible time. Children are taught to use kinship terms when addressing parents, grandparents, siblings, aunts, uncles, cousins, and other relatives. These terms indicate a closer connection between relatives than those utilized in the English language. A person whose behaviour contravenes the kinship rule assumes the risk of bringing dishonour to one's family – this concept is central to the dispute resolution processes within this legal tradition, as examined in Chapter 6. For all these reasons, harmonious kinship relations are necessary to live according to *snuw'uyulh*.

However, I feel it necessary to comment on the “real” vs. “ideal” in respect of this teaching. While I maintain that kinship and the cultural expression of kinship is inherent to the Hul'qumi'num legal tradition, how that is interpreted in practice varies greatly between families. Consider for example, the conflict I shared at the outset of this chapter regarding my family and the land on which I grew up. This illustration provides a poignant example of the differing conceptions of kin and community with the Hul'qumi'num community today.

The crux of the conflict surrounded kinship ties, or the lack thereof, which existed between my father and his half-brother's family. In presenting their arguments as to why my family had no “right” to the land, my father's brother-in-law's family argued that not only was he not “really” Cowichan, and not connected to their family, but that his brother “wasn't really his brother.” Consider these statements in light of what has been said about Coast Salish social

groupings in this dissertation. These statements appear to be in direct violation of the legal principle of kinship. My father, on the other hand, felt a strong connection to his brother. It made no difference to him that they didn't share the same father. They were connected. They shared a history together. They were kin.

For many years this conflict continued to escalate. It finally came to a head when my neighbours attempted to challenge my father's legitimacy as a member of the community. Because of his contributions to the community, he is well-respected by the Elders, and many of them saw his claim to the land as legitimate, based on our Hul'qumi'num laws regarding land. To respond, my family, led by my great uncle Angus and other respected individuals in the Cowichan community, resolved to bestow a traditional name on him. This Hul'qumi'num name was an implicit recognition of the legitimacy of his connection to the land, through his maternal ancestors.

My father also appeared before Cowichan Tribes Chief and Council and recited our family history and argued that, according to Hul'qumi'num laws and practices, he had a valid claim to the contested land. In the end, my father's claim to the land was upheld and our family's kinship connections to the community were recognized. However, hard feelings still exist amongst some of our neighbours. As this example demonstrates, although kinship considerations are vital to the Hul'qumi'num legal tradition, because of variations in practice, these rules may not be capable of resolving conflicts without consideration of other teachings.

## ii. *Si'emstuhw* – Respect

Respect is another teaching of *snuw'uyulh*. Ellen White describes the concept of respect as, "... Respect for others and their differences and for the power of love. The teachings [*snyw'uyulh*] show that we are all different but the power of love and commitment transcends

all differences.”<sup>60</sup> The concept of respect should guide all our interactions in the natural world.

We are to treat every animate and inanimate object in a manner which fosters respect. This

notion resonates within our oral tradition. Wes Modeste shared the following account with me:

One story that intrigued me is that there used to be stories of giants. I suppose they were something like Goliath.

One day, a man came across a very large bow when he was hunting. He was looking at it. He could see that it wasn't a natural branch that had fallen in the forest. After he had satisfied his curiosity, he continued on.

It wasn't long after that he came across human remains – but they were from a very large person. “This man must have been accidentally killed,” he thought to himself. So he went walking around the mountain, looking for a resting place for the bones. He came across a crack in the rock. So he gathered up some moss and laid it down and then picked up all the bones and started placing them in this shelter by the rocks.

After he had gathered up all the remains that he could find, he remember the bow. “That must have belonged to this man,” he said to himself. So he went back until he found it. He covered it over with moss and placed it with the remains. Then he covered all of it over with moss.

That night, that man came to him in his dreams and expressed gratitude for his gesture of kindness and for taking care of his remains. He especially thanked him for returning his bow, because he had been missing it.

The giant bestowed a gift on the man. I don't remember the gift; maybe it was to be lucky in hunting or something similar. So the gesture was not without reward.

That's a teaching. To save respect for something like that and to go out of your way to respectfully remove the remains to a place they know more. That is more in keeping with how bodies should be kept.<sup>61</sup>

As described in Chapter 3, this teaching of respect for the dead and their resting places still resonate strongly within Coast Salish communities. These sites are valued as powerful

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<sup>60</sup> S Marlo Paige, *In the voices of the Sul-hween/Elders, on the Snuw'uyulh teachings of Respect: their greatest concerns regarding Snuw'uyulh today in the Coast Salish Hul'qumi'num' Treaty Group territory* (MA Thesis, Malaspina University-College, 2004) [unpublished] at 11.

<sup>61</sup> Interview of Wes Modeste (23 June 2010).

ancestral places that must be protected out of respect for past generations. As a result, the Hul'qumi'num Mustimuhw have many customary laws put in place to ensure that these sites remain respected.<sup>62</sup> This is one example of how the rule of respect gets put into practice.

There are many teachings surrounding respect for the natural world. Chuck Seymour shared the following teaching:

My mom's first cousin from Kuper Island taught me how to go out and harvest deer. He told me, 'You're not just going out to shoot deer, you're taking a life. You need to pay respect to its soul and thank it for giving up its life for you to feed your family.'<sup>63</sup>

This passage further supports the argument that law is interwoven with all the beliefs of the Hul'qumi'num Mustimuhw. In this example, one can see the spiritual and the natural worlds connected through law.

Wes Modeste shared his experience:

In the early fall there was a great downfall of rain. The creeks that had been dry all summer began to fill up with water from the heavy rain and the chum salmon began to come up the river. There was chum salmon in the creek and me and my nephew were running after the fish and kicking them out of the river.

When we got home we were all soaking wet and my father asked what we were doing. I told him that there was a lot of fish in the creek and that we were kicking them out of the water.

I got the scolding of my life – by that very act of disrespecting the salmon. He said to me, “They have a right to live just like you do. You have the right to take the life of another animal for your food and you do that respectfully.”

So never again did I abuse live animals after that. It was a concept that stayed with me, even though I was only 14 years old at the time I received it.<sup>64</sup>

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<sup>62</sup> See generally Eric McLay et al, *A'lhut tut et Sulhween “Respecting the Ancestors”*: Report of the Hul'qumi'num Heritage Law Case Study (Ladysmith: Hul'qumi'num Treaty Group, 2004).

<sup>63</sup> *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Chuck Seymour).

<sup>64</sup> Interview of Wes Modeste (23 June 2010).

Through this example, one can see the potential for the development of a suite of conservation laws emanating from this implicit rule. For example, in speaking with a couple of Elders about the lack of fish returning to our traditional rivers and waterways, they shared the importance of respecting our resources – of “letting areas rest.” They explained to me that although an individual has “rights” to a particular fishing site, it does not imply that they can continue to fish there to the detriment of the species. They taught that we should look for signs within the natural world to determine if our practices would be respectful of the fish, for example, if the number returning to spawn was too low, then we would no longer have a right to fish in that area.<sup>65</sup> This “common sense,” as it was articulated to me, was a resource management practice within the Hul’qumi’num communities.

The importance of the teaching of respect is also illustrated through Hul’qumi’num traditional leadership practices. Leadership authority, in the Coast Salish world, is said to be based on respect and acceptance of established modes of conduct and behaviour.<sup>66</sup> Florence James shared her experience with me:

... If you can speak to something that you or a group that needs healing, and they feel that difference in the way you are speaking to them, they are going to feel respected. They will want to heal, or they will want to listen to whatever it is that they need from you – if you are using the traditional ways.

That is the one main rule my grandpa said. He was from Quamichan area and he married at Kuper Island (that is why we were there). He wife’s dad was Moses Peter.

He ran his Big House in that rule – that teaching. So the people would love to be near him and accept the ways he wanted them to be. That is how he ran his Big House.

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<sup>65</sup> This limitation to the resource right is similar to that articulated by the Supreme Court of Canada in *R v Sparrow*, [1990] 1 SCR 1075.

<sup>66</sup> Bruce Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* (Lincoln: University of Nebraska Press, 2001) at 115

So every time they had a ceremony, most of the people would run to him because they knew they were going to be respected, honoured and treated well. It is called *a'lhatham* – they were going to respect you and honour you when you are in their presence. *A'lhatham* is treating you in a highly respectful way.<sup>67</sup>

As this example demonstrates, the rule of respect is highly valued in the Hul'qumi'num communities. It has been explained to me that leadership and governance was more fluid and that if a leader was found to be acting in a disrespectful manner, he could quickly lose the support of this community. Conversely, individuals often rose to positions of influence by virtue of their ability to demonstrate respect, as was illustrated in the case of Florence James' grandfather.

Consider again my own family's dispute reviewed at the beginning of this chapter. A lot of my father's support emanated from his respected position within the community. In particular, the Elders were very responsive to his efforts to help the community reconcile our territory's land use issues through turning to the British Columbia Treaty Process and international law. This high esteem worked to help foster his connection to the community and built his support for and among community members. While I am biased and tensions exist in his relationships, as discussed, respect is an important teaching called upon within the community to help us regulate our behavior and resolve our disputes. Respect touches on all aspects of social ordering within the Hul'qumi'num community.

### iii. *Nu st'l ch* - Love

Love is another teaching of *snuw'uyulh*. Arguably, it is a teaching that touches on all of the six other teachings of *snuw'uyulh*. When contemplating how to articulate it, my thoughts turned to a phrase echoed often by the respected Stz'uminus Elder Roy Edwards: "*Uy'ye'thut ch*

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<sup>67</sup> Interview of Florence James (19 July 2010).

*'u'suw ts'its'uwatul'ch.*” It is a Hul’qumi’num phrase that translates loosely into “Treat each other well and you will help each other.” Although some might see it as fitting more under the teaching of sharing and support, I believe that this phrase articulates the requirement to show love to one another.

Although it is perhaps the simplest of concepts, it is often the most difficult to adhere to.

Wes Modeste shared this story with me:

There were always stories of very large snakes – large and invisible to most of us. This lady was picking berries in the mountains and she came across a very large snake. It was all coiled up with its head up, watching her. She ran over and embraced the snake. (I think I would be too frightened to do something like that). She woke up and she wasn’t at the place where the snake was coiled up. But for the rest of her life, her gift was making beautiful baskets. That was her gift.<sup>68</sup>

I feel that this simple story illustrates the teaching of “*Uy'ye'thut ch 'u'suw ts'its'uwatul'ch.*” The woman showed love to the snake, treated it well, and in return it gifted her with the ability to be a gifted basket maker.

There are many stories within the Hul’qumi’num oral tradition that work to foster the application of this teaching through the promise of reciprocity, for example, the Cowichan story of “*The Stequham and the Spoll*” (The Grouse and The Raven).<sup>69</sup>

Once there lived in the same village two Chiefs who were named Grouse and Raven. Raven was mean, stingy and selfish, while Grouse was kind-hearted and generous. While Grouse was greatly loved by his people, no one cared for Raven. One day Raven caught a large number of herrings. They looked very good, and as the Grouse was rather short of meat, he asked the Raven to share with him some of the herrings. But Raven refused, stating that he caught fish for him and his family, not to give away.

Grouse felt greatly hurt. He went home and told his wife what Raven had said. But he quickly put his mind past his hurt and decided to make a

<sup>68</sup> Interview of Wes Modeste (23 June 2010).

<sup>69</sup> Diamond Jenness, *Faith of a Coast Salish Indian: Memoirs in Anthropology no 3* (Victoria, BC: British Columbia Provincial Museum, 1955) at 5.

bow and some arrows to deer hunt. He commenced work and soon he had his bow and arrows ready. He then went out into the forest to hunt. He had gone but a short distance when he saw a beautiful fat deer. He strung his bow and shot an arrow at the deer. It was a beautiful shot; the arrow pierced the deer's heart and it fell dead. He put the deer on his back and started towards his home.

On his way home Grouse met a very old man. His hair was white and he was bent almost double with age. He carried a stick in his hand to steady his tottering feet. The old man admired Grouse's kill and told him that he was short of food. He asked for the heart of the deer. Grouse readily obliged the old man, who ate it up at once. The old man thanked Grouse and told him to put the deer on his back again so that he could breathe on it to make Grouse's burden light.

So Grouse put the deer on his back and the old man breathed on it, and it became so light he could scarcely feel its weight. He soon arrived home and there was great rejoicing in his house. Mrs. Grouse cut up some of the meat and put it on sticks and stuck it in front of the fire to cook. It soon began to sizzle and give off a very pleasant odour.

Raven was outside gathering wood for his fire and he smelled the meat being cooked. He told one of his boys to go over to the Grouses to see what was cooking. So the young Raven went to visit the Grouses and Mrs. Grouse invited him to try a piece of the toasted deer meat. The young Raven devoured the meat quickly and returned to his father to tell him that the Grouses had a lot of delicious deer meat.

Raven wanted some of the meat, but he decided that he couldn't ask them because he refused to give them any of his herrings that morning. So, he told young Raven to take over some herrings, in the hope that they would give him some deer meat in return. However, Mrs. Grouse refused the herrings, stating that they had a lot of deer meat and the herrings would only spoil.

When the young Raven returned Raven was very disappointed. That night Raven kept talking about the deer meat. Finally, Mrs. Raven suggested that he make a bow and some arrows and go out and kill a deer for himself the next morning. So the next morning he made a bow and some arrows and went into the forest to hunt for a deer. He had been out but a short time when he saw a fine deer. He shot an arrow and the deer fell. He went up to it, removed its heart and wrapped it up to give to his youngest son. Then he put the deer on his back and started home.

On the way home he met the same old man that Grouse had met. Admiring the deer, the old man asked Raven for the heart. Raven

refused, stating that he did not give away food to strangers and that the old man ought to be old enough to get food for himself. The old man replied that he was old and his limbs were feeble, preventing him from killing deer as he did when he was young. Raven told the old man that he should be dead, because those who cannot provide food for themselves should not live.

The old man told Raven that the old live to provide counsel for the young. He lives to make the burden of others light. He then breathed on the deer and told Raven to be on his way. As he travelled home, Raven thought to himself what a fool the old man was. He has the secret of making heavy things light, yet he cannot provide for himself. Think of all the food he could get if he knew his secret.

When he got to his house he threw the deer down outside and walked into his house. He took the deer's heart out and threw it towards his youngest son. But as the heart left his hands it turned to stone. The stone struck the boy in the breast and killed him. Raven then told his eldest son to go outside and bring in the deer. But when his eldest son went out, he could find no deer. All he noticed was a big piece of wood shaped like a deer. He returned inside and told his father that he could not find the deer. Raven went out to look for the deer, but he found that it had turned to wood. He cried out in despair. He was very upset, for should his food continue to disappear in this manner he too would soon become old and feeble like the old man of the forest.

This story illustrates that love is a key teaching within the Hul'qumi'num world. As evidenced by the previous discussions on kinship, love is central to defining relationships and obligations. It is the ideal to which all our relations strive to obtain. Furthermore, this story signifies the important relationship between love and leadership. Both Raven and Grouse were chiefs. Grouse practiced love in his leadership and served his community and treated the Old Man with compassion. Raven did not exercise that principle. The consequences of his actions demonstrate that he failed to live Hul'qumi'num law. Furthermore, when practicing the principle of love, it is important to recognize the worth of all individuals. It is important to acknowledge everyone's strengths and acknowledge our responsibilities to one another. The Old

Man in the story reminded Raven about this when he said that the Old People exist to counsel and instruct the young.

This story also demonstrates how it is at times difficult to understand or apply love without turning one's mind to the other six teachings of *snuw'uyulh*. The teachings of sharing, respect, love, and kinship were all integrated and practiced in this well-known Cowichan story. Their interrelationship is vital to its understanding. Teachings must be contextualized and applied together to "live a good life" or fulfill *snuw'uyulh*. According to *snuw'uyulh* one should demonstrate love in all their actions and "*uy'ye' thutch u' suw ts'i ts'u watul'ch.*"

#### iv. *Hw'uywulh* - Sharing and Support

*Snuw'uyulh* is the basis for giving, sharing and supporting relatives. It is the foundation for reciprocity with non-relatives in the Coast Salish world. Kinship is indispensable to the Hul'qumi'num Mustimuhw. Strong kinship ties brought both security and protection to the Coast Salish people. As such, a Hul'qumi'num person could fulfill one's kinship obligations to family members by sharing and providing physical, emotional and spiritual support.

These teachings of sharing and support are reinforced through the Hul'qumi'num kinship system and through ceremonial practices, such as naming, memorials and weddings. These ceremonies, like the naming ceremony, require extensive labour, food, materials and spiritual support. Individuals would not receive a name without the support or co-operation of family members.

My own naming ceremony provides an illustration of this rule between kin and non-kin. In preparation for my own naming ceremony, I relied greatly on the support of my own family. They helped purchase gifts for the give-away, they aided in hiring, they helped with set-up, etc. During the ceremony they also stood beside me and helped me pay out the individuals that we

had hired to help facilitate the event. My family stood beside me and gave of their time and resources because of the very fact that we were related. Although I will most certainly support them at their events, I did not make a record of each and every one of their donations to repay at a future date. During my naming ceremony, other individuals, non-kin, also shook my hand and made donations to help me with the cost of my naming. I did make note of these donations from non-kin. It is my understanding that I will return the gift, in whole or in excess, during one of their family events.

If we consider my family's conflict over land, we can see that although sharing and support are teachings of *snuw'uyulh*, these teachings may be overlooked in contemporary circumstances. People continue to fight about land. Reserve lands are insufficient for the number of community members who want to live there. Single-family homes are often filled with grandparents, parents, children and grandchildren. In fact, in my familial dispute, my late uncle's family argued that they needed the land to build homes for their children and grandchildren. So while they were willing to share the land with individuals they considered kin, they were not willing to share it with non-kin. This example illustrates the interdependence of these teachings – in this case, the relationship between the kinship and sharing. These teachings must work together to prescribe the type or conduct acceptable within any given situation.

**v. *Sh-tiiwun* - Responsibility**

Approaching issues with a kinship orientation does not mean that individual rights and freedoms always give way to community interests. Hul'qumi'num law respects individual rights, but they must be exercised responsibly within a community context, just as is the case in

Canadian constitutionalism.<sup>70</sup> Hul'qumi'num Mustimuhw have the freedom to do what they want, but they must do so in a manner which respects the collective nature of their relationships.

Although there is a high respect for individual freedom within Hul'qumi'num communities, it is balanced by fundamental responsibilities and duties. Hul'qumi'num Mustimuhw have a deep respect for kinship or family. As noted the respect for kinship encompasses extensive responsibilities and respect for others. The others include spouses, children, immediate blood relations, community relations, Coast Salish people in general and non-Coast Salish individuals. Even ancestors and plants and animals are included under this principle of responsibility.

The example of land conflict between my family and my neighbours demonstrates that both parties failed to be responsible to one another. Although it could be stated that our neighbours failed to respect their responsibilities towards us as kin; it could also be said that our family failed in our responsibility to try to build and foster kinship relations with these people. Both parties had a responsibility to try and work together to come up with a mutually satisfactory solution to the problem.

A Hul'qumi'num person not only has responsibilities to the natural and supernatural world, they also have a responsibility to *snuw'uyulh* itself. Florence James described this teaching to me with the following words:

Once you are passed down the traditional teachings you had to believe it in your heart – all the rules and ways to live ... It's not just about saying it. You have to live it for it to be creditable. When you just say it, then it won't have meaning if you aren't living it in your hear. So that is what makes us authentic when we tell you the law ... *Sni'niw* means that you know the knowledge of *snuw'uyulh*.

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<sup>70</sup> For the importance of balancing individual and collective rights see generally *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835; *R v Keegstra* [1990] 3 SCR 697.

... Once they teach you these laws, the *snuw'uyulh*, as soon as I say it to you, you are now responsible. That is why we say *sni'niw* – you are a responsible person of the traditional ways. So that is why they say to you – you are responsible.

If you are behaving badly and breaking all the laws of our First Nation ways then you have not followed any of the teachings. You are breaking one after another all the laws that you have been given to live by. Your whole life is guided by that law.<sup>71</sup>

As this passage demonstrates, responsibility not only entails duties but also entails accountability. This is two-fold. Individuals have a duty to uphold and follow *snuw'uyulh* once the teachings have been passed down; however, there is a corresponding duty that the teachings are clearly understood before and individual is held responsible for them.

#### vi. *Thu'it* - Trust

The teaching of trust is intertwined with the teachings of responsibility and respect. Being trustworthy is highly valued with the Hul'qumi'num communities. When contemplating the practices and traditions within the Coast Salish world that foster the development of the principle of trust, my thoughts immediately turned to the practice of witnessing.

Witnesses are:

persons ... called upon when the membership want to voice their opinions at a gathering. They must be reliable because, when called upon at a later time, they must be able to recollect what was discussed and be able to relate that to a gathering. They must be able to thank those for their help or payback, and encourage others to carry and pass on this teaching to their children. Witnesses must have the respect of the Elders and general membership, and they must be knowledgeable of Tribal Affairs and Customs.<sup>72</sup>

Florence James described the concept to me in the following terms:

<sup>71</sup> Interview of Florence James (19 July 2010).

<sup>72</sup> First Nations of South Island Tribal Council, "Briefing Notes: An Introduction to Aboriginal Justice and Function of an Elders Council" (Paper presented to the Cross Cultural Awareness Workshop, March 9-11, 1990) [unpublished] at 5 cited in Miller, *The Problem of Justice*, *supra* note 66 at 189.

So when you call a witness and you pay them to be there, you have invited them and that is going to be your witness. Witness all the work and they are going to help you, to stand by you and say this is the way it was said.

And if anything comes up from it, you call your witnesses back. They are going to stand up and say this is what happened. This is the way it was done. That is why you have a witness in the house. They help you to know and stand up and say this is how I seen it.<sup>73</sup>

So one can see, Hul'qumi'num Mustimuhw need to be trustworthy in order to be called as witnesses – an important process in the Hul'qumi'num legal tradition. However, the process of calling witnesses also helps to foster trust with the community. It reaffirms to community members that proper protocols are being followed and that individuals have rights to the gifts that they are bestowed with. Consider the use of witnesses in my father's naming ceremony. Not only did they serve to recognize that my father had a right to the name that he was bestowed with, they also served to help reaffirm his position within the Cowichan community.

Trust takes on an even more important role within a society that utilizes the oral tradition in their legal tradition. We currently live in a world of the written word, which has conditioned some people to believe that the written word is more valuable and credible than the oral tradition. Yet oral narratives contain doctrines and principles which permit the use of customs and traditions in dispute resolution and community problem solving. This knowledge provides ample authority for the use of customs and traditions as law in these modern times. However, individuals need to trust that those who are making the decisions and acting on their behalf, such as the witnesses, are trustworthy. Trust is also imperative to recognizing the validity of the process itself, whether it is the decision-making process or the laws drawn upon to resolve the legal issue. For example, my father had to trust in the process of recounting his family history to the Chief and Council and that those making the decision would exercise accountability.

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<sup>73</sup> Interview of Florence James (19 July 2010).

Arguably, trust is imperative in gaining recognition for any Indigenous legal tradition, whether from the Indigenous community itself or society at large.

**vii. *Mel'qt* - Forgiveness**

Forgiveness is another teaching of *snuw'uyulh* because it is necessary to restore harmony among the people and healing within the community. I would like to share with you a story told to me by Willie Seymour. Although he discussed it in the context of conflict resolution, I feel that it illustrates many of the principles outlined in this chapter, in particular the principle of forgiveness:

I'll tell you a little story. I grew up with a real close cousin of mine, late Garry Smith. My grandfather and his father were really close ... We just loved each other. We would be together all the time, either at his place or nine times out of ten he was at my place.

It wasn't uncommon when we just small that our grandparents or parents would leave us alone for a day. It didn't disturb us. We were able to take care of ourselves. I would have been ten or eleven years old. Garry and I would play and we would say, "Let's go chop wood." And we'd go chop wood. We'd get tired of that and then we would go do something else. In between we would always find something productive to do. We'd say, "Well, we could get some sand and fill in these potholes."

This one particular day we were playing cards, and we never did argue, but this one day we got into an argument and we were arguing and a lot of words were said. We started wrestling around and rolling around on the floor. He had me beat. He had me beat. He was bigger than I was. He was big like his dad. Finally I said, "I don't want you here no more. I want you to go," and after a while he did get up and leave.

My grandfather was gone a good part of the day and Garry went home. About an hour later he was coming back, taking his time, walking. I went and locked my doors. I didn't want to see him. I didn't want to talk to him. He got to my front door and he started knocking, "Willie, Willie, I got to talk to you." I said, "Go away. I don't want to talk to you." And I don't know how long he stayed there. And finally he said, "Willie, I really need to talk to you. I'm not allowed to go home until I talk to you. My dad says I can't. I got to come in and talk to you."

So after a while I did open the door and he sat down and I say down and he said, “I’m really sorry for what happened. I come to apologize for my part of having an argument.”

You know I felt real bad. I look back and I was the one that initiated the argument. I was the one that started it, but his father made him come and apologize to me. He didn’t stay too long because we were still kind of distant with each other. And he said, “Well, I did what my dad asked me to do.” He was satisfied and he left.

My grandfather got home and he always seemed to have a way of knowing when something was wrong. He walked in and I was watching t.v. – trying to look natural, I guess. He walked in and he’s putting his things in the house and he stopped and said, “Son, what happened? What’s wrong?” “Oh nothing Dad,” I replied. “Where’s your brother, your brother?” “Oh, his dad called him and told him he had to go home.”

Somehow he pieced it together and then him and my grandmother went in the kitchen and took out some preserves and some dried fish and stuff and some herring, and started making lunch. He said, “You go call your grandpa and tell him to bring Garry.” So I did.

Of course we were trying to be natural there. We ate and my grandfather started talking. He said, “I don’t know what happened. I don’t know what was said, but I don’t ever want to see hurt grow within my family. *Ti’yu-xween* – I don’t want to see trouble grow from a small conflict.”

And he talked about that. He told us that *ti’yu-xween* starts from a little speck. Not taking care and it grows and grows and it starts to involve a lot more people. It becomes negative. It becomes attacking.

He told us he wanted it to stop now. He didn’t want anyone to ever know that there was a difference between Garry and I because it would come between him and Arthur Smith and like I said, they had a real passion for one another. They did everything for each other. There wasn’t a day that went by that they couldn’t be together. They made us commit to each other that we wouldn’t let anything come between us.

You know, I sat there and cried because I knew I was at fault. I knew it was my mistake and yet Arthur Smith’s goodwill saw that it was easier for his boy, my cousin, to apologize rather than carry on unnecessary conflict. And that’s how I was taught that a small conflict leads into greater trouble.<sup>74</sup>

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<sup>74</sup> Interview of Willie Seymour (23 June 2010).

In that story, the notion that familial disharmony can grow into conflict which can be detrimental to the kinship network is illustrated. As Willie's stated in his account, it was acknowledged that the misunderstanding between the two young boys could develop into a larger conflict which could harm the relationship between their fathers. As a result, the emphasis was on restoring harmony within the family through joint apologies, not on placing blame on a single party. This is a concept that will be explored in greater detail in Chapter 6, when I discuss the conflict resolution with Hul'qumi'num communities. As will the rest of the seven teachings: 1) *Sts'lhnuts'amat* ("Kinship/Family"); 2) *Si'emstuhw* ("Respect"); 3) *Nu st'Ich* ("Love"); 4) *Hw'uywulh* ("Sharing/Support"); 5) *Sh-tiiwun* ("Responsibility"); 6) *Thu'it* ("Trust"); and 7) *Mel'qt* ("Forgiveness").

**d. Source of *Snuw'uyulh***

What is the source of *snuw'uyulh*? Where do these teachings come from? I recognize that understanding these Hul'qumi'num legal foundations "can lead to a better appreciation for their contemporary potential, including how they might be recognized, interpreted, enforced, and implemented."<sup>75</sup>

After conducting my secondary research, I thought it was apparent that these laws emanated from *Xeel's*. I believed that as he travelled throughout the Coast Salish world, rewarding the good and punishing the transgressors, he was also developing the legal tradition of the Hul'qumi'num Mustimuhw. Through my discussions with my Elders, I have come to understand that this is not true. *Xeel's* is not the source of our *snuw'uyulh*.

In his book, *Canada's Indigenous Constitution*, Professor Borrows developed a taxonomy of different sources of Indigenous law.<sup>76</sup> One such source is the sacred. Sacred laws

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<sup>75</sup> Borrows, *Canada's Indigenous Constitution*, *supra* note 9 at 23.

<sup>76</sup> *Ibid* at 23-58.

are fixed laws, given by the Creator, for the world to follow.<sup>77</sup> According to my understanding, this is the source of *snuw'uyulh*. Arvid Charlie explained it to me this way: “We were here long before *Xeel's* came here. Some people are saying we come from *Xeel's* but no, he got here way after.”<sup>78</sup> Willie Seymour supported this understanding: “It’s hard to say the origin. They had to come with the First People or else otherwise they wouldn’t exist.”<sup>79</sup> Therefore, *snuw'uyulh* and the teachings that generate from it, have their origin in the First Ancestors of the Hul’qumi’num Mustimuhw. Although the teachings may be reinforced through story and song, those stories and songs are not the sources of these teachings.

What are the implications of a legal tradition whose source lies within the sacred? This reliance on sacred legal sources is not unique to the Hul’qumi’num people, in fact, almost every culture’s legal inheritance is based on some form of spiritual principles.<sup>80</sup> Although Canada’s legal traditions have become increasingly secularized, one cannot deny the role of the metaphysical in our law’s formation.<sup>81</sup> For example, the historic receipt of evidence and test for truth within the Canadian judicial system rested on appeals to the divine. As such, these inherent principles should not be looked on any differently than other laws within Canada.

#### e. Cautions

In outlining these teachings I am not suggesting that this is a complete analysis of both the categories and descriptions. Law is never knowable as fact nor is it the product of clear

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<sup>77</sup> *Ibid* at 14.

<sup>78</sup> Interview of Arvid Charlie (23 June 2010).

<sup>79</sup> Interview of Willie Seymour (23 June 2010).

<sup>80</sup> Borrows, *Canada’s Indigenous Constitution*, *supra* note 9 at 23. See generally Harold Berman, *Law and Revolution* (Cambridge, Mass: Harvard University Press, 1985) where Berman convincingly asserts that the Western Legal Tradition has its origins in the papal revolution of the 11<sup>th</sup> and 12<sup>th</sup> centuries and that all its basic concepts have religious – mainly Christian – origins.

<sup>81</sup> *Ibid*.

reasoning from self-evident premises.<sup>82</sup> Nevertheless, law's ambiguity poses some serious issues for many Indigenous communities, including the Hul'qumi'num communities. While many Hul'qumi'num communities have preserved their traditions, in others, Canada's policies of assimilation has resulted in the loss of much of their guiding values and principles. Many of the current generation of Hul'qumi'num Elders grew up in circumstances that limited their access to justice practices. For example, in the 1930s one scholar was told by a Coast Salish elder that children were never allowed to watch the work conducted to resolve difficulties.<sup>83</sup> Although this limitation was not universal in the Coast Salish world,<sup>84</sup> it is suggestive of the challenges faced by our communities. Furthermore, many of today's Hul'qumi'num Elders attended residential schools that further removed them from witnessing and learning about how their people handled conflict and contradiction.<sup>85</sup> Officials at residential schools worked to break the transmission of Aboriginal languages and this resulted in the loss of many key ideas.<sup>86</sup> Ernie Crey states: "the bridge between generations which would have permitted the transfer of cultural knowledge from one generation to the next was virtually destroyed by four generations of residential schools."<sup>87</sup> This erosion of Indigenous legal traditions presents particular challenges for the Hul'qumi'num Mustimuhw and their leadership. For those communities that have lost touch with their traditions, reclaiming and regenerating their traditions for contemporary application is vital. Such a process inevitably involves gathering and sharing knowledge about traditions, customs and values and may also involve reconstructing the traditions. This approach is consistent with

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<sup>82</sup> CA Zorzi, *The 'Irrecognition' of Aboriginal Customary Law* (Melbourne: Lawyers Information Network, 2002) online: <[www.link.asn.au/downloads/papers/indeginous/p\\_in\\_09.pdf](http://www.link.asn.au/downloads/papers/indeginous/p_in_09.pdf)> at 3.

<sup>83</sup> Miller, *supra* note 66 at 55.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> Ernie Crey, "The Children of Tomorrow's Great Potlatch" (1991) 89 BC Studies 150 at 152.

the notion that Indigenous legal traditions are “living” – and should not be frozen in their pre-contact form.<sup>88</sup>

Furthermore, I am cognizant of the practice of “cultural editing.”<sup>89</sup> This refers to the systematic simplification of images of culture and society.<sup>90</sup> This simplification has been both historically imposed on Indigenous peoples and is now self-imposed as a part of the process of “de-colonization” and the reframing of the relationship with the state. This is not a new practice. This process of simplification of Coast Salish society began early on in the period after contact. In an effort to find common ground with newcomers, Coast Salish people often presented their complex systems of social relations in a simplified form and left out their traditional beliefs entirely.<sup>91</sup> This process of cultural editing has occurred with the Hul’qumi’num legal tradition; however, arguably it has occurred in all legal traditions. I believe that one response to this process is to examine a legal tradition within the culture in which it operates. As such, I have attempted to infuse a discussion of Coast Salish culture within this dissertation.

## **5.4 Family Laws**

### **a. Introduction**

Through my research, I have discovered that there is another type of “law” present within the Hul’qumi’num communities. These laws encompass the norms, customs and traditions, or customary laws, which produce or maintain the state of *snuw’uyulh*. However, I have chosen not to categorize them as customary laws, although they can be discovered by observing specific

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<sup>88</sup> John Borrows, “Indigenous Legal Traditions in Canada”, CD-ROM: *Justice Within: Indigenous Legal Traditions Consultation Package* (Ottawa: Law Commission of Canada, 2006) at 4 [Borrows, “Indigenous Legal Traditions in Canada”].

<sup>89</sup> Elizabeth A Povinelli, *Labor’s Lot: The Power, History and Culture of Aboriginal Action* (Chicago: University of Chicago Press, 1993) at 126.

<sup>90</sup> *Ibid.*

<sup>91</sup> Miller, *The Problem of Justice*, *supra* note 66 at 15.

routines and procedures relating to conduct within a community.<sup>92</sup> Instead, I have chosen to refer to these laws as family laws. I have made this distinction because these laws emanate from sources other than custom as well. Furthermore, these laws find their expression within the specific practices of individual families and as such, are not reflective of the customs and traditions of the Hul'qumi'num Mustimuhw as a whole.

In this section I will introduce the notion of family law-making, a process by which individual customs or practices are practiced by individual family members through many different processes, such as ceremony, spiritual practices, deliberative practices etc. Again, I want to stress that this concept is not meant to be a completely distinct category of laws – it is very much tied to the notion of *snuw'uyulh* and cannot be separated from the seven teachings outlined above. Furthermore, I want to stress that I have again struggled with the classification of laws. Although these concepts have been expressed and supported by my Elders, they have not suggested this taxonomy to me. This nomenclature merely reflects my understanding of the Hul'qumi'num legal tradition at this time.

#### **b. Legal Pluralism within Coast Salish Communities**

One of the most interesting characteristics of the Hul'qumi'num legal tradition is the acceptance of differences in family laws. This is a kind of internal legal pluralism within Hul'qumi'num law. I learned of this acceptance of difference in preparation for my naming ceremony. One evening, while attending a family meeting at my great uncle Angus' home, he explained to me that different families conducted the ceremony in different ways. He said to me, “This is how we do it. Another family may choose to do it a different way, and that's okay too.” He was explaining the process of witnessing to my family. He remembered a time when not everyone was called to witness at the completion of work. He said that one used to only call two

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<sup>92</sup> Borrows, “Indigenous Legal Traditions in Canada”, *supra* note 88 at 15-16.

witnesses from each village. Now, he said, we call everyone. He remembered when the practice changed and he shared the story with us. He said that there was a big dance and a new initiate was dancing. The new initiate started to get sick and so everyone present at the dance stood up and formed a circle around him in order to protect him and ensure that he didn't fall down. After the dance was over, the family of the new initiate paid out everyone present at the dance, in order to thank them. Ever since that time, my great uncle Angus said, we have paid out everyone at the end of our work. He expressed to me that it was okay that the practice had changed. Thus, at the end of my work, I too was expected to pay out to all the females in attendance.

This example contains at least two important concepts: 1) pluralism exists within the Hul'qumi'num legal tradition and 2) our legal tradition is not frozen in time - it is fluid and capable of change. The existence of pluralism within the Hul'qumi'num legal tradition is significant to my research. It demonstrates that Hul'qumi'num Mustimuhw have always dealt with differing legal practices and traditions. Although community and consensus-building permeate the culture, the acceptance of familial difference demonstrates that autonomy is also an important aspect of the culture. The transformative nature of legal practices is important to this work. Although there are inherent teachings within *snuw'uyulh*, the application of those teachings is contingent on circumstance and family custom. The Hul'qumi'num legal tradition is not static and is capable of change when needed.

In his work on justice initiatives in the Coast Salish world, Bruce Miller also discussed legal pluralism:

There is also the issue of differences in teachings by family and by individual. As with other cultural practices, members of various families do not think in precisely the same terms concerning aboriginal justice. We have found that the toleration for some differences in practices and

viewpoint is, in fact, a hallmark of Stó:lō society, and that the practice of aboriginal justice reflects this.<sup>93</sup>

This pluralism could be attributed to the respect Coast Salish people view the family unit:

“Remember our law is family law. Exercise your responsibilities. Do not trust in a foreign justice system to solve those problems.”<sup>94</sup> Traditionally, Coast Salish legal traditions were the sum total of laws articulated by separate Coast Salish families.<sup>95</sup> It is recognized that different families have different understandings about laws. This is because these laws are, in part, received from *Xeel's* on an individual basis, for the benefit of the family, the community and the natural world.

These laws are received from *Hals* after a purification period or a retreat of months or years of daily bathing in cold water, in streams or lakes, and living with nature during this period. Laws would come after *Hals* feels that you are pure enough, then he would give you the law through one of the resources or through a vision. It is through total commitment, concentration and fasting of an individual that he is able to receive these laws from *Hals*.

When one received a law from *Hals* he would further bathe and fast to give thanks for the law or vision he has received. He must who his thanks for what he received for it should be for the survival of his family, the community, and the resources. Once this law is in place it is the responsibility of parents and Elders to uphold this law and pass it onto their children and their children's children.<sup>96</sup>

Before contact, disputes and conflicts between family members, between families, between communities of Coast Salish, and between people from different Indigenous nations were resolved, or in some cases failed to be resolved, within a Coast Salish set of practices and concepts.<sup>97</sup> Not all people viewed these practices and concepts the same way, however, and

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<sup>93</sup> Miller, *The Problem of Justice*, *supra* note 66 at 59.

<sup>94</sup> Monture-Angus, Patricia, “Thinking About Aboriginal Justice: Myths and Revolution” in *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*. Compiled by Richard Gosse, James Youngblood Henderson and Roger Carter (Saskatoon: Purich Publishing, 1994) at 229.

<sup>95</sup> Miller, *The Problem of Justice*, *supra* note 66 at 205.

<sup>96</sup> Bruce Miller, “Justice, Law and the Lens of Culture,” (2003) *Wicazo Sa Review* 135 at 143.

<sup>97</sup> Miller, *The Problem of Justice*, *supra* note 66 at 2.

teachings about how to govern oneself varied between families, as they do today.<sup>98</sup> Nor did all people have access to all of the content of Coast Salish culture; there was, and is, differentiation between people along the dimensions of social class, personal status and nature and power of one's spirit helper, private knowledge of spiritual practice and magic and, simply, personal experience and capacity.<sup>99</sup> The resolution of conflict and of disputes required that these differences be negotiated.

However, this is not to suggest that all family law-making practices were ad hoc or unregulated. Although variations in customs, norms and practices were, and continue to be, accepted; this does not negate the fact that all of these difference must still work towards achieving *snuw'uyulh*. The next example two Elders shared with me; however, due to its sensitive nature, I have been asked not to include any identifying factors in my account. The following story is told in my own words:

One day, a young and highly respected man was going to be given a name by his community. He began to prepare for this honour and held family meetings to discuss the protocols that would need to be fulfilled before the important day. After meeting with his family, he went out and hired the individuals who would help him with his work. He began to gather the food and give away items that would be needed for this event.

The day finally arrived and the young man stood before his community to receive his name. However, as soon as the work began, community members present began to see that something was not right.

The family went to pay out, but they went in the wrong direction. The mask dancers came out, but they seemed confused. The community members felt uneasy, something was not right. A few of the Elders present closed their eyes; they didn't want to witness what was happening.

It soon became apparent to some of the Elders present what was going on. A family stood up, a family which also carried the name that was going to be bestowed upon this young man. They announced that

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<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid* at 2-3.

although they knew that one of their names was going to be used, they hadn't been officially notified or consulted about the bestowal so that they could be involved in the work.

Some of the Elders were surprised – the failure to notify was not in keeping with *snuw'uyulh*. They knew that this mistake needed to be corrected, in order for the work to be successful; however, they were hesitant to do so because of the high status of this young man. They knew that the young man wasn't aware that he was not in keeping with *snuw'uyulh*. They didn't want to belittle the young leader, because they knew that the belittlement could carry on for generations. However, historically, they recognized that a few speakers would have gotten up and expressed that the work was not being conducted in its proper order. They would have pointed out the mistakes that were happening and laid caution to the family to correct the process.

In this example, many of the implicit rules of *snuw'uyulh* were ignored. Kinship wasn't recognized because the young man's family failed to include the family which carried the same traditional name in their work. Respect was not accorded when the family was not recognized at the gathering and nothing was done to rectify this. Trust was not upheld, as individuals were hesitant to witness the work when they realized that something was amiss. As discussed in more detail in Chapter 6, often Hul'qumi'num Mustimuhw rely on the spiritual to make it known when *snuw'uyulh* is not being upheld; therefore, individuals are less likely to create further conflict by publicly denouncing an individual or a family. This is a further recognition that the Hul'qumi'num Mustimuhw accepts a plurality of laws, working towards the achievement of *snuw'uyulh*.

### c. Sources of Family Laws

As previously noted this process of family law-making includes customs, norms and traditions. For example, similar to *snuw'uyulh*, family laws also have divine sources. However, as demonstrated in the preceding section, whereas *snuw'uyulh* finds its source in the First Ancestors, family law-making finds its source in *Xeel's*. Different families have different

teachings about the Transformer. These transformer stories allow for a flexibility of laws with the Hul'qumi'num legal tradition. However, it is important to note that in the above description, revelations from *Xeel's* are viewed by the receiver as sacred; one could imagine hesitancy amongst the receiver to affect the integrity of these laws through transmission.

Family law-making also finds its source through deliberative practices, through councils, family meetings, circles and other informal meetings and gatherings.<sup>100</sup> As illustrated by my personal naming experience, these are situations where family law gets recounted, reaffirmed and in some cases, altered.

Family law-making can also be naturalistic, deriving either from the Creator or independent of any external force through personal observation.<sup>101</sup> These latter laws are often discovered through observation of the physical and spiritual world. Through such observation individuals may then counsel with one another to explain the principles, practices and remedies for violating natural norms of order, though their actions do not have the power to influence the law's requirements.<sup>102</sup> Often these naturalistic laws are passed down in the oral tradition, through stories such as "The Grouse and the Raven."<sup>103</sup>

#### **d. Cautions**

A detailed accounting of family law-making, or the laws that derive from this tradition, is beyond the scope of this dissertation for a variety of reasons. Fully understanding this source of Hul'qumi'num law-making would be a lifelong project. Although I am interested in researching and discussing this topic in further detail, it is one which will have to take place at a later date. Furthermore, I recognize my own limitations in studying these laws. They are unique to family

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<sup>100</sup> Borrows, "Indigenous Legal Traditions in Canada", *supra* note 88 at 15.

<sup>101</sup> *Ibid* at 14.

<sup>102</sup> *Ibid* at 14-15.

<sup>103</sup> Jenness, *supra* note 69 at 5.

units. As such, many of them may be inaccessible to me – both in terms of transmission and understanding. It is difficult to separate the laws from the context in which they are shared, transmitted and from the context in which they arise. I realize that my “outsider” status in the family law-making process may inadvertently result in the altering of many of these family laws.

## 5.5 Conclusion

The Hul’qumi’num legal tradition is a living tradition. It continues to operate within the Coast Salish world. Although it can appear difficult to distinguish laws and practices from the Hul’qumi’num legal tradition, they are best understood in their context. In order to make sense to the people who abide by them, the laws have to operate within the worldview of the Indigenous communities.

In thinking about the relationship between law and culture, I have identified two fundamental categories of law within the Hul’qumi’num legal tradition: 1) *snuw’uyulh* and 2) family laws. *Snuw’uyulh* refers to a condition generated by the application of seven teachings: 1) *Sts’lhnuts’amat* (“Kinship/Family”); 2) *Si’emstuhw* (“Respect”); 3) *Nu stl i ch* (“Love”); 4) *Hw’uywulh* (“Sharing/Support”); 5) *Sh-tiiwun* (“Responsibility”); 6) *Thu’it* (“Trust”); and 7) *Mel’qt* (“Forgiveness”). Accordingly, these seven teachings represent a set of implicit laws that seek to foster harmony, peacefulness, solidarity and kinship between all living beings and nature in the world. Family laws, on the other hand, encompass the norms, customs and traditions, or customary laws, which produce or maintain the state of *snuw’uyulh*. The application of these laws will be examined more closely in the next chapter focusing on conflict and dispute resolution in the Coast Salish World.

## CHAPTER 6

### Conflict and Dispute Resolution in the Coast Salish World

“Cultures are like underground rivers that run through our lives and relationships, giving us messages that shape our perceptions, attributions, judgements, and ideas of self and other ... they are often unconscious, influencing conflict and attempts to resolve conflict in imperceptible way.”<sup>1</sup>

#### *“The Conflict Within”*

*As I worked through this Chapter, I found myself struggling with an internal conflict. In fact, my first drafts of this chapter were a huge departure from the chapters I had previously drafted. I had lost my narrative. I had difficulty finding my voice within.*

*Some of this struggle is attributable to the pressure I feel to foster respect and recognition for the Hul’qumi’num legal tradition, in particular, their principles of conflict resolution. Although I recognize there is room for improvement in all legal traditions, I worried about bringing a critical eye to these principles before they achieved proper standing with the Canadian legal system. How could I build them up, if I was tearing them down at the same time? I struggled with this for some time. Fortunately, conversations with my supervisors and father helped me understand that critical discussion of this legal tradition demonstrate that it is capable of change and growth. It also demonstrates its strength and continuity. My Elders helped me to realize that these concepts are not dogmatic. In fact, many of them, in describing modern-day applications of the teachings of the Old People, brought a critical eye to practices occurring today. I found this insightful, especially given Bruce Miller’s research, in which he argues that Coast Salish groups “may choose to emphasize regaining control over legal processes, making a political statement about cultural differences, or foregrounding large-scale*

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<sup>1</sup> Michelle LeBaron, “Culture and Conflict” in G Burgess & Heidi Bruggess, *Beyond Intractability* (Boulder, CO: Conflict Research Consortium, University of Colorado, 2003), online: <[http://www.beyondintractability.org/essay/culture\\_conflict/](http://www.beyondintractability.org/essay/culture_conflict/)> at 1.

*social dilemmas that are the outcomes of contact and colonization.”<sup>2</sup> My Elders helped me to realize that my previous approach was actually in keeping with Miller’s critique and urged me to find my own strength within.*

*I also struggled with my own capacity to bring a critical eye to these legal traditions. I am a young student of snuw’uyulh. I am cognizant of the fact that the Elders have only started to give me the foundation for more teachings. How can I bring a critical eye to principles when I have such a limited understanding of them? What if my “superficial” understanding leads to the discrediting of an important practice or procedure – one which I have yet to grasp?*

*Also, I have come to realize that, like many Hul’qumi’num Mustimuhw, I tend to avoid conflict. I often sacrifice my own wants and desires if I feel that they would cause harm or discomfort someone whom I care about. This has been a struggle for me as I have drafted this chapter. I realize that there are many audiences whom I want to please: my family; my Elders; my community; my supervisors; the academic community and finally – myself. Sometimes I feel the needs and wants of these groups diverge and I have struggled to find a way to honour each and every one of them. A task which I have learned is difficult, if not impossible, to do.*

*I hope that as you read this chapter you will hear my voice. I hope that you will keep in mind my personal introduction shared in Chapter 2. I hope that you will find me respectful of my family, my Elders, my community and my place within the academic community. Finally, I hope that you are encouraged by the strength and vitality of the Hul’qumi’num legal tradition.*

## **6.1 Introduction**

In its most basic form law is about regulating human relations. It is a practice – an activity. While law has many regulatory functions, its dispute resolution function is often most

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<sup>2</sup> Bruce Miller, “Justice, Law, and the Lens of Culture” (2003) *Wicazo Sa Review* 135 at 136 [Miller, “Justice, Law”].

visible. “Conflict is a feature of all human societies, and potentially an aspect of all social relationships.”<sup>3</sup> Because conflicts arise in human relationships, cultural considerations are embedded in every conflict. These cultural considerations may play an explicit role in conflict or they may influence it more subtly and implicitly. For example, I experienced a lot of difficulty researching the dispute resolution process used to resolve conflicts over land. In all of my interviews, the results were the same. My Elders focused on modern-day conflicts over land, in particular, the modern-day treaty with the Tsawwassen First Nation. When I pushed them to recall stories they had heard about disputes over land in earlier times, they responded that they couldn’t remember hearing the Old People mention anything about any conflicts of that sort. Many of them said that conflicts over land were “new.” In pondering these statements, I realized that (although I am positive that struggles did arise over land and resource areas), it is the culture of the Hul’qumi’num Mustimuhw that accounts for their failure to characterize these struggles as “conflict.” Application of the teachings of *snuw’uyulh*, especially the teachings of respect and sharing and consideration of the conceptualization of land described in Chapter 3 can bring some clarity to these responses. The Hul’qumi’num worldview and their laws around respect and sharing explain why the Elders do not remember hearing stories from the Old People about struggles over land and territory. Labeling some of our interactions as conflicts is a distinctly Western approach that may obscure other aspects of our relationships,<sup>4</sup> for example, the Hul’qumi’num Mustimuhw relationship to land.

Although culture is inextricably linked to conflict, it does not cause it. When differences arise in families, organizations or communities, legal culture is always present, shaping

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<sup>3</sup> Kevin Avruch, “Cross-Cultural Conflict,” online: Encyclopedia of Life Support Systems (EOLSS) <<http://www.eolss.net/ebooks/Sample%20Chapters/C14/E1-40-01-01.pdf>> at 2.

<sup>4</sup> See generally LeBaron, *supra* note 1.

perceptions, attitudes, behaviours and outcomes.<sup>5</sup> This will be demonstrated by the examples shared in this chapter. Many of the teachings that work to bring about *snuw'uyulh* also play an important role in achieving harmony within the Hul'qumi'num communities. The three concepts of *snuw'uyulh*, conflict resolution and culture are intertwined and build upon each other. Together they work to reinforce the importance of these foundational principles within the Hul'qumi'num legal tradition.

However, it is important to recognize cultures are also capable of change. The Hul'qumi'num legal tradition is living and transformative. As a result, conflict or dispute resolution processes need to be responsive to “debate within communities over the character of their culture, the nature of their traditions, and the legitimacy of existing structures of representation.”<sup>6</sup> This responsiveness is also demonstrated by the examples shared within this chapter. Stories will be shared that indicate that, at one point of time, capital punishment was an acceptable form of dispute resolution within the Coast Salish world. However, this is not a dispute resolution practice that is tolerated today. These traditional practices have been influenced by the presence of outsiders within the Coast Salish world. However, this does not affect the integrity of these dispute resolution practices. If anything, it speaks to their vitality and responsiveness to difference.

This chapter describes a theory of conflict resolution within the Hul'qumi'num community by drawing upon the dichotomy between “universal” and “contingent” legal standards. In the context of conflict resolution principles, “universal” refers to principles that ought to be considered in all disputes within the Hul'qumi'num territory. Alternatively, “contingent” refers to standards that do not necessarily need to be drawn upon in all

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<sup>5</sup> *Ibid* at 1.

<sup>6</sup> David Kahane, “What Is Culture?” in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 28 at 50.

Hul'qumi'num disputes. This is because these principles are dependent upon the exercise of the Hul'qumi'num people themselves. They gain legitimacy from use within conflict resolution practices.

Again, I recognize these are fluid categories. At one point in time one of these standards may be considered "universal" and at another, "contingent." However, I find it useful to think of these standards within this dichotomy to demonstrate the connection between culture, law and dispute resolution. Drawing upon this dichotomy, this chapter discusses the interchange between past dispute resolution practices and more current practices, rather than simply the contemplation of past practices. I take this approach to demonstrate how Hul'qumi'num conflict resolution might be revitalized within the Coast Salish world.

This chapter begins with a discussion of universal standards of conflict resolution within the Hul'qumi'num legal tradition. The universal standards of: a) kinship; b) restoring balance or restitution; c) spirituality and d) respect will each be addressed. Stories are shared to demonstrate why these standards are, in fact, universal and why they should apply to all dispute resolution processes within the Hul'qumi'num territory. I will also critique these standards and, when appropriate, discuss how modern circumstances complicate their application. The second half of the chapter examines contingent standards of conflict resolution. Those standards are: a) avoidance; b) socio-class considerations; c) words; d) consensus; and e) precedent. These contingent standards will also be described through the use of the Hul'qumi'num oral tradition. This should not only further the recognition of the Hul'qumi'num legal tradition, it will also provide further insight into a theory of Hul'qumi'num dispute resolution that may help to reconcile this legal tradition with other non-Hul'qumi'num legal traditions in the future.

## 6.2 Universal Standards of Conflict Resolution

The term “universal standards” refers to standards of conflict resolution that are more strict to the Hul’qumi’num Mustimuhw and therefore, less autonomy is accorded to the practitioners in deciding when to apply them. These principles of: a) kinship; b) restoring balance or restitution; c) spiritual and d) respect are closely connected to the teachings of *snuw’uyulh* and therefore find their source in the divine.

### a. Kinship

As I previously mentioned, when I asked the Elders if they could recall moments when the Old People spoke of conflicts within the community, many of them could not. This is not meant to suggest that conflicts did not exist. Rather it is indicative of the social groupings, examined in detail in Chapter 3, of the Coast Salish people. “The way in which the pre-treaty Salish societies were organized minimized open disputing and emphasized a cooperative coexistence that was essential to the survival of the family and village.”<sup>7</sup> Community consensus regarding standards of behaviour fostered an environment in which various forms of indirect social control, rather than regulations and sanctions, pressured people to control their behaviour.

Children learned proper attitudes and behaviours that promoted appropriate conflict avoidance and resolution: to respect their Elders and teachers, to refrain from boastfulness, and to value qualities of self-discipline, self-control, generosity, peacefulness, and hospitality.<sup>8</sup> A study of the Northwest Intertribal Court System (NICS) came to a similar conclusion:

The family was the most important social group. When conflict arose within a family, every effort was made to resolve the issue within the family. Dispute resolution was learned from birth. Proper attitude and

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<sup>7</sup> Northwest Intertribal Court System (NICS), *Traditional and Informal Dispute Resolution Processes in Tribes of the Puget Sound and Olympic Peninsula Region* (Edmonds, WA: NICS, 1991) at 47-48.

<sup>8</sup> WW Elmendorf, *The Structure of Twana Culture* (Pullman: Washington State University, 1960) in Emily Mansfield, “Balance and Harmony: Peacemaking in Coast Salish Tribes of the Pacific Northwest” (1993) 10:4 *Mediation Quarterly* 339 at 342.

behaviour were taught – primarily by elders – by example, lecture, storytelling and recounting of family history. Storytelling, history and advice that was passed on from generation to generation within the families ensure the continuity of tradition and identity.

Children were trained from an early age in the qualities that led to continuity and flexibility within the communities. They learned to respect their elders and teachers, to refrain from boastfulness, and to value qualities of self-discipline, self-control, generosity, peaceful attitude and hospitality. Their training prepared them for their role in a society that was structured to minimize open expression of dispute.<sup>9</sup>

Kinship is a key to dispute resolution. The family is considered the most important social group within the Coast Salish world. Thus, its strength and preservation is imperative to the maintenance of society. Part of that strength depends on its network of kinship relations. One can imagine that disputes would cause factions within that network. Therefore, conflict was dealt with swiftly and in private, so as not to demonstrate weakness to other families.

Wenona Victor's thesis, "Searching for the Bone Needle: The Sto:lo Nation's Continuing Quest for Justice"<sup>10</sup> supports the view that kinship relations fostered a concept of justice that was preventative by nature:

I think most of the justice was taught right from when you were, well from the cradle I guess, so it was a part of you (St'enilhot, 1999:1, transcript).

Well in our, in these old family values I think there's an underlying base. I may be wrong, but I view it as a form of justice because it is prevention (Leonard, 2000:2, transcript).

I think the difference was we were more focused on the values of being a human being. Therefore our whole system supported from, like where your daughter is now, Jade, and even when she was in your womb, the process that we go through in living with one another in growing and teaching one another. So that we had those values that prevented a person from being, from going to the wrong side (Leonard, 2000:1, transcript).

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<sup>9</sup> Northwest Intertribal Court System, *supra* note 7 at 4-5.

<sup>10</sup> Wenona Victor, *Searching for the Bone Needle: The Sto:lo Nation's Continuing Quest for Justice* (MA Thesis, Simon Fraser University, 1998) [unpublished].

If you're talking about traditional Sto:lo justice, we need to initially set a framework. One of the values that was taught by our people was that mutual respect and one could generalize in saying that our whole philosophy of life has been based on that value. And consider this in terms of justice that if everyone in our communities held that as one of their basic values in their make-up and philosophy of life then you can understand where there wouldn't be a need for laws or police forces that kind of thing (Tíxwelátsa, 1999:1, transcript).<sup>11</sup>

As Victor describes, teachings of *snuw'uyulh* were taught by families in the hopes of creating harmony within the community. Respect, trust, love, sharing – these were all taught to individuals at a young age in the hopes of avoiding conflict within the community.

However, this family structure and education system has been severely affected by the creation of the reserve system within the Coast Salish world. With the move from longhouse to single-family dwellings, the restraining influence of the extended family in the household was removed. This resulted in a gradual loosening of the behavioural controls mentioned above.<sup>12</sup> Residential schools also severely affected this traditional education system. In the majority of my interviews with Elders, many of them said they did not have an opportunity to learn various traditional teachings because they were removed from their homes and sent to residential schools. The 60's scoop further disrupted this family education system. Several generations of Coast Salish children were removed from their family and community and placed with non-Hul'qumi'num families. Additionally, throughout the entire post contact period, alcoholism has adversely affected some families' abilities to transmit family teachings related to conflict and dispute resolution. Willie Seymour described this process of transformation with the following words:

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<sup>11</sup> *Ibid* at 81-82 (citations in original).

<sup>12</sup> WW Elmondorf, "Skokomish Sorcery, Ethics, and Society" in DE Walker Jr, ed, *Systems of North American Witchcraft and Sorcery* (Moscow: University of Idaho Press, 1970) 147 at 148.

Historically if young people were doing wrong and you were a certain part of the community, the Elders would call them into their home and sit them down and discipline them. They would follow-up by going to the family and letting them know that they had to sit their child down and talk to them - because the community had the permission to raise that child.

Today we don't have that same permission. I remember my grandfather, no matter where we went ... he would sit with other community elders and I would always hear him say, "Don't be backwards when you speak to my son, my grandson. Even if he does nothing wrong, don't be backwards in talking to him." Today we have a different value.

Many years ago, two of my nephews were getting into mischief. I sat them down and disciplined them. I talked to them for some time. This is how I was taught – this is how I was taught in Chemainus. And I was at my mom's when this took place – in Saanich. You know, later on that evening the boys were talking to their dad – talking about the discipline that I had put on to them. It wasn't harsh but my brother literally wanted to fight. He said I had no right to correct and discipline his children – my own nephews, who today carry sacred Indian names of my uncles.<sup>13</sup>

Willie Seymour's words demonstrate the changing role of families in conflict resolution within the Coast Salish world. Through his example, the move from communal instruction in conflict avoidance to more individualistic methods is evident. It is interesting to note that Willie stresses that he is not only connected through blood relations to his nephews but also through their Hul'qumi'num names. His final statements suggest that the teachings he received indicate he has a strong right to correct and discipline his nephews. This is based on the strength of their kinship relationships, which are further strengthened through their connection to these ancestral names.

The difficulty then lies in reconciling the differing viewpoints about instruction and conflict resolution that have arisen in Coast Salish communities due to the internal and external factors described in the preceding paragraph. While families are still central to dispute resolution (as well as social, ceremonial and political life) some may argue that the focus has

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<sup>13</sup> Interview of Willie Seymour (16 June 2010).

shifted towards utilizing kinship relations to resolve disputes, rather than drawing on them to avoid conflict in the first place. However, in every conversation with Elders about conflicts and disputes, it was always stressed that entire families, not just individuals, are the subjects of disputes. It is for this reason that I classify kinship as a universal standard of conflict resolution. Although the specific practices used to resolve conflict may be contingent, based upon the presence of kin and non-kin, kinship must always be considered in the resolution of any conflict in the Coast Salish world.

### **i. Non-Interference in Family Disputes**

Disputes within the family are often considered private matters.<sup>14</sup> Intervention by individuals outside the family is not welcome. As a Skokomish Elder explained:

I think it would have been disgraceful to have somebody else resolve your problems. Your own family needed to help you clear your mind and clear your heart if you were having a problem<sup>15</sup>

If you recall the story shared by Willie Seymour in Chapter 5 regarding the conflict with his cousin, we also see this standard articulated: “My grandfather started talking and he said, ‘I don’t know what happened. I don’t know what was said. But I don’t ever want to see hurt grow within my family.’ He didn’t want anyone to ever know that there was a difference between Garry and I because it would come between him and Arthur Smith.”<sup>16</sup> Accordingly, reliance on outsiders in dispute resolution was used only as a last resort if the family was unable to resolve the problem itself.<sup>17</sup>

In some cases, extreme forms of punishment, including capital punishment, were carried out with no recourse to a neutral third party. Consider the following example shared with me:

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<sup>14</sup> Emily Mansfield, “Balance and Harmony: Peacemaking in Coast Salish Tribes of the Pacific Northwest” (1993) 10:4 *Mediation Quarterly* 339 at 342 [Mansfield, “Balance and Harmony”].

<sup>15</sup> Northwest Intertribal Court System (NICS), *supra* note 7 at 72.

<sup>16</sup> Interview of Willie Seymour (16 June 2010).

<sup>17</sup> Mansfield, “Balance and Harmony”, *supra* note 14 at 342.

I remember an example that my father heard when he was growing up. A person was very bad to his wife – beating her up all the time. The family of the lady that was being abused was concerned about her wellbeing and one day invited her husband to go hunting with them. When they returned, he wasn't with them. Nobody asked questions. They just accepted it. That's the extreme.<sup>18</sup>

Jeff Point described an equally extreme result of an intra-family dispute:

The young fellow who got caught stealing. Because I heard my uncle tell me about that. It was the common thing to do for anybody who broke the law to cut his ear off. And kick the family out of the home. And then nobody was allowed to take them in. And so what happened was this family turned on the boy and they ran away from him so they could be accepted to another family. ... This young man, it must have taken a long time to decide to cut his ear off, that is the last point to do that and to excommunicate someone from the house. ... I imagine the young man had many chances to redeem himself before they did this.<sup>19</sup>

Although these might have been highly accepted practices in the past, they are not acceptable in the present. Since 1997, the United Nations has passed resolutions calling for the abolition of the death penalty, in general. Furthermore, it has specifically called on countries not to impose it for crimes committed by persons below 18 years of age. Indigenous groups, in particular the Hul'qumi'num Treaty Group, have utilized the international law system, including the U.N. Declaration on the Rights of Indigenous Peoples and customary laws to advance their rights to self-governance. As such, it would be inconsistent for them to try to advance a legal system which violates this human right.

The external and internal factors which have affected the traditional education system of Coast Salish children have also affected the family unit. This has often undermined the status of women within the Coast Salish world. In communities rife with domestic abuse, one has to consider the effect of a separate and independent conflict resolution process.

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<sup>18</sup> Interview of Wes Modeste (23 June 2010).

<sup>19</sup> Bruce Miller, *The Problem of Justice: Tradition and law in the Coast Salish World* (Lincoln: University of Nebraska Press, 2001) at 137 [Miller, *The Problem of Justice*].

The traditional roles of men and women in Indigenous communities have changed drastically since contact. Euro-American traders found that Indigenous women of the Oregon Seaboard and Coast Salish societies had high status and important roles in their cultures.<sup>20</sup> By lineage, wealth and spiritual powers, a woman could lead her community politically, achieve prominence as a shaman, or be active in trade.<sup>21</sup> “It is as common to see the wife . . . trading at the factory, as her husband,” observed Alexander Ross, clerk of the North West Company.<sup>22</sup> Women spoke in council and their opinions were sought on all important matters, including trading bargains.<sup>23</sup> Although the position of women was not uniformly high, because slavery existed, women had opportunities and respect equal to the men of their status in the Coast Salish World.<sup>24</sup>

In large part, Indigenous women’s power emanated from their role in the family and the importance of the kinship system to public issues.<sup>25</sup> Aboriginal society was not separated into distinct spheres; rather, functions of family were enmeshed with politics and economics.<sup>26</sup> Inter-marriage facilitated this merging. Exogamy was the practice and inter-marriage occurred between families of high status in separate villages and language groups.<sup>27</sup> Women maintained dual membership, since descent was calculated on a bilateral basis.<sup>28</sup> Therefore, they remained fully recognized members of their own kin group and although they often resided with their husbands’ people, they traveled, traded and mediated between the two groups.

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<sup>20</sup> Mary Wright, “Economic Development and Native American Women in the Early Nineteenth Century” (1981) 33:5 *American Quarterly* 525 at 527.

<sup>21</sup> *Ibid.*

<sup>22</sup> Alexander Ross, *Adventures of the First Settlers on the Oregon or Columbia River* in Reuben Gold Thwaites, ed, *Early Western Travels, 1748-1846* (Cleveland: Clark, 1904) 107 at 110.

<sup>23</sup> Wright, *supra* note 20 at 527.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Wayne Suttles, “Affinal Ties, Subsistence, and Prestige Among the Coast Salish,” (1960) 62 *American Anthropologist* 296 at 296 [Suttles, “Affinal Ties”].

However, this is not to suggest that there were not power dynamics at play during this period of time. In fact, the story told about *Swuq'us* and the daughter of the chief from *Sookw* in Chapter 2 seems to suggest that often a woman had very little control over her life choices. Val Napoleon, John Borrows and Emily Snyder have written about the danger in viewing the past as being fully non-violent and completely egalitarian.<sup>29</sup> They argue that important lessons about dealing with gender equality and gendered violence can be overlooked if the past is regarded as non-violent.<sup>30</sup> These accounts of and responses to gendered violence provide important resources for Indigenous communities to learn from in dealing with issues of violence today.<sup>31</sup>

At the time of European arrival in the Northwest coast, married European women were not permitted to own property or hold positions of power and their legal status was akin to that of minors. The *Indian Act* imposed these restrictions on Coast Salish communities, which took away women's powers, permitting only men to hold office in band councils, emphasizing male lineage and stripping women of the status as Indians upon marriage to non-Indigenous men. Many Indigenous women have raised concerns that Indigenous men (and women) have internalized the notions of gender imposed by the *Indian Act* and that this may lead to distorted interpretations of traditions.<sup>32</sup>

This fear was realized by female participants in the South Island Justice Project.<sup>33</sup>

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<sup>29</sup> Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2014) UBC Law Review [forthcoming].

<sup>30</sup> *Ibid* at 3.

<sup>31</sup> *Ibid*.

<sup>32</sup> Canada, *Justice Within: Indigenous Legal Traditions* (Ottawa: Law Commission of Canada, 2006) at 12.

<sup>33</sup> The South (Vancouver) Island Justice Project emerged out of an effort in the 1980s to educate mainstream B.C. legal personnel about Coast Salish practices and concepts and became, in addition, a diversionary justice project in which cases could be treated by Coast Salish peoples themselves. There were several limitations to the program: cases had to come through the mainstream court, which maintained jurisdiction; all parties had to agree to the diversion; penalties and sanctions were limited. The defining characteristics were the separation between band elective government and the band elders who drove the program and the highly ideological effort to generate normative "trial law" as a collaborative effort between a set of elders.

Project reviewers commented that, “Pressure exerted by family or other community members regarding justice issues is consistently reported to have disturbed community members and service providers. Victims and offenders were likewise caught in the web of persuasion to deal with matters within the community.”<sup>34</sup> They noted that some victims did not come forward because they presumed that the offenders would simply be “counselled” by elders and remain in the community, perhaps as neighbours.<sup>35</sup> “In some instances, women were reluctant to approach certain Elders who were convicted sex offenders, as the women felt their concerns would not be addressed.”<sup>36</sup> Furthermore, the project review included a passage from an official report made during a preliminary review:

In conversation with community members, problems in the project arose during the phase in which victims were contacted to give their consent. Despite the highly confidential nature of the information shared at the diversion take-in meetings, allegations have been made that women who made disclosures of abuse to the police were subsequently approached by Elders who would try to persuade them not to use the criminal justice system. Apparently, this was often done by emotional blackmail, or “guilt trips.” ... In one instance, the victim was approached by a male Elder and was advised to “just put this behind her” and get on with her life.

It was alleged that victims who persisted were sometimes bribed or visited by spiritual representatives who again tried to “persuade” them to drop the matter, sometimes through the use of “bad medicine.” If the victims continued to persist [sic], we were told that the victim’s abuser might be sent to intimidate them.<sup>37</sup>

This is the type of issue identified by Miller.<sup>38</sup> It appears as though some of the community members involved in this justice initiative were more concerned about regaining control over their legal processes than addressing the internal malfeasance within the initiative.

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<sup>34</sup> Miller, *The Problem of Justice*, *supra* note 19 at 198.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Miller, “Justice, Law”, *supra* note 2 at 136.

However, I feel that the intra-familial nature of these conflicts also have to be examined in order to discover the true motivations behind these practices. Although, as Miller suggests, the Elders may have been concerned with reasserting their jurisdiction over these justice issues, it seems that they were in a conflict-of-interest in these cases. Perhaps they were related to the offenders? We cannot know for sure; however, Florence James described similar situations to me as well:

... the other one backfired. This family called this young man and he did damage in a court of law and they were going to sentence him in the law and the Elders went and said, "Oh, we are going to help him. We are going to do it in our law, which is the traditional way." And they called these certain Elders, and they were handpicked. And so these Elders were going to back him up and make it look like it was right ... and it was rape. So he raped this young lady and because those Elders were handpicked, he slipped through the whole two systems without being corrected. So the rape victim became victimized twice. So they manipulated the Elders system by handpicking those Elders.

... the other one was I saw this young lady. They got all these Elders together – this is another example – they called all these Elders, another handpicked Elders, and this young lady was supposed to receive all this inheritance. Instead of the Elders helping her to get the inheritance, she lost all her inheritance because the Elders went against her instead of working with her. So she lost her inheritance and she ended up with nothing. No land, no money. They manipulated the system and the traditional ways. Instead of honour, she lost everything.<sup>39</sup>

In these examples described by Florence, one can see the potential pitfalls of a conflict resolution system that doesn't permit for an unbiased, third-party mediator. It is human nature to want to protect the interests of people you love and care about; that is why there are laws around conflict of interest. These types of situations are not limited to Hul'qumi'num communities – they are present in all societies. That is why most societies and organizations create a system of checks and balances to ensure that these types of situations don't arise.

These concerns are of particular relevance to Indigenous women who, as we've seen, are often twice disadvantaged – within the outside world and within their own communities. Under

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<sup>39</sup> Interview of Florence James (19 July 2010).

the *Constitution Act, 1867*, “Indians, and Lands reserved for the Indians” falls purely within federal jurisdiction. Therefore, Indian reserve lands are held by the federal government in trust for bands, and cannot be owned by Aboriginal people individually. Section 20(1) of the *Indian Act* allows band councils to allot lands to band members by issuing certificates of possession. In practice, most certificates are issued in the husband’s name. As Indian lands fall exclusively within federal jurisdiction, Indigenous women are unable to take advantage of provincial matrimonial property laws that prescribe equal division of property. An Indigenous woman who separates or divorces cannot get possession of the matrimonial home under matrimonial property laws as these are provincial laws and only the federal government has the jurisdiction to pass law affecting the ownership and possession of Indian lands.<sup>40</sup>

The inability to own land on-reserve has implications beyond property issues. Indigenous women are more likely to face domestic abuse than other women in Canada. If an Indigenous woman leaves the reserve to escape domestic abuse, she can lose her home altogether.<sup>41</sup> There is often a long waiting list for reserve housing, with a great deal of pressure on band councils to re-allocate housing as soon as possible. As Christine Goodwin reports, in some extreme cases, “a band council will confiscate a house, if it is vacant, after only ten days. Generally, when Aboriginal women go to a shelter, their spouses also leave for a number of reasons. For a brief period, the houses appear to be abandoned. In rare instances, a woman will have been given notice by the band council that she has to give up possession of her house, but in

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<sup>40</sup> Provincial laws of general application apply on reserves because of Section 88 of the Indian Act. However, the Supreme Court of Canada, in *Derrickson v Derrickson*, [1986] 1 SCR 285, held that only the federal government can pass laws affecting the ownership and possession of Indian lands.

<sup>41</sup> The *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 is new federal legislation that is heralding some change to this regime.

the majority of cases, no notice is given.”<sup>42</sup> As most chiefs and council members are male, they may sometimes show bias in favour of the husband in a domestic abuse situation, and this can result in the ostracism of a woman from her home, community and culture.

As such, in the process of revitalizing the Hul’qumi’num legal tradition, the community needs to be cognizant of the most vulnerable members of their society, such as women. Recognizing the unjust situations that can arise, any process designed to deal with intra-family disputes needs to fully recognize the conflicts of interests which will occur – in any society. As such, a system of checks and balances to ensure procedural fairness needs to be developed in tandem with a conflict resolution process. In this regard, although kinship is a universal standard, the process developed to deal with intra-family disputes could be considered contingent.

## **ii. Family Involvement in Disputes with Non-Kin**

Within the Hul’qumi’num legal tradition, family is integral to the handling of disputes with non-kin. Again, this notion finds its roots in how Hul’qumi’num Mustimuhw conceptualize their kinship relations. Willie Seymour described it in the following way:

Growing up, my grandfather always used to say to me, “Look after yourself when you go out on weekends. Don’t let yourself be called by a slanderous name. If you’re going to be insulting or hurting people or whatever, they’re not going to be talking about you. They’re going to say, ‘That’s Joe Seymour’s grandson – the one that’s causing this.’” My grandfather was a well-known speaker and a leader. He used to always say that, “Don’t slander yourself because they will never use your name. They won’t say, ‘Oh that’s Willie Seymour. They will say that’s Joe Seymour’s grandson.’ And then you bring the community down – Chemainus Bay.”<sup>43</sup>

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<sup>42</sup> Christine M Goodwin, “Human Rights Women’s Rights, Aboriginal Rights: Indivisible and Guaranteed?” (2002) 8:2 Newsletter of the Alberta Civil Liberties Research Centre, online: <<http://www.aclrc.com/Newsletter/centrepiece8no2.html>>.

<sup>43</sup> Interview of Willie Seymour (23 June 2010).

In describing the concept to me personally, Arvid Charlie stressed that if I got involved in a conflict it would reflect on not only me personally, but my parents, siblings, aunts, uncles, cousins, grandparents, relatives who have gone before me, those individuals to whom I'm connected through my traditional name, my community, the Hul'qumi'num people and my nation.<sup>44</sup> Because the actions of an individual also reflect on all their relations, all of those relations are also a party to the conflict. This is a universal standard of conflict resolution, and arguably one that is shared by many non-Indigenous cultures as well.

Frank Malloway gave this description on how families might settle problems between them:

I think most of it was done through the head of the family. The head of the families would meet and they would discuss the crime, or whatever it was, and they'd reach a consensus. I've never really heard about what the sentences were. They'd say, "Well, we had a family meeting with this family, and they decided on what had to be done," but you never really hear about the punishment itself and how the families reach that verdict, or whatever you'd call it. ... If you did something wrong the family would take the responsibility and make an offering. They call it an offering. Some of the things in the old days were canoes, because they were like cars today, "Ah, I'll give you my car if you forget about this." But it was canoes in those days. I don't think it was really food because food was so plentiful that it wasn't expensive. Later on, my dad was saying, when it was settlement time, it was horses. They took the place of canoes. He talked about bringing horses right into the longhouse to distribute to somebody.<sup>45</sup>

This exchange of gifts creates a situation where the families are brought together and strengthens their relationship. Similar to the discussion of marriage and potlatches in Chapter 3, this exchange of gifts works to foster community relations. I have heard it referred to as an exchange of "good feelings" and it can be thought of as conforming to the larger cultural pattern

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<sup>44</sup> Interview of Arvid Charlie (23 June 2010).

<sup>45</sup> Miller, *The Problem of Justice*, *supra* note 19 at 146.

of interchange that occurs within Coast Salish communities.<sup>46</sup> However, in all my discussions, the most recent example of this type of reciprocal exchange occurred in the late 1970s and early 1980s. This is not to say that these types of exchanges don't still take place, it may be that they are less visible and worked into larger gift-giving exchanges, such as at marriages, adoptions and naming ceremonies.

Again, however, only the proper people must be drawn into the resolution and only at the right time.<sup>47</sup> Ill feelings arise when individuals involve themselves in other people's problems and when those who should be taking care of a situation do not.<sup>48</sup> This is because there is a strong preference within the Hul'qumi'num communities for settling disputes within as narrow a circle of disputants as possible. Similar to the intra-familial dispute resolution process, depending on the nature and severity of the conflict outsiders can be drawn in to resolve the issue. Usually these outsiders are widely recognized and respected people; however, they do not necessarily occupy a formal position within the community. Counsel from these respected people was taken very seriously and they often acted as an arbitrator of sorts, giving the final word in the resolution. Frank Malloway gave an example of a *si'em* (respected person) coming in to settle a land boundary dispute between two farmers:

So they called in Chief Harry Steward ... and I remember that because my dad used to babysit me when my mother was busy, he'd take me with him. I was about four or five years old. It's like a dream, I remember walking back here with my dad and the old man with two canes, that was Chief Stewart. So, he heard both sides of the story and looked the site over and then he said, ... "You're taking his land, but you're half way to the ditch with your fence. I'm not going to tell you to take your fence down and move it. What you do is you go across and cut your lot off." So if you go back there today there's a fence still up there. It goes towards the ditch and then stops and goes across to the Scowkale cemetery and that was done maybe about fifty years ago, I

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<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid* at 149.

<sup>48</sup> *Ibid.*

guess. And that was the only incident where I've seen outside *sí:yá:m* coming in to decide on an issue and that was Chief Harry Steward. ... He heard both sides of the story and then he made his decision. ... The old respected chiefs, Billy Sepas and Harry Stewart and Billy Hall, their decisions were honoured by the other people even if they didn't come from this reserve. They held high positions as leaders. Whatever they decided, you respected their decisions. So [the farmers], they agreed on it and they brought it up again.<sup>49</sup>

This example is interesting to note because in many of my discussions with Hul'qumi'num Elders it has been stressed that consensus is key to dispute resolution because it fosters harmony within the community. The ability to draw upon a highly respected individual to arbitrate a decision, upon first consideration, seems to run contrary to this principle. One of the Elders I spoke with, although she acknowledged that is customary to draw upon a speaker or another *si'em* to aid in the resolving a dispute, expressed that she felt that it further complicated the issue. She preferred the process of consensus building, even if it was a difficult and lengthy process. It is my understanding that she felt there was a value in that because it helped to foster relations, whereas oftentimes relationships didn't develop from the use of a *si'em* because often they based their decision simply on what was expressed to them in a single meeting.

However, it is important to note that consensus must be reached in the decision to approach a *si'em*. Both parties have to come to the conclusion that they are at an impasse and recognize that they would be unable to resolve this conflict on their own. Also, both parties must agree to the *si'em* to be given the authority to decide the dispute for them. As one can see, the principle of consensus is universal standard of conflict resolution. The implications of this consensus and the use of a third-party in dispute resolution will be discussed in more detail in the subsection dealing with the principle of consensus.

## **b. Restoring Balance or Restitution**

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<sup>49</sup> *Ibid* at 149.

Hul'qumi'num conflict resolution processes aim to restore balance within the community. Accordingly, many of the procedures tend to mirror those ceremonies utilized by Hul'qumi'num Mustimuhw to strengthen bonds within the community, both familial and non-familial. Gift exchange, as explained briefly above, is one such procedure. Wes Modeste shared a beautiful story with me about the last time he witnessed this process used to restore balance to the community after an interpersonal dispute between two families:

In the late 70s or 80s there was an Indian dance in Nanaimo and a couple of Cowichan boys went outside of the longhouse to have a smoke or something. On their way back in, some of the members of the Nanaimo community beat them up. I'm not sure exactly how things evolved after they were beat up. I guess maybe they went inside, with bloodied faces or maybe they just left the longhouse.

Not long after, the families from Nanaimo came down to Cowichan for another Indian dance – the whole family. And they hired a speaker and they called witnesses – many, many witnesses.

And they called forward that young fellow that got beat up – they publically called him forward. And they publically apologized to that young fellow for the conduct of their children for beating him up like they did in Nanaimo. That is a public form of apology.

And the family put a blanket in his hand and money. The parents of the boys who beat him up put money in his hand and the rest of the family followed (and it is a very large family). He had a lot, a lot of money in his hand.

I'm not sure if both of the young men who got beat up were present that night. There's only one that I remember.

But how things unfolded after that, after all the money was given, the speaker got up and concluded the work. But after the speaker said that, witness after witness came up to respond. They said, "We will do the honourable things to restore your honour." And they scolded the young people who had beat up the boys from Cowichan. They said, "See all your family here? They are all here because of your wrongdoing. And you see all your family members following with money? You are now responsible to repay it. So anytime any of your family has work, you bring money to help."

And with a large family like that, I suspect it took him quite a while to repay.<sup>50</sup>

Every time I listen to this story I gain a greater understanding and appreciation for the worldview and legal tradition of my Hul'qumi'num community. This process of gift exchange is not one of simply "paying a fine" – though this might appear to be the case to a non-Hul'qumi'num individual at first glance. Although the exchange is aimed at fostering good feelings between the families involved and restoring balance in the communities, the restitution continues long after the physical exchange of goods and/or money.

I am struck by the fact that the witnesses came forward after the conclusion of the work. They spoke to the young men who had shamed their families through their misconduct. They took the opportunity to remind these young men that they were now indebted to their family members who had taken it upon themselves to rectify this situation. They stressed that it would take them many years to repay their relations for the cost of restoring harmony within the community.

This is interesting because it demonstrates that this is a different type of gift exchange than those normally held at weddings, memorials, naming ceremonies and other work. In Chapter 5, I described that at my naming ceremony I was instructed to record and pay back those non-kin who supported me in my work. As you will also recall, I mentioned the contributions of my family to this work as well. However, there is no positive obligation on me to repay my family members for their support. The opposite is true in the example shared with me by Wes Modeste. In that situation, the witnesses stressed that it was not the young men who were given the money who were required to repay, but rather the offending young men. This seems to

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<sup>50</sup> Interview of Wes Modeste (23 June 2010).

address those who would argue that this type of gift exchange implicitly creates the possibility for ongoing conflicts within the community. Sonny McHalsie states:

There is a word for stepping on people. Class and status wise. You know how you are always giving [as in potlatches] to elevate your status, and if someone comes along from the lower class and start trying to build themselves up to the upper class by giving all of these things away. Well, you know how when someone gives you something you are obliged to give it back, an upper-class family would, to discourage someone from moving up by giving them so much resources and wealth that they could never fulfill the obligation to return it, thus stepping on it.<sup>51</sup>

As demonstrated by the words of the witnesses in the conflict described by Wes Modeste, it would appear that this type of strategic gift exchange is not the type contemplated through this process. However, it is important to note that this type of reciprocal exchange can be problematic if there is a power imbalance between the parties involved.

Even in the absence of intent by the wrongdoers, restitution must still be given to families of the wronged in order for the community to be restored. Willie Seymour shared the following:

One evening two brother-in-laws were partying. There was quite a few of them sitting on the beach near the big house and they were partying. Anyways, the two brother-in-laws got into it and one brother-in-law beat this brother-in-law (his sister's husband) real bad. It put him in the hospital and in he was in a coma for a couple of days.

The Old People got together right away. I remember them saying that they'd all go to the hospital when the other brother-in-law comes out of consciousness and ask him what he wants.

So the Elders were there when he woke up and the first thing he asked was, "How is my brother-in-law?" He didn't know the situation because he was pretty intoxicated when it all happened.

They told him he was charged with attempted murder. And they asked him, "How do you feel?" He replied, "Honestly, I have no argument with my brother-in-law. I was part of the problem and I don't want to see him incarcerated or put in jail." So they had that discussion right there.

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<sup>51</sup> Miller, *The Problem of Justice*, *supra* note 19 at 147.

A couple of days later the brother-in-law was in court and all the Elders from Chemainus Bay showed up ... They were all there ... And they had a spokesperson get up and talk about what the brother-in-law in the hospital had said. They requested time in the courts and explained how the victim felt that he was somewhat part of the problem that happened and said that he was requesting to drop the charges.

But the courts couldn't drop the charges. So they gave him a \$300 fine. The Elders right there gathered the money and bailed him out. And they told him that when the winter starts, he had to be down there helping in the big house. And as long as his brother-in-law was injured, he had to go hunting and fishing for his sister.<sup>52</sup>

As explained to me by Willie Seymour and Arvid Charlie, restitution was not limited to monetary gifts. If the brother-in-law was injured to such an extent that he could no longer hunt, it would be his brother-in-law's responsibility to hunt for him for the rest of his life.<sup>53</sup> Even though both parties admitted their fault and there was no real intent to cause bodily harm, the brother-in-law who committed the injury was still responsible for restoring harmony within the family and community.

In both of the examples shared above, I am struck by the fact that this process of conflict resolution provides equal reconciliation for both the offended and the offender(s). Love and support – two teachings of *snuw'uyulh* – are demonstrated to both parties to the conflict. In each case, I am struck by the reassurance given to the offenders. They were still important members of the community, so important in fact, that family members and Elders were willing to come forward to support them in rectifying the situation. While the Western legal tradition often alienates offenders, this system of conflict resolution works to restore these offenders to their communities. However, I am cognizant of the fact that in some situations, it may not be appropriate to have the victim and offender continue such a close relationship. For example, as demonstrated by the experiences of women in the South Island Justice Project, in cases of sexual

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<sup>52</sup> Interview of Willie Seymour (23 June 2010).

<sup>53</sup> Interview of Arvid Charlie (23 June 2010).

assault and domestic abuse, creating a situation where the victim is capable of coming into contact with the offender on a frequent basis does little to restore balance within the victim's life.

### **c. Spirituality**

The rich spiritual life of the Hul'qumi'num Mustimuhw is an integral part of their culture. These beliefs are integral to their worldview and to their concept of kinship. It is for these reasons that I chose to include the spiritual in the category of "universal." I am not meaning to suggest that these spiritual beliefs are practiced and followed by all Hul'qumi'num community members today. In fact, I, like others discussed in this section, personally do not adhere to this belief system. However, I do believe that the spiritual cannot be separated from the process of conflict resolution. So whereas the specific practices themselves may be considered contingent, the influence of the spiritual is so engrained in the dispute resolution process that it cannot be separated from it.

Historically, spiritual beliefs permitted a range of expression and privacy which was not easily found in other areas of the culture. This helped ease the tensions created by group residence styles.<sup>54</sup> No one could tell another how to act, but no one was allowed to behave in a manner that brought harm or shame to his or her family. These beliefs may be associated with a privacy ethic, which still makes Hul'qumi'num Mustimuhw today averse to intervene directly in the disputes of others.<sup>55</sup>

Connected to this belief is their reliance on spiritual sanctions for wrongdoing. This also helps to account for the non-interventionist nature of the conflict resolution processes within

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<sup>54</sup> Mansfield, "Balance and Harmony", *supra* note 14 at 349.

<sup>55</sup> Pamela Amoss, "The Power of Secrecy Among the Coast Salish" in RD Fogelson and RN Adams, eds, *The Anthropology of Power* (New York: Academic Press, 1977) 131 at 133, 136.

these communities. It is based, in part, on the belief that you do not have to punish an individual because the spirit world will take care of it. As one Elder said:

It might take a long time but justice is served by just your actions. ... If you do something bad you'll get punished for it later. The people don't have to do the punishment, it's our Creator, I guess, that makes sure that you don't benefit from what you've done. Maybe you'll benefit in a certain degree, but in the long run you'll suffer for it.<sup>56</sup>

The Hul'qumi'num Mustimuhw also believe that ill-feelings can cause illness or injury in others, and therefore there is an emphasis on self-control within Hul'qumi'num families and communities. Willie Seymour shared, "A small conflict leads into great trouble, greater tragedy where if we use anger directed at someone they are hurt ... My grandfather said, "You do not want to be responsible for someone losing their life because of conflict."<sup>57</sup> Vince Stogan further explained:

This is the teaching that we got from my Grandfather: "Never hate anybody. Never get angry at anybody. If somebody's real angry at you and still wants your help, you go there and help. Don't have this feeling, 'Oh, he's mad at me, why should I help him?' No, you go there and help. Otherwise, if something happens to that person you'll feel responsible for it after. No matter how mad you get looking at him you go and help." So that's the teaching we got.<sup>58</sup>

Not only do wrongdoers taint their family name and their ancestral names, but it is believed that they can bring harm upon their family members as well. Arvid Charlie described this concept as follows:

The way the Old People put it, if you haven't been following our ways, something might happen to you ... Maybe if you're traveling down the road you might have an accident. Maybe you'll be paddling your canoe and an accident is going to happen to you ... Maybe you'll get in an accident but you'll be okay.

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<sup>56</sup> Miller, *The Problem of Justice*, *supra* note 19 at 137.

<sup>57</sup> Interview of Willie Seymour (23 June 2010).

<sup>58</sup> Miller, *The Problem of Justice*, *supra* note 19 at 138.

It's so strong that you should be afraid to make a mistake. You should be afraid to do wrong. The Old People would look right at you. You might be strong enough that nothing will happen to you, but it might be one of your family. Maybe someone that is very dear to you, something might happen ... These are all examples ... that I've seen. And looking back I'm thinking about some of the people that had death happen to them, how they behaved, how they acted and some of the consequences. These are definitely examples for me.<sup>59</sup>

Implicit in this description is an understanding that a wrongdoer's actions will show through in the quality of relationships, health or other aspects of their life.<sup>60</sup> In previous studies of conflict resolution in Coast Salish communities, elders gave examples of individuals who became ill, became isolated from others, or died a terrible death because of negative actions taken throughout their life.<sup>61</sup> In discussions with my Elders, I found this concept to be of particular importance to those involved in traditional spiritual practices, such as the *sxwayxwuy* mask dance.

If you live and follow the right way as a masked dance person, you and your family can benefit from that. I'll give an example here. Sometimes you see a masked dancer ... after they come in after their dancing and they are soaked, huffing and puffing. That person might be in the prime of his life, physically healthy, athletically in good shape, but they might see another person that's older and maybe not as physically fit hardly breaking a sweat. That's the value of following the right way and continuing on.

If you lived properly, like a masked dance way ... When you put that mask on, you become one with it. That person is not dancing by himself – he is one with the mask. When he goes around he may feel like he is as light as a feather on his feet going around. Something may even start to happen, such as a piece of regalia starting to fall off, but if he's lived properly, then it won't come off until he is in the tent. The mask is spiritually helping him there.

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<sup>59</sup> Interview of Arvid Charlie (8 November 2009).

<sup>60</sup> Miller, *The Problem of Justice*, *supra* note 19 at 138.

<sup>61</sup> See generally Miller, *The Problem of Justice*, *supra* note 19.

Many Old People said that the mask is very quick to tell on you. So that item might fall off ... We see them come in from finishing and they are just drenched. You can tell who is following the right way.<sup>62</sup>

According to my understanding, it is the shame associated with this public “outing” that works to persuade individuals to follow the legal principles of *snuw’uyulh*.

Big house, Shaker religion and other spiritual practices also help individuals with their disputes by “lifting the trouble” or “calming things down” rather than by intervening directly with both parties.<sup>63</sup> Arguably, the big house has preserved, within the context of spiritual practice, many dispute resolution practices that would have been used within families or communities in earlier times; including use of councils, peer pressure through public recognition or reprimand, advising, oratory and exclusion.<sup>64</sup> The example shared by Wes Modeste regarding the dispute between the young men from Cowichan and Nanaimo shared in the previous subsection is an example of this type of preservation.

Not only is the longhouse an institution where dispute resolution processes occur, but some Hul’qumi’num Mustimuhw believe that individuals can be initiated into the big house as a way to change behaviour, particularly if an individual is involved with drugs or alcohol.<sup>65</sup> No doubt that some Hul’qumi’num community members utilize the big house for this social ordering process today. I have heard it said that in the past initiation was not viewed as a form of punishment. Rather it is as an act necessary for healing. As Frank Malloway says:

All I know is [that] syowen is a cry, syowen is supposed to heal the mind rather than have you get so sick from grief, you know. Some people go the other way, get mentally disturbed and all of that. Syowen is supposed to straighten you out, straighten your mind out, strengthen the body out,

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<sup>62</sup> Interview of Arvid Charlie (8 November 2009).

<sup>63</sup> Mansfield, “Balance and Harmony”, *supra* note 14 at 349.

<sup>64</sup> Northwest Intertribal Court System (NICS), *supra* note 7 at 147-150.

<sup>65</sup> WG Gilke, *Salish Indian Mental Health and Culture Change: Psychogenic and Therapeutic Aspects of the Guardian Spirit Ceremonial* (Troy, MO: Holt, Rinehart & Winston, 1974) at 28, 104, 105, 122; Northwest Intertribal Court System (NICS), *supra* note 7 at 147.

strengthen your body out ... (Frank Malloway, personal communication).<sup>66</sup>

Often this “sickness” becomes manifest through unacceptable behaviours; however, I feel it important to stress that according to my understanding the longhouse initiation ceremony is intended to heal the “sickness” and not punish the behaviour.

However, not all Hul’qumi’num Mustimuhw today ascribe to the spiritual practices of the big house and the Shaker church. One well-known example of this is the case of David Thomas.<sup>67</sup> One February 14, 1988, David Thomas was “grabbed” at the request of his common law wife Kim Johnny by seven spirit dancers for initiation at the Somenos big house of Cowichan Tribes. Kim Johnny had requested the initiation because she thought it would help solve problems in the marriage and Thomas’ excessive drinking. As a result, the initiation of Thomas was involuntary. Thomas was held in the big house for four days, during which time he underwent traditional rites of purification attended at all times by the dancers and his “babysitter.” When he began experiencing pain from a stomach ulcer, the dancers allowed Thomas to leave the big house, and they took him to the hospital in Duncan. He never returned to the big house and instead commenced civil proceedings against the spirit dancers, alleging assault, battery, and false imprisonment, and claiming non-pecuniary, aggravated, punitive, and special damages. In an interview in 2005, Thomas made the following statement:

Hardly anybody goes in there willingly. I could probably count them on two hands. Most of them, they just get put in by the wife or a relative, and then they arrange people to go and pick them up and bring them in.

... I never wanted to be in the big house to begin with. I didn’t want to go in there – ever. My brother is one. He’s a dancer. Most of my relatives. But, like I say, I didn’t believe in that, and I told people that if they ever threw me in, I would go public, which nobody else ever done. And I

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<sup>66</sup> Crisca Bierwert, *Brushed by Cedar, Living by the River: Coast Salish Figures of Power* (Tucson: The University of Arizona Press, 1999) at 178.

<sup>67</sup> *Thomas v Norris*, [1992] 2 CNLR 139.

guess they didn't believe me, so I ended up in there. So I brought them to court.<sup>68</sup>

Recognizing these divergent views, how appropriate is it for conflict resolution processes to be prioritized within these spiritual realms? This standard, combined with the standard of non-interference and the reliance on the family unit, could result in situations like that discussed above, where collective rights trump individual autonomy. The issue of big house initiation is a sensitive subject within the Hul'qumi'num community; and therefore, one which I feel hesitant to discuss. However, through my discussions with community members I feel confident in suggesting that David Thomas is not alone in his views. Even respected members of the big house community have commented on how the practices have changed. And while there seems to be some dialogue about the need for more standardization, due to the sensitive nature of the topic, no one is prepared to suggest such a thing in public.

This is not to say that there isn't a place for these spiritual standards within a modern-day conflict resolution process. The difficulty lies separating the standard from the practice. I believe that there are ways to honour the standard of healing, utilized in the big house, without utilizing the practice of "grabbing" someone against their will. In this case, the spiritual standard is inherent, but the practice is contingent.

#### **d. Respect**

Proper respect towards and recognition of rights held by the individual, family and community was, and continues to be, enforced in Hul'qumi'num culture by customary, accepted ways of behaving. Because these rights find their source in the First Ancestors, they are universal and must be considered in all conflict resolution processes. As this section will

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<sup>68</sup> Lindsay Kines, "Accountability Called for in Longhouse Death" *Victoria Times Colonist* (January 10, 2005), online: NatNews-north <<http://www.mail-archive.com/natnews-north@yahoogroups.com/msg00564.html>>.

demonstrate, the failure to do so in the modern British Columbia Treaty Process has resulted in further conflict for the Hul'qumi'num Mustimuhw.

There was an understanding among families and communities about who had the rights to use resources within the traditional territory. If an individual or group of individuals wanted to use areas where they did not have rights, they would ask permission and these requests were usually always granted since to do otherwise would be thought to breed conflict.<sup>69</sup> This standard accounts for the fact that some of the Elders whom I interviewed during this research had difficulty recalling instances where the Old People spoke of disputes over land. Arvid Charlie recalled a rich fishing site that one of his great-grandfathers had the rights to:

One of my great, great, I don't know how many greats, but it's more than five, [grandfathers], he had several or quite a few fishing traps. He didn't have to harvest. He just sat at home and the people would come to see him and ask him if they could use his site. So he'd get a good portion of it and he didn't even have to go out.<sup>70</sup>

This practice of sharing was respected on a larger scale as well. Arvid explained how Cowichan people were connected to areas in Semiahmoo territory of Boundary Bay, and reciprocal consideration was shown Semiamoo kin on the Cowichan River:

Now, *Luchiim* [Arvid's Indian name], the name *Luschiim*. I said it is part *Hwlummi* [place name for the Lummi community], and that is also part Semiahmoo. Now everybody's got four grandparents and you go to your great grandparents, you've twice as many. So, one of *Luschiim*'s roots is Semiahmoo, one of his main roots. The other one *Swlummi*, who had a town in the islands.

Now, which islands? I don't know, Orcas? You know? I don't know. His other name is technically Orcas Island. He had two names.

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<sup>69</sup> *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Chuck Seymour). *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Tim Kulchusky).

<sup>70</sup> Interview of Arvid Charlie (23 June 2010).

So I reached *Semyamu* [Semiahmoo; White Rock]. We have also, like *Hwlummi*, we have lots of connections to Semiahmoo area. Now if I remember, there was no border [Canada/USA] there. So, as I mentioned earlier, *Luschiim* had heavy roots over there.

Now, if you're going to go into my *s'tsamuqw* [great grandparent] on my dad's side. I will go to my dad, go to his mom, Monica, her mom is Mary, one of her main roots, or maybe the main root, I'm not too sure, is Semiahmoo. [...]

Mary, as I've said, had heavy roots in Semiahmoo, and her family used to come and camp at *Thulpalus* [Kilpalus] Reserve which would be the east end of the present day reserve by the creek. Mary's family had a campground there, and they were the most easterly camp. Then Donette Charlie had a camp. Donette's family and *Luschiim*, that's working west.

So my family knew that, called that spot Semiahmoo. That's why we call it Semiahmoo, is because our other part of our family came to visit and stayed for weeks at a time there. And that's what I mean, we have to acknowledge each other. [03-04-01-ca-i:1026-1050]<sup>71</sup>

It is important to note the reciprocal relationship explained by Arvid in the passage above. A good harvesting area, such as the Cowichan River, may be shared with members of other communities, just as the Hul'qumi'num Mustimuhw themselves may similarly expect to have their connections to lands in Semiahmoo territory recognized.<sup>72</sup> This standard of sharing does not imply joint ownership of or jurisdiction over these territories; rather it is the recognition of kinship ties between these communities that is used to establish these practices of respectful use.<sup>73</sup> As such, the Cowichan would welcome their kin from neighbouring communities and permit them to use their sites; however, they had the right to limit their use and the resource site was completely under their jurisdiction. The hereditary chief of Lyackson First Nation, Rick Thomas, shared the following experience with me:

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<sup>71</sup> Brian Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World* (PhD Thesis, McGill University, 2005) [unpublished] at 359-360 (citation in original).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

I'm thankful that Cowichan recognizes my family ties to Cowichan. When I was in my 20s, I got approached by the Cowichan wardens when I was steelhead fishing in the wintertime. I was standing at the end of the Cowichan River and they asked me if I had a fishing permit. But they were my relatives and so I was permitted to fish there. I still go down there and sport fish.<sup>74</sup>

As evidenced by both Arvid's and Rick's descriptions of their kinship ties above, the network of extended kin throughout the Coast Salish world is extensive. However, this does not imply that Hul'qumi'num Mustimuhw did not have the right to restrict outsiders from trespass or use of land and resources within their territories. Situations of over-harvesting or overstaying one's welcome or failure to respect local protocols about resource harvesting were historically met with death or reparations through potlatching.<sup>75</sup>

Elmendorf described a general principle held by Twana people, a southern Coast Salish group, towards individuals who over-extended their welcome:

There was, however, a definite dislike of 'outsiders' persistently intruding for hunting, on Twana territory far outside their own drainage area. Such intruders were 'impolite,' they 'didn't know how to act,' 'they hadn't been brought up right.' Informants HA and FA used these expressions independently. If persistent, intruders might be told to 'get out and use their own country.'<sup>76</sup>

As one can glean from these comments, respecting the local protocols of extra-territorial resource areas is essential. As described by Brian Thom, "People who use these territories without drawing on their web of kinship and people who were so socially distant that they spoke languages unrelated to the Salishan speech of Coast Salish communities ... were likely not to know or respect local protocols."<sup>77</sup> Snyder pointed out the distinction Skagit people made

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<sup>74</sup> *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/92, *Annual Report of the Inter-American Commission on Human Rights: 2009*, OEA/Ser.L/V/II (Affidavit of Chief Richard Wayne Thomas).

<sup>75</sup> Thom, *supra* note 71 at 377.

<sup>76</sup> Elmendorf, *supra* note 8 at 267.

<sup>77</sup> Thom, *supra* note 71 at 379.

between neighbouring Coast Salish peoples and “outsiders” who did not have any rights to land or resources in the area:

Neighbours were humans *a'citibixw'* ('us living here'), because their lives were regulated in the same way, according to the same rules. They understood the subtleties of the feud, the snub, the verbal innuendo. But never, for most Skagits, could *sti'tlalh* [foreigners] be one of the *a'citibixw'*. They were capable only of physical not social destruction; in other words, they could not humiliate. And so Skagits dealt accordingly with *sti'tlalh*. Reprisals could be swift and brutal, consequences never were social but as impersonal as any in the world of Skagits.<sup>78</sup>

As Snyder's research demonstrated, 'outsiders' whose behaviour toward resource management could not be controlled through social pressures such as embarrassment and ostracizing were not permitted to use these resource areas. They were often summarily killed if they were found encroaching on the territory.<sup>79</sup> This seems to suggest that these areas were limited to people who understood the rules by which the resources could be extracted. These rules included both the legal rules applicable to resource extraction, i.e. respect, sharing, kinship and the standards of conflict resolution that governed these resource areas. Contrary to the recollections of my Elders, this seems to suggest that conflicts over land did arise in certain circumstances.

Ironically, the modern-day Tsawwassen treaty was the territorial conflict described most frequently when I asked the Hul'qumi'num Elders to discuss territorial conflicts and dispute resolution processes. In my discussions, I observed that the issue was not limited to their treaty territory, but also stemmed from their refusal to acknowledge the rights of the Hul'qumi'num Mustimuhw to those areas within their statement of intent. Wes Modeste noted:

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<sup>78</sup> Sally Snyder, *Skagit Society and its Existential Basis: An Ethnofolkloristic Reconstruction* (PhD Dissertation, University of Washington, 1964) [unpublished] at 435 [Snyder, *Skagit Society*].

<sup>79</sup> *Ibid* at 432-433.

... What Tsawwassen did was take advantage of the treaty process because it allowed them to create their boundaries within our territory. We have attempted to meet with them to remove the boundary line but they wouldn't. They chose not to remove the boundary line back. But they didn't come from those islands, the Cowichan people had rights to those islands – from South Pender, Maine and Galiano Island – that was known as the Cowichan archipelago.

... This is what I don't understand about the process and law in general. How can it allow such a small community to encompass such a large land base that traditionally was held by the Cowichan? So in effect, they would have more rights to this through treaty than the Cowichan and that is not acceptable.

So we went to court ... We went to Washington, D.C. and pulled the early records of the commission to establish the 49<sup>th</sup> parallel through the Gulf Islands in the mid 1800s ... The boundary line was supposed to come straight across the Georgia Strait and the U.K. said, "The Cowichan are here. There is no reason why their land should be in your waters." So they went to those islands and there is substantial evidence of occupation of those islands by the Cowichan. So those islands remained in Canada. So it is because of our presence there that their location is in Canada. But we don't enjoy ownership of it.

With that evidence Tsawwassen said, "Oh, we can see that it's yours." And then they had the gall to come to our meeting and tell us how they would manage the resources in our islands.<sup>80</sup>

The British Columbia Treaty Process is transforming the way First Nations in British Columbia conceive of their land and territories. In the example above, one can sense the frustration felt by Wes by the unwillingness of Tsawwassen First Nation to acknowledge the rights and presence of the Hul'qumi'num Mustimuhw within the boundary lines of their treaty lands. Although the treaty process was established to help resolve Indigenous land rights in British Columbia, it has not done so in a manner that reflects traditional Indigenous dispute resolution process. As a result, it is creating more conflicts rather than resolutions. Willie Seymour explains:

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<sup>80</sup> Interview of Wes Modeste (23 June 2010).

You just look at the Tsawwassen Treaty – how it overlaps us. You know, they had no respect for us, to come over and explain their knowledge of the islands. They didn't do that.

Now Luchiim and them went out to the island to take care of some uncovered remains and we had to write to Tsawwassen to get permission to go to that island because that is their claim.

... How can we right that wrong? The treaty commissioners didn't do their job. They were supposed to help everybody and remain neutral. The government's supposed to allow First Nation, First Nation negotiations, but they stepped in and said, "No, we aren't going to change this boundary." They aren't supposed to say that. They are supposed to allow HTG and Tsawwassen to sit down and have a productive discussion on that.

But yes, I do say that today's modern thinking has changed us. What Tsawwassen don't have is affecting their decision-making. It's always up here – *snuw'uyulh*.<sup>81</sup>

In the kin-oriented social world of the Hul'qumi'num Mustimuhw, these seemingly arbitrary boundaries, such as treaty lines, are creating conflicts and hard feelings between kinship groups. They "offend the kin- and ancestor-centred senses of place, and have the potential, if empowered with the institutions of the state, of limiting many of the other kinds of associations with land in the Coast Salish world."<sup>82</sup> As Willie's statement suggests, the failure to recognize and account for Indigenous systems of conflict resolution with the modern-day treaty process is weakening the legal traditions of the Coast Salish people, rather than reconciling their position within Canada.

### **6.3 Contingent Standards of Conflict Resolution**

"Contingent" standards are aspects of conflict resolution that although authoritative, arise out of the processes of people working with them and therefore, are more capable of change. Similar to family law-making, the application of these contingent standards: a)

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<sup>81</sup> Interview of Willie Seymour (23 June 2010).

<sup>82</sup> Thom, *supra* note 71 at 402.

avoidance; b) socio-class considerations; c) words; d) consensus and e) precedent allow for differences in the practice of conflict resolution because they are inductive by nature. The standards that follow are contingent by nature. I will express the significance of this taxonomy in the subsections below.

**a. Avoidance – *Ti'yu-xween* (“Trouble Grows from Small Conflict”)**

Traditionally, Hul'qumi'num social-order was indirect. For example, suggestions and statements of personal opinion without claiming to represent others, scornful glances or derisive laughter were all utilized to govern behaviour. As Vi Hilbert explains:

The disapproval would be in the non-communication, in the silence. Silence was often used to resolve things. It was very uncomfortable to have people avert their heads and not talk to you because you've done something that they don't approve of.<sup>83</sup>

Indirect social controls such as gossip, ignoring, teasing, insulting and silence continue to help minimize open disputes in the Coast Salish world; however, in earlier times they must have been more consistently used and more effective.<sup>84</sup>

This standard of avoidance was also articulated in the story shared, in Chapter 5, by Willie Seymour about the conflict that arose between his cousin and him. He said that although his grandfather made no mention of the disagreement that arose between them, he knew that his grandfather knew. This knowledge alone was enough to cause Willie to ponder upon the choices he had made and his role in the disagreement. He realized that his behaviour had brought shame to his family and that knowledge caused him great remorse.

It was during the resolution of that conflict that his grandfather taught him about the legal standard of *ti'yu-xween* – meaning “trouble grows from small conflict.” In explaining this

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<sup>83</sup> Northwest Intertribal Court System (NICS), *supra* note 7 at 81.

<sup>84</sup> *Ibid* at 137, 141-144.

concept to Willie, his grandfather stressed the importance of resolving understandings before they grew into larger conflicts that could involve entire families.

I don't want to see trouble grow from a small conflict ... *ti'yu-xween* starts from a little speck. Not taking care [of it] makes it grow and grow and it starts to involve a lot more people. It becomes negative. It becomes attacking ... and that's how I was taught that a small conflict leads into greater trouble.<sup>85</sup>

The passage of time is also used to settle disputes. In most cases, an individual will ignore the other and turn to spiritual practices or the advice of elders to help “calm things down,” until eventually the dispute is set aside, usually at a large gathering over a meal. In her work dealing with peacemaking in the Coast Salish world, Emily Mansfield described this concept in the following way:<sup>86</sup>

Often, elders very wisely allow things to resolve themselves because nature does that most of the time.

You can try too hard to solve a problem; other people get involved and it gets worse.

If you started talking, you would go right back to the trouble again.

Research on dispute resolution? You mean there was ever a dispute that was resolved here?<sup>87</sup>

Upon first glance it would appear that these two practices, the passing of time and *ti'yu-xween*, contradict each other. One appears to suggest that the parties simply ignore their disagreement and rely on the passage of time to diminish it. The other directs the parties to deal with issues as soon as they arrive. I would argue that both practices work towards conflict avoidance. In both situations a disagreement, or conflict, has already occurred, both practices are

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<sup>85</sup> Interview of Willie Seymour (23 June 2010).

<sup>86</sup> Mansfield, *supra* note 14 at 350.

<sup>87</sup> Northwest Intertribal Court System (NICS), *supra* note 7 at 136.

simply aimed at preventing any further escalation of the situation. This difference in practices illustrates the contingent nature of the standard.

In some situations, where conflict was not resolved, individuals chose to remove themselves physically from the disagreement. As described in Chapter 3, a family would sometimes remove the boards on their dwelling and use them to construct a new home, if a dispute was not resolved. According to Jenness :

Each married family in this group occupied one segment or room in the dwelling; it owned the wall and roof boards of that segment, either through inheritance or through having cooperated in the building; and it might remove these boards whenever it wished, leaving that portion of the common home wide open ... As a rule a family only removed its wall and roof boards for temporary shelter in a spring or summer camp; but occasionally (e.g. In the event of a quarrel) it removed them permanently and used them for construction of a new home.<sup>88</sup>

Barnett records a similar incident:

An instance is recorded of a quarrel between two brothers at Comox which resulted in the removal of one who stripped his half of the house bare of its walls and roof to set up an independent household with his son-in-law. This was the recourse of a man of means; others could not afford to be so sensitive and preferred for many reasons to maintain their brotherly affiliations. Nevertheless this process of segmentation of the extended family within a village must be looked upon as the ordinary mechanism of its growth.<sup>89</sup>

Florence James shared the following examples with me:

A conflict arose by Bella Bella and some of them went to Comox – Comox Tribe. They ended up not returning to that group that they belonged to before.

The second example I can give you is right here. There was a conflict that arose between this married couple ... right near Chemainus

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<sup>88</sup> Diamond Jenness, *The Saanich Indians of Vancouver Island* (1935), Ottawa, Canadian Ethnology Service Archives, Canadian Museum of Civilization (Ms. 3 VII-G-8M), cited in Dorothy Kennedy, *Looking for Tribes in all the Wrong Places: An Examination of the Central Coast Salish Social Network* (MA Thesis, University of Victoria, 1993) [unpublished] at 39.

<sup>89</sup> HG Barnett, "The Coast Salish of Canada" (1938) 40:1 *American Anthropologist* 118 at 129.

... This man injured this young lady that he had married and because it was abuse, the other family spoke against this young man and the whole tribe itself went into conflict over it because they knew that ... this young man had broken the law of the way to be married.

So they went to war, this tribe by itself, between families, and they broke off and they went to what you know call Kinsol Park ... in the town of Chemainus.

And what happened was the village was called Chemainus and this tribe that broke off, because of the war between the families, they got to be called Chuchminus.

... The elders confirmed it for me that ... the families ... got into a power struggle because they wanted this young man to answer and they didn't resolve it so they went to war. They broke off and came away from the main tribe and that is why they are called Chuchminus.<sup>90</sup>

Although these accounts seem to suggest a form of dispute resolution which emphasizes individual autonomy, in describing these conflicts, Suttles has argued that households generally acted more co-operatively.<sup>91</sup> Although Suttles takes the position that this type of avoidance was not typical, I draw comfort from the acknowledgement that conflict is not capable of being resolved in all situations. In some cases, individuals may need to distance themselves in order for healing to occur. This is reflective of many disputes, in particular, domestic abuse or sexual assault. Again, this is a contingent standard that may be necessary to achieve reconciliation for some disputes.

In instances of banishment, avoidance was not a choice. In extreme cases where issues could not be resolved, the community could impose a sentence of exile. Elders made the distinction between internal exile, where offenders continued to live in the community but were

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<sup>90</sup> Interview of Florence James (19 July 2010).

<sup>91</sup> Wayne Suttles, "The Shed-Roof House" in Robin K Wright, *A Time of Gathering: Native Heritage in Washington State* (Seattle: University of Washington Press, 1992) 212 at 216.

not considered a part of the community and live their lives alienated and alone, and external exile, which was a formal type of banishment.<sup>92</sup>

External banishment was a sanction reserved for extreme offences, such as incest and murder. For example:

Another banishment was if you married somebody too close to you, if you fell in love with somebody that was in your family and it was too close a relationship, you were asked to leave. There's a lot of stories about one fellow falling in love with his sister. When they say sister it could be your first or second cousin because the Indian people for three generations they were your sisters or brothers so when you hear stories like that from the elders you don't know how really close related they are. Today your sister is the same father and mother or same mother, but they were banished too, told to leave the village if they started a family together, they were asked to leave the village. They usually moved away, in those days it wasn't hard to survive because there was so much around you that you needed, you didn't suffer any, but just lack of companionship with other people and not participating in your village functions. I guess that was banishment enough, lonely people.<sup>93</sup>

In some situations, banishment was accompanied by physical deformations. In serious situations, such as sexual abuse, earlobes or the tip of one's nose were cut off.<sup>94</sup> This served to warn other communities of that the individual was a serious offender, thereby causing the individual to be further isolated.<sup>95</sup> However, even in the case of these serious offenses, these sanctions were never carried out without the consent of the community involved.<sup>96</sup>

This type of external exile was rare and it is important to note that the practice was ordinarily not to isolate wrongdoers but to restore them into the community and heal wounded relationships. It was not contemplated that an individual would starve or die as a result of the banishment (often times provisions were made to ensure this such as the provision of food and

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<sup>92</sup> Miller, *The Problem of Justice*, *supra* note 19 at 153.

<sup>93</sup> *Ibid* at 153-154.

<sup>94</sup> Interview of Arvid Charlie (23 June 2010); Interview of Willie Seymour (23 June 2010).

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid*.

water); rather its purpose was to isolate the individual from family and community. It was thought that the sentence would lead to loneliness and isolation, creating a desire for the individual to be restored to community life. As one Elder put it:

We had banishment, too, but that was the last resort. Banishment isn't, say, 'So long and we don't see you any more' if they sent you away, and again it depends on how serious it is. If the person mends their ways and does better and helps and gives restitution and [does] all those sorts of things, then maybe they'll be allowed to come back. But again, it depends on how serious it is.<sup>97</sup>

In considering the avoidance standard in today's context, one has to be cognizant of the importance of community to the maintenance of culture. In Sandra Lovelace's complaint to the United Nations Human Rights Committee,<sup>98</sup> the Committee found that her inability to reside on the Tobique Reserve constituted a violation of Article 27 of the International Covenant on Civil and Political rights which reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>99</sup>

Their finding was based largely on the fact that access to her Indigenous culture and language "in community with the other members" of her group was interfered with because there was no place outside the Tobique Reserve where such a community exists. As such, the right to enjoy one's culture must be a consideration in contemplating the acceptability of the sanction of banishment to Hul'qumi'num dispute resolution processes. As demonstrated by the examples articulated in

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<sup>97</sup> Miller, *The Problem of Justice*, *supra* note 19 at 154.

<sup>98</sup> *Sandra Lovelace v Canada* (Communication No. 24/1977), Views adopted 30 July 1981, Report of the Human Rights Committee, GAOR, Thirty-sixth session, Suppl. No. 40 (A/36/40).

<sup>99</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, arts 9-14, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

this section, it is possible for this standard to be upheld without utilizing this practice, in that respect, it is contingent.

### **b. Socio-Class Considerations**

Closely linked to this notion of avoidance are conflict's socio-class considerations for a Hul'qumi'num family. The social field was not historically level within the Coast Salish world; therefore, the local play of power by dominant members of society must also be taken into account when considering disputes resolution principles. Domination was not ordinarily carried out through physical intimidation or direct attack; rather, it was manifested through indirect, subtle intimidation and efforts to control public discourses about appropriate behaviour.<sup>100</sup>

Anthropologists have long observed the relationship between the Coast Salish class system and social conflict. In describing the "Upper Stalo," Duff observed that birth into high-ranked family "constituted a tremendous advantage."<sup>101</sup> Birth into these high-ranked families brought with it control of wealth, the right to important ancestral names and the opportunity to train for positions of respect. These children were thought to inherit the characteristics of their parents and as such, were regarded as superior and worthy of deference. He noted that notwithstanding the expected humility and mock denial of status by these high-ranked individuals, "there was never any doubt in anyone's mind that high-rank people were superior individuals. All children were thoroughly taught who were their social equals, and who were their inferiors."<sup>102</sup>

As Miller notes, however, this power was regularly and quietly contested by subordinated individuals in forms such as storytelling and in the constant monitoring of elite people to see if

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<sup>100</sup> Miller, *The Problem of Justice*, *supra* note 19 at 62.

<sup>101</sup> Wilson Duff, *The Upper Stalo Indians of the Fraser Valley*, *British Columbia* (Victoria: British Columbia Provincial Museum, 1952) at 80.

<sup>102</sup> *Ibid.*

they would maintain their propriety.<sup>103</sup> He goes on to explain that for the Coast Salish people, power, as a general rule, was not ordinarily consolidated in social institutions that functioned to protect and reproduce the advantage of the elites, nor were there social boundaries insulating the elites from continual interaction with non-elites.<sup>104</sup> Instead, “power was regularly contested and the capacity of others could be underestimated only at one’s peril.”<sup>105</sup>

Perhaps the most relevant ethnographic examination of the relationship between justice and social hierarchy is found in the work of Sally Snyder,<sup>106</sup> who combined her ethnographic work in the 1940s and early 1950s with an analysis of folkloric reflections on community values and practices. In 1953 a Swinomish elder told Snyder a story about his father concerning an event that brought relations between members of two groups (Swinomish and Stillaguamish) to a dangerous point:

When HbE’s father was a small boy he was once walking home along the beach at dusk. He was half lost, and came to a Stillaguamish camp in front of which he had to pass. Nightguards had already been posted there, and the child skulked along the shoreline in hopes that they would not see him. But they did, and his suspicious activity led them to think that he was trying to steal a canoe. They held him at their camp overnight. The next morning a man there recognized the boy and warned the others that they had made a grave mistake, that he was the son of important people and that they [the boy’s people] would soon find out why he was detained – as a captive for slave-trade. The Stillaguamish hurriedly released the boy and were ready to face a charge against them. Soon the boy’s family arrived at their camp bringing a canoe load of valuables to the Stillaguamish and obsequious apologies for having a youngster foolish enough to lose his way at night. That was, of course, an insinuation of the Stillaguamish’s guilt – one which could have been played up as an abduction and not a natural error. But all of this was supererogatory for the already anxious Stillaguamish who accepted the Skagits’ offerings and then gave their visitors in return far more than they had received.<sup>107</sup>

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<sup>103</sup> Miller, *The Problem of Justice*, *supra* note 19 at 63.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> Snyder, *Skagit Society*, *supra* note 78.

<sup>107</sup> *Ibid* at 433-34.

This story illustrates both the importance of social class and status in the Coast Salish world and the pragmatic side of justice. As one can glean from this situation, upper-class people dominated the thoughts of lower-ranked individuals in Coast Salish society. High class families had the ability to influence their actions without resorting to force. In the example above, relations of power played the most important role in resolving this dispute – not the boy’s guilt or intentions (as no one, neither his family nor his captors, made an attempt to determine if he had or had not tried to steal a canoe).

Snyder’s field notes reveal another consideration in the resolution of this dispute, namely the costs to elite people anxious to maintain their position in society. Her interviewee, HbE stated that his grandfather’s actions were also motivated by the fact that he “wanted to keep their record clean; to wipe out the accusation, rather than the crime or the supposed crime.”<sup>108</sup> This is a concept which resonated throughout my interviews. There is still a strong sentiment that exists today amongst the Hul’qumi’num people regarding bringing yourself and your family “down” or “becoming” lower through conflict. Florence James explained, “So a lot of what I do, you know, say to the people, is that we shouldn’t be fighting because that’s putting yourself down really low. The way you do things, you fight and talk, you’re putting yourself down. No one has to hurt you or say anything, you’re already hurting yourself.”<sup>109</sup> Joey Caro explained, “I know that our people, when there was a conflict, used different things ... You could lose your status, lose your prestige in the community ... You could be treated lower, like you were a lower person now and that could be hard too.”<sup>110</sup> So even though the social class system is not as apparent today as it was in the past (due to the recognition that everyone’s status has been “watered-down” through

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<sup>108</sup> Miller, *The Problem of Justice*, *supra* note 19 at 65.

<sup>109</sup> Interview of Florence James (16 August 2010).

<sup>110</sup> Interview of Joey Caro (16 August 2010).

inter-marriage), there is still a concern that exists within Hul'qumi'num families and communities today of lowering one's position within the community.

Power had both spiritual and material dimensions in the Coast Salish world and power differentials often times reflected demographic variables, most notably the size of one's family network, in addition to control over important resource access locations and the personal abilities of leaders.<sup>111</sup> Although not as apparent as it was in the past, large families, families with large landholdings and families who can trace their roots to the First Ancestors continue to occupy a place a privilege within Hul'qumi'num communities. However, the danger lies in the fact that many of the traditional preventative practices of social monitoring of these individuals are no longer practiced in the Coast Salish world.

For example, some of the Elders I spoke with discussed the issues surrounding nepotism in our communities today. Florence James explains:

Lately ... I've seen a family that has gained power by the knowledge of knowing the history of the family and they started to practice nepotism. From what I saw, it was a small portion of their family not knowing the history. They might have experienced residential school and I saw another part of their family practicing that nepotism and leaving a portion of their family out. So instead of their family all being together and sharing names or sharing territory, they are leaving a part of their family out, saying, "We are going to make this decision, we are going to call it," and this other part is getting left out. So they've learned how to manipulate their power, so that is how I've seen it.<sup>112</sup>

In this example Florence shares how she's noticed families using their family history and knowledge to dominate other family and community members. This could occur in many different forms, such as refusal to use traditional names or exclusion from decision-making practices.

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<sup>111</sup> Miller, *The Problem of Justice*, *supra* note 19 at 63.

<sup>112</sup> Interview of Florence James (16 July 2010).

This type of nepotism is also apparent when one examines band governance structures. Often times the individuals elected to council are those who occupy positions of power within the community, such as individuals with large extended families or individuals with vast land bases. Traditionally, this was not how leadership was distributed within Coast Salish communities. Leadership was more fluid as it was based on qualities that lent them authority and caused other to call on them for help.<sup>113</sup> As a result, a leader was dependent upon community support and approval. Florence James articulates:

The leader is called *yulwuhwiw'aqw* – the one in the lead, the head leader. You call it chief ... if you go against your own leader ... you are bringing down your own head leader, your governance person.<sup>114</sup>

She went on to explain that anytime someone in the community, especially an Elder, spoke against a leader, it would “bring them down” or lessen their authority within the community.<sup>115</sup>

This “shaming” served as a system of accountability within the Hul’qumi’num world.

As articulated in this section, power continues to influence decision-making and conflict resolution in Hul’qumi’num communities today. The difficulty lies in the acknowledgement that many aspects of the Coast Salish socio-class system have been lost or replaced with more Western concepts of regulation, such as the *Indian Act*. Florence James gave the following contemporary example of how some Hul’qumi’num Elders deal with issues of abuse of power:

There are Elders that don’t always come in ... I had a group of Elders who I was interviewing and they said, “We don’t want to come there and say this, but we have noticed that they are practicing this strange way of being and it is creating a conflict within the family ... We are going to stop attending until we see that the families are operating under *snuw’uyulh*.” So they are starting to walk away from it.<sup>116</sup>

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<sup>113</sup> Miller, *The Problem of Justice*, *supra* note 19 at 116.

<sup>114</sup> Interview of Florence James (16 July 2010).

<sup>115</sup> *Ibid*.

<sup>116</sup> *Ibid* at 5.

Since not all Hul'qumi'num community members ascribe to the same traditional values and spiritual practices, one has to consider how power imbalances should be dealt with in modern Hul'qumi'num dispute resolution processes. In the situation described by Florence, recourse to the Elders was used to avoid the situation – to not support the work that was being done. This is in keeping with legal standards of the Hul'qumi'num resolution system; however, does it foster reconciliation within the family involved? One could argue that the past practices of social ordering and residency styles supported a system based on social sanctioning. However, with changes to these practices, one has to consider how effective social sanctioning would be today in influencing behaviours. I have heard it said that we aren't as concerned with socio-class status today because there is recognition that we have all been “watered-down.” So it would not be appropriate to consider socio-class considerations universal to conflict resolution processes.

**c. Words – *hw'uyuqun* (“words are powerful”)**

Some Elders who I spoke with also discussed the importance of “words”, or *hw'uyuqun*, in conflict resolution. Words are important to the Hul'qumi'num legal tradition for a number of reasons. Words resonate throughout the Coast Salish world – place names help to preserve our connection to the land and ancestral names bind us through kinship. Recognizing the centrality of language to the culture of the Hul'qumi'num Mustimuhw, some may wonder why I chose to categorize this conflict resolution standard as contingent? One would imagine that language, or words, would be inherent to the Hul'qumi'num legal tradition.

As stated previously, a contingent conflict resolution standard is one that depends upon the Hul'qumi'num Mustimuhw themselves. The legitimacy of words emanates from their very use in conflict resolution practices. Similar words are not used to resolve every dispute. In fact,

in some cases it may be more appropriate to draw upon the English language, rather than Hul'q'umi'num, to resolve disputes. Given the limited number of fluent Hul'q'umi'num speakers within the Coast Salish world and the differences that exist within dialects, linguistic flexibility is necessary to successful dispute resolution processes.

Speakers are recognized for their status within the community. Their judgement, relating to the words they choose to use, is trusted when they are facilitating disputes, naming, memorials etc. In fact, different speakers are utilized for their varying techniques:

... Then they will appoint a couple of elders to go deal with those involved ... They selected ... people that were appropriate for that situation. There were many different speakers, the speakers that were real direct and hit hard and really shook you up. There were speakers that were really clam and read into your emotion and threw out the feeling. There were other speakers that could be for the rebels ... We looked at the individual and decided ... This is a real tricky matter so we're going to get an aggressive speaker that he can't dominate. So we went to this young man, he could be really cheeky, smart-mouth, so we get an aggressive speaker who will say, "Listen to me now!" You know it stops them in their tracks. So we had these different levels of speakers.<sup>117</sup>

As this description illustrates, there is a recognition amongst the Hul'qumi'num Mustimuhw that different situations require different speakers – different “words.” These words only take upon meaning when they are utilized through these processes. As a result, their significance in conflict resolution processes and Hul'qumi'num Mustimuhw in general depends upon their use by the individuals involved in the process.

There are teachings about the use of words. These teachings are tied closely to the standard of conflict avoidance described in the section outlined above. Florence James describes this concept:

So in our ways, even when a person is speaking in an aggressive manner, and the harsh tones of the way they speak, they are not following

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<sup>117</sup> Interview of Willie Seymour (23 June 2010).

traditional law, the *snuw'uyulh* because the way you speak is one of the main signs of keeping the law – the *snuw'uyulh*.

So it offends the other person. That is why you begin the conflict. You are asking what is conflict? Well, you are breaking the ways of speaking which is the way of saying things and then when you don't practice it, the other people will become offended by the way you speak and just shut down and they won't want to say anything. So people are very aware when you see a group and someone is speaking in that tone that is not too nice. So they will shut down and won't want to say anything. So that is one example of that teaching.

And a high class person, if you can speak to something that you or a group that needs healing, and they feel that difference in the way you are speaking to them, they are going to feel respected and they will want to heal or they will want to listen to whatever it is that they need from you, if you are using the traditional ways.<sup>118</sup>

Reflected throughout this teaching are the teachings of *snuw'uyulh*. One needs to speak respectfully. Harsh words are often the first indicator that an individual is not living according to one's *snuw'uyulh*, or “way of being on Earth.” Harsh words do not promote harmony within the community. They are capable of breaking down relationships; whereas good words foster them. This teaching also indicates that one needs to be responsible with their words. Words have meaning and words are powerful. They are capable of creating conflict and they are capable of absolving conflict, healing and restoring individuals to a harmonious relationship with each other, their kin and their community. As a result, words play an important role in the Hul'qumi'num legal tradition:

So you have to think things through before you say it. And you have to make sure that once it is said, everyone has accepted it. And that is the basic component to why you have witnesses.

So when you call a witness and you pay them to be there; you have invited them, and that is going to be your witness. Witness all the people you name – they are going to stand by you and say this is the way it was said. And if anything comes up from it, you call your witnesses back and they are going to stand up and say this is what happened; this is the way

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<sup>118</sup> Interview of Florence James (19 July 2010).

it was done. ... This is why you have a witness in the house. They help you to know and stand up and say this is how I seen it. And if there is any conflict, you can resolve it there.

Your witnesses can stand up and say we thank you for the respect you are using and the way you did that and usually that is how they would say it if there is a conflict. Or even if there was a conflict in the territory we would call you and say “We want to address that and come to a resolution.” They would all speak about it and have a say. It’s not just one person making a decision. Decision-making is what you are going to do – you come together and each one has to have a say about it ... and everyone will come to a decision about it. That is how you can help your conflict get solved – not just by you, but by your Elders or your witnesses.<sup>119</sup>

As this passage demonstrates, it is not just the words themselves that are important to the Hul’qumi’num legal tradition; it is the oral tradition in its entirety. As Bierwert explains, “Written accounts, in the view of longhouse orators, are comparatively lifeless.”<sup>120</sup> Hul’qumi’num legal practices, especially those directly connected to the big house, are oral by nature and as a result, big house people have excluded the technologies of photographs and tape and video recordings and the practice of writing from the big house ceremonies. Outsiders tend to view this as a protective exclusion; however, for the Coast Salish, this practice is said to be an act of integrity.<sup>121</sup> Wes Modeste recounted a situation that arose when a family relied on written accounts, rather than utilizing witnesses:

I remember one time ... I was invited by a host in Musqueam to go there to dance for a remembrance, or memorial ... But there was, much to my surprise, a committee that got to the occasion and they had a book there. ... They said, “This family is not in this book, so they aren’t allowed to use this *sxwayyxwey*” – that’s what you call a mask. “You’re not allowed to use the mask dance if you aren’t in the book.”

They had a little table on the floor, which is unusual for our culture and they had this book. So my late father got up and interpreted the family tree of the host – which connects them directly to the mask dance. So

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<sup>119</sup> Interview of Florence James (19 July 2010).

<sup>120</sup> Bierwert, *supra* note 66 at 113.

<sup>121</sup> *Ibid.*

they had bloodline to the mask dance, which flabbergasted the family who had that book because they failed to recognize that. They were asked, “Do you still want to try to deny these people?” So the work carried on.

... Because they were using the white man’s way of recording a family tree, and this occasion was being hosted in the oral tradition, and they were introducing the contemporary, it was their mistake. They didn’t research properly and so they put the pie in their face.<sup>122</sup>

Witnessing and the oral tradition are vital to the continuance of these legal ceremonies, such as weddings, naming ceremonies, memorials etc. As explained by Florence, the witness both supports the work being done and acts as a “textbook” of sorts, to be called upon in the event of any disagreement on the proceedings of the event. The presence of witnesses also serves to validate the work being done. Witnesses are required to conduct the work and to challenge the work. As explained by Wes:

You have to spend money when you challenge somebody’s work. You have to hire a Speaker and call a whole bunch of witnesses and by calling all these witnesses you will get support from the witness that you called up ... By standing with them, that means that you believe the same. The danger is that no one will stand up or if someone stands up and says you are wrong because we do belong. That’s how it could happen to.<sup>123</sup>

As a result, a speaking against one’s rights or the work being done is not an act to be taken lightly.

Wes went on to further explain a subtle nuance that was taking place in the background of this dispute. The individuals that challenged the use of the mask dance by the host family had been hired by the host family to be the mask remover and door opener at the event. He explained that on the day you accept being hired, you also accept the position that the host belongs to the mask dance tradition. Challenging their kinship ties to the mask was therefore a direct insult to the host family. When I inquired as to how this conflict was dealt with, Wes explained that the

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<sup>122</sup> Interview of Wes Modeste (23 June 2010).

<sup>123</sup> *Ibid.*

individuals who challenged the use of the mask dance stayed at the memorial and performed their hired positions as mask remover and door opener. They were both called up and paid out by the host family. On one hand the host family “avoided” the conflict by allowing those hired individuals to stay on and be a part of the work; however, paying them out served as a public shaming of sorts because it demonstrated to those present whom was the “higher” family.

Recognizing the centrality of the oral tradition, and words, within the Hul’qumi’num communities, one has to consider the effects of the loss of language on their legal tradition. I would like to share a personal example with you about how this loss has affected me. I am not a Hul’qumi’num speaker. This is a fact that has weighed heavily upon me as I have conducted this research. Although I am eternally grateful for my Elders who have helped to further my understanding through our discussions, I still have a long way to go in my studies. Also, my family are not traditional big house people. As such, I did not have the opportunity to witness work being done in the big house until very recently.

I must admit, I was nervous the first time I attended. I did not know what to expect. There was nothing I could read to prepare me for the event. I was also hesitant to ask because of the sacredness surrounding the practices that occur within those cedar walls. As soon as I entered and began to witness the work being done, my heart was full as I realized that the Hul’qumi’num legal tradition is a living tradition. I wanted to understand the procedures and protocols that were taking place. What was their meaning? What were the implications of the work being done? However, although translations into English were offered for the more procedural practices, such as the calling of witnesses, once the work began, most of the language used was Hul’qumi’num.

It was in that moment that I first began to struggle internally with my place in this world – I was a Coast Salish woman, present to witness the work and support my dear friend; however, I was also a scholar, about to embark on a study of the Hul’qumi’num legal tradition. I wanted to ask those around me about the significance of the procedure taking place, but I was hesitant. I did not want to offend and, at that moment, I did not want to point myself out as an outsider. Therefore, I chose to sit in silence, witnessing the event and hypothesizing about the events taking place.

It was only when I began the secondary research for this project that I began to realize the significance of my experience. In discussing the challenges of revitalizing Indigenous legal traditions, Borrows points out that inaccessibility is one of them.<sup>124</sup> Arguably, the use of the Hul’qumi’num language within the Hul’qumi’num legal tradition made that event “inaccessible” to a degree for me. Even though I was not “called” as a witness, I was still a witness at that event. The teachings of trust and support require me to be able to recall the events and stand beside my friend if ever questioned. However, I would not be able to do so. What are the implications of this for the Hul’qumi’num legal tradition?

Arguably, recognition and respect of our legal tradition will only come as understanding deepens within the non-Hul’qumi’num communities. How can they develop an understanding when the language used and oral nature of the tradition makes it inaccessible to them? While I am not suggesting that we codify our laws and practices, and conduct them entirely in the English language, I am suggesting that the contingent nature of “words” and language allows for the preservation of our laws and conflict resolution processes.

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<sup>124</sup> John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 142.

**d. Consensus – *nil ow' sthuthi' ni' 'utun shqualuwun* (“Is this okay with you personally?”)**

The importance of reaching consensus has been stressed to me throughout my discussions on conflict resolution with Elders. However, while developing consensus is definitely the high-water mark in Hul'qumi'num dispute resolution practices, it is also acknowledged that, reaching consensus is simply not possible in all cases. It is for this reason that I chose to categorize the standard of consensus as contingent. It is not necessary, nor is it expected, that all disputes will result in a common understanding by all parties involved. Reaching consensus is contingent upon both the parties to the dispute and the issue at hand. The contingent nature of this standard of consensus is important to recognize because it allows for legal tradition that respects the decision of individuals to call upon an arbitrator when appropriate. This may be an Elder, a respected leader within the community, or even a judge from the Western legal system.

**i. Consensus-Building Circles**

I have struggled with the terms to use for the type of dispute resolution process aimed at achieving consensus. At first I had termed it “big house circles.” However, recognizing the contingent nature of the consensus standard, I was worried that the term “big house circles” would be too prescriptive. It might imply that this type of conflict resolution could only occur within the walls of the big house. Also, I struggled with the term “circle.” I am aware of the literature on sentencing circles and the implications of that ADR process within the Western legal system. I wanted to distance my description from that established process. Based on my conversations with my Elders, I believe that the term “consensus-building” circles best describes the process outlined in this subsection. It is a process in which all parties involved in the dispute, as well as those respected for their knowledge on the subject matter, usually Elders, meet and discuss the issues until a resolution is reached that is acceptable for all those involved.

Willie Seymour describes one of the first times he witnessed such an event:

Another one I remember clearly, I was just a little guy and there was a problem in the community that needed to be dealt with right away.

All the big houses were on the waterfront in Kulleet Bay, and there was a point, a rock that went out ... my grandfather went down there.

I remember one summer day and somebody was there talking to him and it wasn't long and he grabbed his drum. He had a big drum – hand drum.

We walked down to the big house, he unlocked the doors, opened up the doors, and someone saw him walking, I can't remember who it was, they went in and started the fire right away. And he beat on his drum. Beating on his drum for maybe five minutes so the whole community can hear it. And then five minutes later, he beat on his drum again and that was his notice for the people to come; that there was business to be taken care of. And if it was an urgent matter, then there was a third time.

The people rushed down, “We need to talk about whatever the concern was.” And every family brought something. The women, they would go in the kitchen ... the women would start cooking and the men would be down the other end discussing what had to be taken care of.

When the table was ready, they continued their discussion as they ate. And when the women were finished cleaning up, they came in and joined and they were invited to continue the discussion. It was open and sometimes they involved women if it was a husband and wife conflict or whatever.

And they didn't leave until they came to a satisfied resolution. Sometimes they were there until real late at night. Really late at night they would stop and eat again ...

If there was somebody missing, they would send one of the young men. There was trails between the villages ... so they would send a runner from Kulleet Bay to Shellbeach, from Kulleet Bay to Nelson Point – to call all the individuals that were knowledgeable on the issues they were discussing, or so that they could contribute to some solution.

... They asked everyone; they asked every individual, “*nil ow' sthuthi' ni' 'utun shquahuwun.*” “Is it okay with you, okay with you personally? Is our decision effective? Is our decision acceptable?” They go around asking each individual and then they say, “*tun' ni' 'utunu 'il kwet ch*” –

from this day on we put this to rest. Then they will appoint a couple of elders to go deal with the involved ...<sup>125</sup>

This description of an intra-family dispute resolution demonstrates the importance of maintaining community harmony. All Willie's grandfather had to do was beat on the drum. The community recognized that there was a matter that needed attention. It was dealt with immediately. It wasn't postponed until a time that was convenient for all involved, as soon as individuals heard the drum; they stopped what they were doing and gathered at the longhouse. Contrast this with the Canadian legal system, in which many disputes are not heard until months after the issue arose. Not only is the standard of consensus aimed at restoring balance within the community, but so is the procedure used to achieve consensus.

The procedure for dealing with inter-family disputes or disputes between communities is quite similar:

The leaders got together from the different communities and whatever time it took, one day, two days, three days, of deliberations and then they would decide. They decided, well, you can go ... and my community will go ... and someone else with sometimes volunteer, I will go ... But the leaders deliberated and then the communities were brought together and this is what I'm talking about – reconciliation.

If one community was offended, they never allowed that to go by. Somebody would step in, even somebody that is in the background would step in, and then they would blanket the ones that are victims ... they will have a ceremony, mask dance or sometimes they will just stand them up ... and honour them with gifts.

... blanketing them. You shield them from the hurt. You shield them from the harm and at the same time you are embracing them back their strength. You are picking up their soul and putting it back into their being. So it serves more than one purpose.<sup>126</sup>

Frank Malloway shared a similar understanding of inter-family disputes:

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<sup>125</sup> Interview of Willie Seymour (23 June 2010).

<sup>126</sup> Interview of Willie Seymour (23 June 2010).

I think most of it was done through the head of the family. The head of the families would meet and they would discuss the crime, or whatever it was, and they'd reach a consensus. I've never really heard about what the sentences were. They'd say, "Well, we had a family meeting with this family, and they decided on what had to be done," but you never really hear about the punishment itself and how the families reach that verdict, or whatever you'd call it, ... If you did something wrong the family would take the responsibility and make an offering. They call it an offering.<sup>127</sup>

As these understandings suggest, reconciliation or restoring harmony between communities was considered just as important as resolving disputes within communities. The main differences are reflected in the number of participants involved in the process and the mechanisms used to signify the resolution of the dispute. In the example shared above concerning an intra-family dispute, once a decision was decided upon, the community appointed an elder to go and speak with the disputants and ensure that they understood the terms of the resolution. In the inter-family examples, reconciliation was usually signified through some sort of ceremony or offering. Although not discussed by any of the Elders I interviewed, I would argue that the lack of kinship relations in inter-family disputes created a situation where the parties involved wanted to secure their new relationship in a more formal manner.

**ii. Elders and *Si'em* ("respected leaders") as Decision-Makers**

Although consensus was the preferred form of conflict resolution, it was acknowledged within the Hul'qumi'num communities that this would not always be attainable. As previously discussed, in some instances, families would break-off or move to a different community if differences failed to be resolved through "talking things out." In other circumstances, individuals, or families, would call upon a highly respected individual, or *si'em*, to make a binding decision. Crisca Bierwert shared the following example:

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<sup>127</sup> Miller, *The Problem of Justice*, *supra* note 19 at 146.

The following story describes a complex and sensitive negotiation of differences within one longhouse. In this case, no unitary principle was established, but one of two very different approaches to ceremony had to be selected to return a gift. Personalities clashed forcefully but not publically, as did core ideas about the appropriate cultural practice needed to honor the syowen of deceased family members. The conflict concerned the ritual procedure to be used to return a dance shirt.

Regalia worn by dancers ... is part of their expression of syowen and is intimately connected with them. When a dancer dies, the regalia is usually ritually burned with other intimate belongings. The dance shirt in question had belonged to Vi Hilbert's mother, and Vi had decided to keep it, rather than burn it, after her mother's death. She told me that she had felt when her mother died that it was not appropriate to burn the dance shirt, so she had kept it, carefully wrapped, for decades. When her grown son was initiated into the longhouse, she realized what she "was meant to do" with the regalia. She had traveled with her son to her senior cousin's longhouse, a trip of great moment because her son – like others – had been resisting a pull toward syowen for some time. That night, Vi was reunited with an acquaintance from her youth, whom I shall call Mary John, who arrived almost simultaneously with one of *her* sons who had decided to be initiated. Mary was the daughter of the woman who had given the dance shirt to Vi Hilbert's mother. In meeting her again, Vi realized that she was to return the regalia to Mary.

Mary remembered with affection that her mother and Vi's were close and also that her mother had given the dance shirt. It was news to her that the dance shirt still existed. Neither she nor Vi were dancers, and they had not seen one another for forty years before the night they met at the longhouse.

The conflict arose not about whether the garments should be returned, but about how it should be returned. Because the dance shirt evoked memories of the deceased, all agreed that memorial burnings of food for the dead parents were in order. And all agreed that, after receiving the dance shirt, Mary would have it ritually burned for her mother. Some of the longhouse family said that because the dance shirt had been around for so long, a memorial song was needed to "put away" the dancer's songs. This ceremony had been revived in recent years and involved a large gathering and the dancing of the *sxwayxwey* mask for cleansing and honouring. The *sxwayxwey* is a privilege of some Salish families in the Halkomelem area (of which Mary John's family was part) but not in the Lushootseed area (to which Vi Hilbert belonged). The longhouse in question was on the borderline between the two, and its own family was part of both sides of this legacy. Yet, over the past decade, the *sxwayxwey* was more and more called upon to mark important life

events, distinguishing not only those families who held the privilege of dancing the sxwayxwey mask but also those families who “hired” the mask to be danced for weddings, memorials, and so on. A swirl of discussion ensued involving issues of spirit representation and protection and of status. Because both Vi and Mary were well-esteemed members of their communities, people felt they could afford the elaborate ceremony.

Vi Hilbert did not want to “bring out” the sxwayxwey. “We don’t do that,” she insisted. Her parents’ ways were much more low key. They were not sxwayxwey people; moreover, they held the view that power was in transactions, not in the substance of the things used to convey power. Informed by their perspectives and resisting what felt for a time like pressure to conform to new ways that were creeping into the Lushootseed area (by intermarriage), Vi firmly stated, “This does not need to be done.”

The tension at the level of cultural expression here reflects standing differences between the Halkomelem and Lushootseed cultures, comparable to the differences between northern Northwest Coast cultures and Salish styles as a whole. The cultural debate over display is distinctively Salish. Vi Hilbert was concerned primarily about what was right from her parents’ viewpoints, especially since the material involved was from their time, but she was also culturally biased against the trend toward elaborating ceremony. She deliberately countered pressure that seemed to be building up to get her to put on a “big party.” She had organized large gatherings before, and she had attended numerous events in her extended family at which the sxwayxwey was danced. But her arguments against doing the memorial were adamant, and her comments to some people were brusque enough to cause hard feelings.

Hard feelings were also stirred by comments made by some of the new longhouse workers who had spent much of the year with Mary’s newly initiated son. They expressed ominous concern that Mary’s health might be damaged if the spirits were not honoured at a large gathering ... Still others expressed worry that Mary might not have enough strength to handle producing a ceremony that took a year of planning and advance notice. Mary told me that she was troubled because the people who thought the sxwayxwey was important was having hurt feelings and because words on the subject had been so painfully sharp.

As conflicting points of view emerged and failed to reconcile, the head of the longhouse determined that the sxwayxwey was not necessary for the sake of the dead. Those who wanted the masked dance to occur were disappointed and still troubled. Some of these people did not attend the longhouse the night the dance shirt was returned. Their staying away

registered the bad feelings they still held about what was happening. In time, most of these people came back together, but the hard feelings drew strength away from the longhouse leader for a while. A small core of these people built a separate longhouse several years later, but maintained their strong connections with the original longhouse group and their leader. After Mary received the garment, she had it ritually burned.

Mary died the following summer. If a *sxwayxwey* memorial had been planned, the return of the dance shirt could not have taken place until the following winter. The decision to go ahead without the large ceremony appeared, in retrospect, to be fortuitous because Mary was still living when the garment was returned. I asked Vi and others, much later, whether premonition may have played a part in the decision. The responses I got were only that what was done ... had seemed best at the time, and that was that.<sup>128</sup>

Every time I read this account, my understanding of Coast Salish legal traditions strengthens and increases. I made the decision to retell this story in its entirety because I feel that it demonstrates most of the conflict resolution principles enunciated in this chapter. The subject-matter of this dispute illustrates the importance of the spiritual, both as a focus of disputes, and as a factor influencing the resolution of disputes. Both parties recognized the dance shirt would have to be returned; however, the legal traditions of the two communities differed on the procedures to be utilized to return the shirt. That issue was at the heart of this conflict. However, Vi and Mary arguably found kinship through the shirt. The use of words, in particular, “harsh words,” served to escalate the dispute and cause “bad feelings” between community members. Because both women were “well-esteemed” members of the community, or had a high socio-class standing, it was thought that they could afford the elaborate ceremony involved with the *sxwayxwey*. When consensus failed to be reached through dialogue, the longhouse leader made a decision, which, while not satisfactory to all parties involved, was respected. In order to avoid further conflict, those who were not satisfied with the resolution,

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<sup>128</sup> Bierwert, *supra* note 66 at 183-185.

chose to stay away from the longhouse. As a result, the status of the longhouse leader decreased for some time.

This example is very telling. It is important to note that at its very core it was a conflict between two different legal traditions. The parties involved were not willing to compromise, as each felt that their tradition was valid. As such, a consensus-building circle was not appropriate. What does this mean for potential conflicts of laws between Indigenous and Western legal traditions? Is it idealistic to assume that a dialogical process could result in the settling of disputes between these two different legal frameworks? Is an arbitrator necessary to resolve these types of conflicts? If so, recognizing the importance of neutrality, will it have to be an international arbitrator? These types of questions demonstrate that this work could have great importance for processes designed to reconcile conflicts of laws that may occur between Hul'qumi'num and non-Hul'qumi'num legal traditions.

**e. Precedent – *tun'ni' utunu kweyul 'i twe't tst* (“From this day on, we put this to rest”)**

The idea of precedent is the final standard of conflict resolution I would like to explore in this theory of Hul'qumi'num dispute resolution. Coast Salish ethnographic materials provide some insights into what might be known as rules of evidence and the use of precedent. Although the terms are foreign to the Hul'qumi'num legal tradition, the ideas are not. As demonstrated by the previous section on consensus, Hul'qumi'num Mustimuhw, in common with others, faced the issue of what might be said about a given dispute or case of wrongdoing, by whom and what weight might be assigned to a particular person's view of the matter. Present-day Elders point out that people were free to make their views known in a dispute. However, if a family did not want to talk publicly, they could hire a public speaker to talk for them. Stories of family and village history, genealogy, and legends could all be presented to provide guidelines for resolving

current disputes.<sup>129</sup> But these histories were not referred to as rules of precedent. A problem was not resolved in the same manner as a previous problem because of the implicit understanding that no two circumstances are precisely alike.<sup>130</sup> In the Hul'qumi'num legal tradition, there is not an emphasis on generalization or anything resembling the creation of binding precedents that allow the facts of a case to fit into an existing legal category. Relationships, obligations and group survival are more significant than substantive law.<sup>131</sup>

When I first began to explore the notion of precedent in the context of the Hul'qumi'num legal tradition, I attributed the lack of precedent to the family law-making function. If different legal practices were permissible, then one family's experience would have little relevance for another family's situation. However, in my conversations with Hul'qumi'num Elders, I realized that it was more than just a difference in law-making that accounted for this practice. As Willie stated, "*tun' ni' utunu kweyul 'I kwe't ts'*" – from this day on we put this to rest.<sup>132</sup> This notion was supported by Frank Malloway, "... but you never really hear about the punishment itself and how the families reach that verdict, or whatever you'd call it."<sup>133</sup> Willie explained to me that this practice was necessary to restoring harmony within the community. How could an individual feel restored to the community, if his or her past transgressions were continually brought up and used as an example for outsiders?

Through my research, I've found evidence of this practice. Elders have provided examples of disputes within or between communities; however, often times the details are scant, as you may have observed in this Chapter. In fact, Bierwert's example of the dance shirt is the

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<sup>129</sup>See generally Northwest Intertribal Court System (NICS), *supra* note 7.

<sup>130</sup> *Ibid.*

<sup>131</sup> James Zion, "Searching for Indian Common Law" in Bradford W Morse & Gordon R Woodman, eds, *Indigenous Law and the State* (Providence, RI: Foris, 1988) 121 at 121.

<sup>132</sup> Interview of Willie Seymour (23 June 2010).

<sup>133</sup> Miller, *The Problem of Justice*, *supra* note 19 at 146.

most detailed description I have found to date of a conflict. However, this may have to do with the fact that she is an “outsider” to Coast Salish legal traditions.

Recognizing the seemingly strict adherence to this legal standard, why is it that I chose to categorize it as a contingent standard, rather than an inherent standard? This categorization has to do with the challenge of intelligibility.<sup>134</sup> Some individuals have criticized Indigenous legal traditions as not being intelligible, meaning that individuals are unable to foresee the consequences of any given action.<sup>135</sup> Arguably, a lack of precedent would contribute to the unintelligibility of the Hul’qumi’num legal tradition.

I would argue that the purpose behind of the legal standard of *tun’ ni’ utunu kweyul ‘i kwe’t tst* is still capable of being achieved with a limited use of precedent. For example, stories are often utilized to transmit legal rules within the Hul’qumi’num legal tradition. Often these stories relate to the natural world or First Ancestors, and therefore, they are not seen as offending the principle of *tun’ ni’ utunu kweyul ‘i kwe’t tst*. One could imagine removing certain identifiers, such as name, age, location etc., from descriptions of conflicts could preserve harmony between the past offenders and offended and foster intelligibility within the Coast Salish legal tradition. This is a practice that is used within the Western legal tradition for young offenders and the more vulnerable members of society. Arguably it could be adopted into the oral traditional of the Hul’qumi’num Mustimuhw to help foster the acceptance of their legal tradition.

#### **6.4 Conclusion**

Since time immemorial the Hul’qumi’num Mustimuhw have utilized processes and practices to resolve conflicts and disputes both within their communities and with other

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<sup>134</sup> Borrows, *supra* note 124 at 138.

<sup>135</sup> *Ibid.*

communities in the Coast Salish world. Although the processes and practices have varied over time, it is possible to identify several inherent standards of conflict resolution which Hul'qumi'num Mustimuhw continue to utilize in resolving their disputes. These standards are: a) kinship; b) restoring balance or restitution; c) spirituality and d) respect. Laws and processes designed to manage conflict draw from these standards and work together to try and resolve a just resolution of the problem. There are also several contingent legal standards that the Hul'qumi'num Mustimuhw draw on to resolve disputes in their communities and with outsiders. These contingent standards are: a) avoidance; b) socio-class considerations; c) words; d) consensus; and e) precedent. These standards are classified as contingent because they are not utilized to resolve every conflict. Their influence is dependent upon the specific circumstances of the case.

The Hul'qumi'num legal tradition is “a living system, defined and modified by constant use.”<sup>136</sup> It is an intricate and complex system, built upon teachings and standards that are both universal and contingent, capable of transformation and development within the communities to which they apply. As such, there should be no questions as to whether or not the Hul'qumi'num Mustimuhw occupy a space within Canada's legal framework. The practices and legal standards shared in this chapter deserve recognition by and reconciliation with the Canadian state. However, reconciliation is a challenge. The Supreme Court of Canada has spoken of the importance of achieving reconciliation, but has given no firm guidance on how to achieve it.<sup>137</sup> Indigenous peoples across Canada have been sitting at negotiating tables for decades trying to work reconcile differences, but very few have been successful. I would argue that these avenues

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<sup>136</sup> Julie Steward, “Untying the Gordian Knot! *Murisa v. Murisa* S-41-92. A Little More Than a Case Note” (1992) 4 Legal Forum 13.

<sup>137</sup> See generally *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48.

have not been successful because they have not recognized nor utilized the dispute resolution processes and principles of the Indigenous people themselves. An understanding, similar to that developed over the course of this Chapter, can help to achieve reconciliation because it will ensure that cross-cultural dispute resolution processes include, and at the very least, are mindful of the manner in which disputes or conflicts are resolved within the Indigenous communities themselves.

## CHAPTER 7

### Conclusion: Achieving Recognition and Working towards Reconciliation

“I thank Florence for the prayer, for the guidance that we need for this very important meeting. I thank my good relatives, my cousins, my uncle, for everyone’s willingness to come, to share the goodwill and the disciplines of the old ways. I share with them that my niece has come a long way, has come a long way in the academic way, but is still seeking to move forward. Following in the disciplines of our ancestors, in the sacred disciplines and the sacred law; that is the purpose and intent why we are together. In the ancestral ways, the truth is very strict. So that is the purpose that we are gathered here to revisit and visit those sacred disciplines. For there is no separation of our ways and our holistic values ... So I thank all of our participants.”<sup>1</sup>

#### ***Hwi neem stum*** (‘‘You are called to witness’’)

*As I come to the conclusion of this research journey, I have struggled with many emotions. I worry that I have not done enough to advance the recognition of Coast Salish legal traditions, in particular, the Hul’qumi’num legal tradition. I recognize that my findings have only begun to scratch the surface of the principles, laws and practices that maintain this society. I worry that publishing this research may give outsiders an incomplete understanding of snuw’uyulh or our process of family law making. I am also concerned that this dissertation may subject this legal tradition to even greater pressure and criticism. However, I also recognize that it is time for this research journey to end and another to begin; perhaps a journey down one of the side roads that I encountered on this journey.*

*I draw comfort from the belief that we are all called to witness now. By articulating the legal history of the Hul’qumi’num people, we are all witnesses to their unjust treatment. We have an obligation to remember that history and speak to it when given the opportunity. By engaging in an analysis of snuw’uyulh and the dispute resolution processes of the Hul’qumi’num*

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<sup>1</sup> Interview of Willie Seymour (16 June 2010),

*people, those who read this research will have an opportunity to experience and engage with their vibrant legal tradition. It is a legal tradition that allows one to remember the past and focus on its present day applicability. It is a legal tradition that can help to shape and pattern laws throughout Canada, not just in the Coast Salish world. As witnesses of this legal tradition, we have the opportunity help foster its recognition within the Canadian state. This can be done in a variety of different ways, from engaging in discussions about the concepts developed in this research, to speaking about them in legal classrooms, to drawing on them in legal proceedings. As witnesses we have an obligation to the Hul'qumi'num Mustimuhw to be lawful individuals and honour their legal tradition and respect its differences.*

## **7.1 Introduction**

In the spirit of the previous section, I now return to my initial research question of what is the nature and characteristics of the Hul'qumi'num legal tradition. What are the fundamental categories of law that comprise this tradition? What are the sources of these laws? Finally, what are fundamental teachings or standards that emanate from these categories of law? While I have learned that there is indeed a vibrant and resilient legal tradition of the Hul'qumi'num Mustimuhw, my answers to my research questions have proven to be far more complex than I initially imagined.

I have come to understand that one cannot begin to understand the nature of Hul'qumi'num legal tradition without first acknowledging and understanding the relationship between culture and law. The Coast Salish people have a vibrant culture, influenced heavily by the nature of their relationships with their ancestors, their kin and their lands. These relationships permeate their legal tradition. Influencing not only regulatory aspects of law, but also dispute resolution processes. Trying to understand and appreciate this tradition outside of

this worldview would be detrimental to the tradition itself, as I believe it would result in a transformation of the laws and practices.

Furthermore, because I am a Hul'qumi'num practitioner of law, my own experiences, assumptions and biases have also influenced the outcome of this work. "My research is part of my life and my life is part of my research."<sup>2</sup> Although I have tried to account for this through my methodology and research practices, it is important to note that this work cannot be separated from me, as a Hul'qumi'num Mustimuhw. This was evident through many of my interviews when my Elders or leaders expressed to me that they were sharing their knowledge with me personally, and that I had a responsibility to disseminate it. It is also apparent by my use of personal experiences in order to demonstrate the application of the teachings and practices that comprise the Hul'qumi'num legal tradition. However, I have come to view this as a strength of this work because it reaffirms the notion that Indigenous legal traditions are flexible and capable of different interpretations. As such, I encourage readers to come to their own conclusions about the application of these categories of law or the practices that I have described in this research.

In this chapter, I will first briefly summarize my findings about the Hul'qumi'num legal tradition, focusing on the categories of law, *snuw'uyulh* and family laws, and their conflict resolution principles. Second, I will reflect on the relevance of this research. I will discuss its implications for both Hul'qumi'num Mustimuhw and non-Hul'qumi'num Mustimuhw. I will also discuss its implications for the Canadian legal system. Finally, I will discuss future research and application questions which flow from this dissertation.

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<sup>2</sup> Gloria Ladson-Billings, "Racialized Discourses & Ethnic Epistemologies" in NK Denzin & YS Lincoln, eds, *Handbook of Qualitative Research*, 2d ed. (Thousand Oaks, CA: Sage, 2000) 257 at 268.

## 7.2 Return to the Research

The overarching purpose of this research is to bring about a greater recognition and future reconciliation of the Hul'qumi'num legal tradition with the Canadian legal system. Indigenous peoples, like the Hul'qumi'num Mustimuhw, have developed systems to maintain and regulate their relations since time immemorial. My Elders continue to express that our *snuw'uyulh* exists and continues to govern our daily interactions with each other and the world around us. However, currently these traditions have an indeterminate status before certain Canadian institutions. As case law demonstrates, the right to govern according to one's own laws and legal traditions is grossly underdeveloped within Canada.<sup>3</sup>

Recognition by the Canadian state is not a prerequisite to the use and value of this tradition within the Hul'qumi'num world. However, the Hul'qumi'num Mustimuhw have had, and continue to have, an expectation that their laws will continue to operate and influence legal decisions within their communities despite colonization. This expectation can be traced through the legal history of the Hul'qumi'num Mustimuhw. This research has also demonstrated that the Hul'qumi'num legal tradition is a living tradition. It is resilient and capable of change. At times

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<sup>3</sup> See generally John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997/1998) 22:1 *American Indian Law Review* 37; John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia* (1999) 37 *Osgoode Hall LJ* 537; John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38 *UBCL Rev* 285; Larry Chartrand, "Re-conceptualizing Equality: A Place for Indigenous Political Identity" (2001) 19 *Windsor YB Access Just* 243; Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, *Delgamuukw* and *Haida Nation*" (2005) 23 *Windsor YB Access Just* 17; Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6 *Indigenous LJ* 13; James (Sákéj) Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 *Sask L Rev* 241; John H Hylton, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon: Purich, 1999); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2002); Kent McNeil, "Aboriginal Rights: Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government" (2003) 22 *Windsor YB Access Just* 329; Bradford Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (2003) 42 *RD McGill* 1011; Dan Russell, *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver: UBC Press, 2002); Kerry Wilkins, "... But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (Winter, 1999) 49 *Univ of Toronto LJ* 53; Kerry Wilkins, "Take Your Time and Do It Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy" (2000) 27 *Man LJ* 241.

these laws have been dominant, at other times they have been concurrent and most often they have been ignored by the Canadian state. The past 150 years, as demonstrated by Chapter 4, has resulted in numerous conflicts and disputes between the Hul'qumi'num Mustimuhw and the non-Indigenous settlers living within the territory. Although these conflicts have been challenging to the Hul'qumi'num communities, arguably there have been benefits associated with these struggles. For example, through these struggles the Hul'qumi'num communities have developed processes which draw on the strengths of the Canadian legal system. Rather than viewing this incorporation as a weakness of their tradition, the Hul'qumi'num Mustimuhw believe fostering relationships and sharing resources is a strength.

The first step towards reconciliation is recognition. I believe that this research will aid in the recognition of Hul'qumi'num laws, and Indigenous legal traditions more generally, because it seeks to describe the Hul'qumi'num legal tradition in a discernable fashion. In seeking to describe this tradition, I sought out to answer the questions of what are the fundamental categories of law that comprise the Hul'qumi'num legal tradition? What are the sources of these categories of law? Finally, what are the major teachings or standards that emanate from these categories of law?

In thinking about the relationship between law and culture, this research has identified two fundamental categories of law within the Hul'qumi'num legal tradition: 1) *snuw'uyulh* and 2) family laws. *Snuw'uyulh* refers to a condition generated by the application of seven teachings: 1) *Sts'lhnuts'amat* ("Kinship/Family"); 2) *Si'emstuhw* ("Respect"); 3) *Nu stl'i ch* ("Love"); 4) *Hw'uywulh* ("Sharing/Support"); 5) *Sh-tiiwun* ("Responsibility"); 6) *Thu'it* ("Trust"); and 7) *Mel'qt* ("Forgiveness"). Accordingly, universal teachings seek to foster harmony, peacefulness, solidarity and kinship between all living beings and nature in the world. In a sense, *snuw'uyulh*

is a state or condition and the Hul'qumi'num legal tradition encompasses all the animating norms, customs and traditions that produce or maintain that state. As a result, Hul'qumi'num law functions as the device that produces or maintains the state of *snuw'uyulh*. This notion of a legal tradition built on teachings is not exclusive to the Hul'qumi'num Mustimuhw; however, it perhaps differs from other Western legal traditions, because *snuw'uyulh* applies to all aspects of Hul'qumi'num culture. These teachings are not just legal concepts; many of them apply to spiritual and normative practices as well.

As demonstrated in Chapter 5, these teachings can be applied to modern day legal questions. However, it is important to note that policies of assimilation have also impacted the understanding associated with these teachings. In some instances, in an effort to protect the nature of the tradition, cultural editing has taken place. Accordingly, one must be aware of the role of critique in recognizing the Hul'qumi'num legal tradition. Critique is not something to be avoided in fostering the recognition of Indigenous legal traditions and their laws and practices. Critique and reflection breeds change. Arguably, legal reform always comes after a period of struggle between conflicting norms or recognition of shortcomings within the legal system itself. A legal tradition that shies away from change, because of concerns around concepts of tradition and authenticity, is not a legal tradition which will continue to have relevance for its people. Therefore, we must think about the Hul'qumi'num legal tradition in a manner which enables it to remain dynamic in the lives of the Hul'qumi'num Mustimuhw and useful in addressing their problems today.

Through my research, I have discovered that there is another fundamental category of law present within the Hul'qumi'num world – family laws. Family laws encompass the norms, customs and traditions, or customary laws, which produce or maintain the state of *snuw'uyulh*.

The recognition of this second fundamental category is important because it suggests that pluralism exists within the Hul'qumi'num legal tradition and provides a process by which these laws are capable of change when needed.

As stated in Chapter 6, law is a practice – an activity. Arguably, much of the practice of law takes places in the form of regulation and conflict and dispute resolution. Similar to how law cannot be separate from its surrounding culture, nor can the processes developed to resolve conflicts in the law. “Conflict is a feature of all human societies, and potentially an aspect of all social relationships.”<sup>4</sup> Because conflicts arise in human relationships, cultures are embedded in every conflict.

Since time immemorial the Hul'qumi'num Mustimuhw have utilized processes and practices to resolve conflicts and disputes both within their communities and with other communities in the Coast Salish world. Although the processes and practices have varied over time, it is possible to identify several inherent standards of conflict resolution which the Hul'qumi'num people continue to utilize in resolving their disputes. These standards are: a) kinship; b) restoring balance or restitution; c) spirituality and d) respect. Laws and processes designed to manage conflict draw from these principles and work together to try and resolve a just resolution of the problem. There are also several contingent legal standards that the Hul'qumi'num people draw on to resolve disputes in their communities and with outsiders. These contingent standards are: a) avoidance; b) socio-class considerations; c) words; d) consensus; and e) precedent. These standards are classified as contingent because they are not utilized to resolve every conflict. Their influence is dependent upon the specific circumstances of the case.

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<sup>4</sup> Kevin Avruch, “Cross-Cultural Conflict,” online: Encyclopedia of Life Support Systems (EOLSS) <<http://www.eolss.net/ebooks/Sample%20Chapters/C14/E1-40-01-01.pdf>> at 1.

The Hul'qumi'num legal tradition is a complex and vibrant legal system. It has been subjected to many outside pressures over the past 150 years, but it has survived and continues to operate within the Coast Salish world today. As this research has demonstrated, although these teachings, standards, laws and practices may draw on past stories and practices, there is a way of thinking about them so that they remain dynamic and useful to both the Hul'qumi'num Mustimuhw and other Canadian communities today. This next section will speak to their relevance.

### **7.3 Research Relevance**

As evidenced throughout this dissertation, the relevance of this research has weighed heavily on my mind throughout this entire learning journey. I have pondered the significance of this research, not only personally, but also for my community, the Coast Salish people and Canadians in general. In reflecting on this question, I have come to conclude that this research is relevant in three major ways: 1) a legal resource; 2) a basis for dialogue and 3) a tool for self-determination.

#### **a. A Legal Resource**

This research is relevant because it serves as a resource of the Hul'qumi'num legal tradition. As noted in Chapters 2 and 3, the Coast Salish people adhere to an oral tradition. As such, it is difficult for non-Hul'qumi'num people to gain access to their laws, customs and practices. It is even more difficult for them to comprehend the legal significance of these laws, customs and practices, given that they are thinking about them and trying to apply them outside of the Hul'qumi'num world view. This research provides a starting point for individuals who desire to learn more about the Hul'qumi'num legal tradition.

The idea that Indigenous legal traditions form a part of the Canadian legal system is not a novel idea. As described in Chapters 1 and 3, many Indigenous legal scholars are arguing for their inclusion within Canada's pluralist system: the common law, the civil law and Indigenous law. In order to help foster this recognition, Indigenous legal traditions are being taught in law classrooms across the country, described and discussed at conferences and written about and published in journals and manuscripts all over the world. However, one of the challenges in this work is that there is not a lot written about these Indigenous legal traditions. I believe that this research aids in this overarching research agenda by disseminating this knowledge which is normally held within my community to the community at large.

This research is also a resource for the Hul'qumi'num Mustimuhw themselves. As noted in Chapter 5, the application of laws is individualistic in nature within this legal tradition and accordingly, sometimes will vary between families. Because of the writing method used in this dissertation, individuals can reflect on the stories, practices and traditions shared and come to their own conclusions or legal determinations. They may also reflect on my own understanding to help them in deepening their own conclusions about legal questions.

Furthermore, these communities are currently engaged in the British Columbia Treaty Process. As part of that process, they are negotiating for law making powers. But questions still remain about what their laws will look like in a post-treaty world. Why are the provincial and federal laws not enough for these communities? What are the differences between Hul'qumi'num laws and provincial or federal laws? Is it important to have law making authority for every negotiable head of power? This work has helped the Hul'qumi'num negotiators think about these questions in a more concrete manner. More specifically, it has helped the Hul'qumi'num Mustimuhw, Elders and leaders determine which Canadian laws may already

work to achieve *snuw'uyulh* and which laws need to be altered in order to more accurately reflect the Hul'qumi'num teachings and legal standards.

The principles articulated in Chapters 5 and 6 are teachings and standards that can be applied to a variety of legal questions. These principles are not limited to Hul'qumi'num regulatory concerns or conflict resolution processes. Every legal system contains beneficial elements that can be utilized by other legal systems. The opportunity is always available for the individuals to learn from each other and this research was carried out with that overarching goal in mind. That being said, I feel it is still important to stress the relationship between law and culture. As discussed in Chapters 3 and 5, the Coast Salish culture has profoundly influenced the legal tradition of the Hul'qumi'num Mustimuhw. Accordingly, I am not suggesting that these concepts will have relevance or utility in every legal system. I am merely suggesting that just as the Hul'qumi'num legal tradition as adapted over time and drawn from surrounding legal systems, it may be that other legal systems will do likewise.

Finally, as discussed in Chapters 5 and 6, this research is not to be viewed as a static compendium of Hul'qumi'num law. I acknowledge that much more needs to be said about Hul'qumi'num law. Also, I acknowledge this is a living legal tradition. As demonstrated in Chapter 4 and discussed in Chapters 5 and 6, the Hul'qumi'num legal tradition has already undergone significant changes due to both internal and external pressures. The ability to adapt and survive, despite these challenges, illustrates the strength of this legal tradition.

#### **b. Basis for Dialogue**

One of the major purposes of this research is to bring about a greater recognition of the Hul'qumi'num legal tradition. I acknowledge that simply writing about the laws and practices of these communities may not result in this recognition. However, this research could be the

starting point for a dialogical process which would engage Hul'qumi'num and Hul'qumi'num Mustimuhw; Hul'qumi'num and other Coast Salish people, Hul'qumi'num and Indigenous people and Hul'qumi'num and non-Indigenous people.

Not everyone has to adhere to the legal teachings, standards and practices which I describe in this research. However, it is hoped that those who learn about this legal tradition will have the desire to engage in a discussion about this system. I hope that they will give Hul'qumi'num people an opportunity to address their questions and concerns. I hope they will see some commonalities between legal traditions and strengthen their relationships based on these common understandings. It is also anticipated that individuals will have the opportunity to engage in lively discussions about the differences between legal traditions or systems of law. This dialogical practice will only serve to strengthen the Hul'qumi'num legal tradition and further its recognition outside of the Coast Salish world.

To this end I view this research as both resistance and activism. It is resistance because it is resisting the idea that Indigenous legal traditions do not form part of the Canadian legal system. It is resisting the stereotypes around these legal traditions that they are somehow unintelligible or inaccessible or "frozen". It is resisting the idea that they are only of relevance to the Indigenous peoples themselves. It is resisting the notion that they are really social norms or mores, and not really "laws". Finally, it is resisting the idea that they don't deserve the same recognition and respect as other laws taught in law schools all across the world. This research is activism because it transformative research. Chapter 2 seeks to transform not only what we think of as law, but also the way law is studied and taught. Many universities and other educational institutions state in their mission statements or in their institutional goals that the education of Indigenous peoples is a priority. In the past these priorities have been neo-colonial. Indigenous

peoples could access what was available, but they were not invited to change the existing knowledge base. This research seeks to change the existing knowledge base by adding to the discussion on legal traditions an understanding of the Hul'qumi'num legal tradition.

**c. Tool for Self-determination**

As explained in Chapters 1 and 2, this research was community-based, meaning not only was it conducted in my community, but the research question itself emanated from my community. As you recall, the Hul'qumi'num communities are currently engaged in the B.C. Treaty Process, and have been since 1994. After 20 years, they have seen little progress at the treaty table in regards to their discussions on governance.

Whether or not the Hul'qumi'num communities will be able to come to a final agreement remains yet to be seen. As noted in Chapter 1, one community, Stz'uminus First Nation, has already decided to pull out of the B.C. Treaty Process and pursue other models of self-governance. Regardless of whether the Hul'qumi'num communities negotiate an agreement through treaty, they are still committed to achieving their overarching goal of self-determination. This work, therefore, will have relevance to this goal whether or not it is achieved through negotiated agreement or through an incremental approach.

This research has already proven useful to the Hul'qumi'num communities on their road to self-determination. This research was used in a project designed to help the then six Hul'qumi'num communities determine what they wanted their governance structure to look like, i.e. six separate governing structures, six separate governing structures with a central body, one central governing structure etc. In determining how to structure their relationships with each and between their community members, the Elders and leaders drew on the teachings of *snuw'uyulh* and the standards articulated in Chapter 6 for managing relationships. Grounding their decision

in a concrete understanding of their laws helped them to foster agreement between the six communities and helped them garner support from their community members. Furthermore, in revising community policies, many Hul'qumi'num communities are working to ensure that they are culturally appropriate and reflect Hul'qumi'num laws and practices. As such, they are drawing upon the teachings of *snuw'uyulh* and the Hul'qumi'num standards for dispute resolution and incorporating them into the language of their policies and processes. In doing so, they are signalling to their membership that they intend to govern according to the Hul'qumi'num legal tradition. Finally, this research is currently being used to draft nation-based child and family wellness legislation. This project is not being funded by either the provincial or federal government, and as such, the Hul'qumi'num community is taking the opportunity to exercise its inherent right of self-determination through this drafting process. Although aspects of provincial laws and standards may be incorporated, the decision to incorporate those standards only comes after determining whether or not they are in conflict with the Hul'qumi'num laws and practices relating to child welfare and families. As such, this research is already starting to have relevance to the communities which it derived from.

#### **7.4 Application: Where do we go from here?**

As previously discussed, in Canada and elsewhere, the concept of parallel systems of law in coexistence within one geographical framework has been best described as legal pluralism – which allows for the situation of several systems operating in unison with accepted rules as to how to settle the inevitable conflicts that arise. However, as articulated in Chapter 1, the Hul'qumi'num legal tradition has yet to be recognized by the Canadian state as one of those systems of law operating in co-existence and on equal footing with the common law and the civil law. Even when some recognition of customary law was granted, it was almost always

circumvented with reservations, and certainly almost always placed in a subordinate position to the dominant state law.<sup>5</sup> However, a true pluralism would recognize Indigenous law (or Hul'qumi'num law) as an integral and important part of the Canadian legal framework.

Part of the problem lies in the fact that some Indigenous customs or practices are *prima facie* incompatible with some of the basic rights enshrined in constitutions or elaborated in theorizing about the rule of law and human rights in general. For example, consider the case of David Thomas, illustrated in the previous Chapter. In finding that Mr. Thomas' Charter rights could not be violated by the collective Aboriginal right of the Band members, the court stated:

Placing the aboriginal right at its highest level it does not include civil immunity for coercion, force, assault, unlawful confinement, or any other unlawful tortuous conduct on the part of the defendants, in forcing the plaintiff to participate in their tradition. While the plaintiff may have special rights and status in Canada as an Indian, the "original" rights and freedoms he enjoys can be no less than those enjoyed by fellow citizens, Indian and non-Indian alike. He lives in a free society and his rights are inviolable. He is free to believe in, and to practise, any religion or tradition, if he chooses to do so. He cannot be coerced or forced to participate in one by any group purporting to exercise their collective rights in doing so. His freedoms and rights are not subject to the collective rights of the aboriginal nation to which he belongs.<sup>6</sup>

As this situation demonstrates, Indigenous laws and legal traditions often touch on the most sensitive subjects of those legislators, policy-makers, and judges – who have to determine whether or not to allow legitimacy to laws, customs and traditions that might run counter to the overall norms of the society at large.

As discussed throughout this dissertation, interpretation of constitutional and legal rules often depends on the overall social context in which decisions are made, or the specific ideologies of the decision-maker, i.e. their cultural context. These contextual and ideological

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<sup>5</sup> See generally Leon Sheleff, "Chapter 7: Between Recognition and Repugnancy" in Leon Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London: Frank Cass, 1999).

<sup>6</sup> *Thomas v Norris*, [1992] 2 CNLR 139.

preferences are never more pronounced than when differing values systems are in contact and in conflict. Since law does not always succeed in achieving a minimum degree of conformity, sooner or later, conflict of one sort or another becomes likely. It is at that point of conflict that the true values of a society will often be tested; on the one hand, the strength and rationale of its overall norms and on the other hand, its commitment to pluralism. Arguably, in the past, the former issue was of major concern, today, the latter consideration is becoming of major importance.

Sovereignty is perhaps the key factor at issue between some of the Indigenous communities of the world, such as the Hul'qumi'num people, and the states in which they live. Recent years have seen an increasing awareness of past injustices, and present needs and demands of Indigenous groups have focused on redefining the meaning of sovereign power.<sup>7</sup> It has become apparent that however much the political leaders of the modern states may wish to minimize the past of these Indigenous peoples, their legal traditions live on. As demonstrated in Chapters 5 and 6, they impinge on state life not just in terms of the larger struggle for self-governance, but in all aspects of a Hul'qumi'num person's life – from the raising of a child, to the agreements he makes with others to the obligations concerning how to care for their dead ancestors. The question then revolves around whether or not the state is willing to divest itself of some of its internal sovereignty.

As I hope the preceding chapters of this dissertation have demonstrated, there should be no question as to whether or not Indigenous people, such as the Hul'qumi'num Mustimuhw, occupy a prominent place within Canada's pluralistic legal tradition. The Hul'qumi'num legal tradition is an intricate and complex system, built upon both inherent and contingent principles,

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<sup>7</sup> See generally Leon Sheleff, "Chapter 4: "Whither the State" in Leon Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London: Frank Cass, 1999).

capable of transformation and development within the communities to which they apply.

Although there may be aspects of the legal tradition which sit uncomfortably with some academics, judges and politicians of the Canadian state, this cultural difference is not enough to deny these legal traditions their rightful place within the Canadian legal order.

The issue then becomes establishing the proper intercultural dispute resolution process so as to enable a cross-cultural dialogue to occur. This view is best articulated as follows:

The balance ... requires giving each cultural tradition an opportunity to contribute in the standard formulation process without allowing any tradition to dictate to the others. The balance also requires recognition of the ethical standards and substantive norms of the cultural tradition while rejecting or disallowing archaic and oppressive norms. To avoid even the appearance of dictation by outsiders, which is likely only to be counterproductive, the classification of certain cultural (legal or religious) norms, as archaic and oppressive, must be done by the members of that cultural or religious group themselves.<sup>8</sup>

Chapter 5 has described some of the fundamental principles regarding conflict resolution in the Hul'qumi'num legal tradition. These principles should be reflected in any intercultural dispute resolution process designed to deal with conflicts that could occur within Canada's pluralistic legal order. Arguably, the Hul'qumi'num treaty process is floundering because the process fails to take into account Hul'qumi'num legal principles regarding conflict resolution. Accordingly, I believe that future research is required on how to utilize Hul'qumi'num dispute resolution principles to develop an inter-cultural dispute resolution process to help reconcile the Coast Salish and non-Coast Salish legal traditions in Canada. In order to do so, more research will have to be conducted; specifically, research focusing on disputes and dispute resolution processes between Coast Salish communities and between Coast Salish communities and non-Coast Salish communities.

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<sup>8</sup> Abdullahi An-Na'im, "The Rights of Women and International Law in the Muslim Context," (1987) 9 Whittier L Rev 491, 501 at 515 as cited in KY Schooley, "Cultural Sovereignty, Islam and Human Rights – Towards A Communitarian Revision," (1994) 25 Cumb L Rev 651 at 687.

## 7.5 Conclusion

As previously stated, this research encompasses only a small part of the work being done across Canada and world to recognize the existence and relevance of Indigenous legal traditions in our legal systems today. It builds on the work of previous scholars and contributes to the dialogue surrounding the importance and challenges of this recognition. Furthermore, it contributes to one's overall understanding of law because it provides an alternative understanding of the purpose of law, the sources of law and the processes of law.

As similar research is conducted, it becomes harder for one to ignore the presence of these Indigenous legal traditions and discount their relevance. I believe that recognition is the easier task associated with the twofold purposes of my research – recognition and reconciliation. We now have to turn our minds towards how we can reconcile these differing and sometimes conflicting legal traditions within the Canadian legal system. It has never been my intent to suggest that this will be an easy task, nor that the answer lies completely within the Indigenous legal traditions themselves. Rather, I believe that a cross-cultural dialogue will have to be developed. One that draws on both legal traditions and works to foster a respectful understanding between all parties involved.

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## Appendix A

### PRIMARY INTERVIEWEES

#### November 2009 – March 2011

##### **Charlie, Arvid (*Luschiim*)**

Arvid Charlie is a traditional speaker for the longhouse. He is a culture leader, with extensive knowledge of family histories, community histories, ethnobotany, toponymy, and culturally significant places. His linguistic skill in *Hul'q'uni'num* has contributed substantially to the language revitalization efforts of the community. For many terms, he stood as an elected councillor for Cowichan Tribes, and is an active staff member in its natural and heritage resource management work. The son of Simon Charlie, Arvid was born in 1942.

##### **Edwards, Roy (*Si'emtuletsu*)**

Roy is a soft-spoken elder from the Penelakut community, who currently resides in his late wife Christine's community in Kulleet Bay. Active in the cultural activities in the summer and winter, Roy's skills as a speaker and mastery of *Hul'q'umi'num* is often called upon in cultural matters. He is an accomplished and much sought-after designer and builder of Salish racing canoes. Roy was born in 1932.

##### **James, Florence (*Thiyaas*)**

Florence is an exceptional, energetic woman, having extensive knowledge in the *Hul'q'umi'num* language, culture, history, geography, and ethnobotany. Florence is active in language revitalization efforts, and has taught *Hul'q'umi'num* in several schools, and acted in the capacity of translator in parts of this study. Florence is a member of the Penelakut community. Florence was born in 1947.

##### **Modeste, Ernest Wesley (Wes) (*Qwustenuxun*)**

Wes Modeste was a Cowichan Tribes elder, former chief and Cowichan school board trustee. He served as a councillor for several terms throughout the 1970s and 1990s, and was involved in treaty talks, economic development and land governance. He has knowledge in his people's oral traditions and was known as a "champion" of the Cowichan culture. He was born in 1939 and died in 2011.

##### **Morales, Robert (*Tl'ul' thut*) - Father**

Robert Morales is a member of Cowichan Tribes. He has served as the Hul'qumi'num Treaty Group (HTG) Chief Negotiator since 2000. He has also served as immediate past Chair for the First Nations Summit Chief Negotiators roundtable which is composed of 47 First Nations treaty group negotiating tables. He has been a lead participant in the establishment and spokesperson of the Common Table for the BC Treaty Negotiation Process. A graduate of the University of

Victoria Law School in British Columbia, Robert maintained a private law practice for over 14 years specializing in the areas of First Nations rights, criminal law, family law, and child protection. He was born in 1952.

**Norris, Joe**

Joe Norris is a widely respected political leader in the Coast Salish World. He speaks about being raised to be a leader since the time he was five years old and he is very knowledgeable about the structure of traditional governance in his community. He served as chief of the Halalt First Nation for many years.

**Seymour, Willie (*Qwulhutstun*)**

Willie Seymour is a widely recognized longhouse speaker, whose skills, connections and experiences are frequently drawn on by the local and national Aboriginal political leadership. He is knowledgeable in cultural teachings, related to the bighouse, and to hereditary ritual practices. Willie was born in 1949.

**Smith, Angus (*Shhwuw wul't'hw*) – Great Uncle**

Angus Smith was a knowledgeable elder with many teachings and history of the Cowichan people. He was a master casket builder and was a ritual specialist who dealt with the recently deceased and found ancient human remains. Angus was born in 1919 and died in 2009.

**SECONDARY INTERVIEWEES**

**December 2009 – March 2010**

**Caro, Joey (*Sii'meylutun*)**

Joey is a Penelakut Tribes member. He was born in 1951.

**Charlie, Arvid (*Luschiim*)**

Arvid is a Cowichan Tribes member. He was born in 1942.

**Charlie, Wayne (*Pul xulstse*)**

Wayne is a Cowichan Tribes member, from the village of Quamichan. He was born in 1954.

**Elliott, John**

John is the Chief of Stz'uminus (Chemainus First Nation). He was born in 1966.

**Elliott, Roger**

Roger is a Stz'uminus (Chemainus First Nation) member.

**Harris, Chad (*Qwustenuxun*)**

Chad is a Stz'uminus (Chemainus First Nation) member.

**Harris, George (*Hwulqeletse'*) – Uncle**

George is a Stz'uminus (Chemainus First Nation) member. George was born in 1945.

**Harris, Ray (*Shulqwilum*)**

Ray is a Stz'uminus (Chemainus First Nation) member. Ray was born in 1947.

**Harris, Sylvia (*Qutsumaat*) – Aunt**

Sylvia is a Stz'uminus (Chemainus First Nation) member. Sylvia was born in 1947.

**James, Florence (*Thiyaas*)**

Florence is a Penelakut Tribes member. She was born in 1947.

**Joe, Edward**

Edward is a Cowichan Tribes member. He was born in 1969.

**Joe, Martina (*Sulsulmunaat*)**

Martina is a Cowichan Tribes member. She was born in 1981.

**Kulchyski, Tim (*Q'utxu-lenuhw*)**

Tim is a Cowichan Tribes member. He was born in 1973.

**Modeste, Ernest Wesley (Wes) (*Qwustenuxun*)**

Wes is a Cowichan Tribes member. He was born in 1939 and died in 2011.

**Norris, Frank (*Yustelets'e*) – Uncle**

Frank is a Halalt band member. Frank was born in 1940.

**Norris, Joseph (Joe) – Uncle**

Joe is a Halalt band member.

**Seymour, William Charles (Chuck) (*Ts'ules*)**

Chuck is a Cowichan Tribes member. He was born in 1973.

**Sylvester, August (*Thy-xey iem*)**

August is a member of Penelakut Tribes. He was born in 1945.

**Sylvester, Laura (*Quay al si aht*)**

Laura is a member of Penelakut Tribes. She was born in 1940.

**Thomas, Richard (Rick) (*Puhuluqtun*)**

Richard Thomas is a hereditary Chief of the Lyackson First Nation. Rick was born in 1952.

## Appendix B

### IAHRC AFFIDAVIT QUESTIONS Hul'qumi'num Treaty Group

**Start by explaining the IAHRC petition, i.e. the process and what we are trying to prove. Explain to them the type of narrative we are seeking.**

I know (sacred sites/bathing sites/ancestral sites/fishing/hunting/gathering/harvesting shellfish etc.) are important. We are trying to understand how private land, urbanization, industrial forestry, and so on, have affected, changed or even disrupted our people's cultural practices in these places, particularly those close to home (inside the traditional territory). Can you please share with us your experiences of this for (a) sacred sites; (b) bathing sites; (c) ancestral places; (d) harvesting places (hunting, gathering medicines, gathering food or wood, fishing on the river, foreshore areas, saltwater fishing).

#### Personal Information

1. What is your name?
2. Do you have a Hul'qumi'num name?
3. What is your date of birth?

**The following more specific questions can be utilized to help prompt the discussions on specific subject matters (the sections focused on will depend on the expertise of the interviewee):**

#### Sacred Lands

1. Many of the lands within our traditional territory are considered sacred by Hul'qumi'num people. For example, there are many sacred burial sites within the territory. How did you come to know about these sacred sites and areas? Who told you of their importance? What stories to you remember being told about these sacred lands and by whom?
2. Are these areas outside of the Hul'qumi'num reserves?
3. How are these sacred lands being affected by private lands, i.e. access and development?
4. How does the destruction of our sacred lands/burial sites affect our culture? What kinds of problems do you encounter doing your work when this occurs?

#### Bathing

1. Bathing is an important cultural practice. How did you come to know about the cultural practice of bathing? Who told you about its importance? What stories to you remember being told about bathing and by whom? Is it easy for you to practice bathing, i.e. are there a lot of places where you can go to bathe?
2. What is the effect of private lands on these bathing sites, i.e. access, privacy, pollution, site destruction etc.?
3. How does being unable to practice bathing affect our culture?

#### Ancestral Connections to Place

1. There are many places within our traditional territory that help connect us to our ancestors; for example, Mt. Prevost is a place where one of our First Ancestors first appeared. How did you come to know about these types of places? Who told you about its importance? What stories do you remember being told about these places and by whom?
2. Are these areas currently protected from development and other types of destructive activities?
3. What effect is private land having on these areas, i.e. access and destruction?
4. Why is it important for these areas to be protected?

### Fishing

1. Do you fish? Who taught you how to fish? What fishing techniques are unique to the Hul'qumi'num people and how do their fishing practices differ from non-Hul'qumi'num fishing practices?
2. What are some uses of fish for food, social and ceremonial reasons?
3. Who taught you about the different uses for fish?
4. Do you get adequate amounts of fish to meet all these different needs?
5. Is it easy for you to fish within your traditional territory? Do you remember a time when it was easier for you to fish within your territory?
6. How do you know where you can fish? Are there any boundaries that limit the fishing areas?
7. Are there any other restrictions on where you can fish?
8. What is the effect of private land on your ability to fish, i.e. access and development?
9. How does being unable to fish affect you as a Hul'qumi'num person?
10. How does being unable to fish affect the health of you and your family, i.e. nutrition, diabetes etc.?

### Hunting

1. Do you hunt? Who taught you how to hunt?
2. What do you use the meat for?
3. Do you use any other parts of the animals you hunt? What do you use it for, i.e. bighouse, dancer's regalia
4. How do you know where you can hunt? Are there any traditional boundaries that limit the hunting areas? Who taught you about these traditional boundaries?
5. Is it easy for you to hunt within your traditional territory? Do you remember a time when it was easier for you to hunt within your territory?
6. Are there any restrictions on where you can hunt? Whose restrictions are these; governments or customary law?
7. What is the effect of the private land on your ability to hunt, i.e. access and development
8. How does being unable to hunt affect your culture, i.e. access to cultural items such as deer hooves, feathers, skin??
9. How does being unable to hunt affect the health of you and your family, i.e. nutrition, diabetes etc.?

### Gathering of Plants

1. Do you gather plants? Who taught you about the traditional uses of plants?

2. Why do you gather plants, i.e. medicinal uses, mat etc.?
3. Is it easy for you to gather plants within your traditional territory? Do you remember a time when it was easier for you to gather plants within your territory?
4. How do you know where you can gather plants? Are there any boundaries that limit the gathering areas?
5. Are there any other types of restrictions on where you can gather plants?
6. What is the effect of the private land on your ability to gather plants i.e. access and development?
7. How does being unable to gather plants affect you as a Hul'qumi'num person?
8. How does being unable to gather plants affect the health of you and your family?

#### Harvesting of Shellfish

1. Do you harvest shellfish? Who taught you how to harvest shellfish?
2. What do you use the harvested shellfish for?
3. Is it easy for you to harvest shellfish within your traditional territory? Do you remember a time when it was easier for you to harvest shellfish in the territory?
4. How do you know where you can harvest shellfish? Are there any boundaries that limit the harvesting areas?
5. Are there any other restrictions on where you can harvest shellfish?
6. What is the effect of the private land especially foreshore on your ability to gather shellfish i.e. access and development, contamination?
7. How much money do you make by digging? How much of that money is taken for the right to participate in the controlled dig?
8. How does being unable to harvest shellfish affect you as a Hul'qumi'num person?
9. How does being unable to harvest shellfish affect the health of you and your family?

#### Harvesting Wood

1. Do you harvest wood? Who taught you how to harvest wood?
2. What are some uses traditional and modern uses that you would have for wood, ex. bark for cultural uses, heat for home, bighouse?
3. Is the wood you have access to suitable for your uses, i.e. bighouse, canoe building?
4. Is it easy for you to harvest wood within your traditional territory? Do you remember a time when it was easier for you to harvest wood in the territory?
5. Are there any restrictions on where you can harvest wood?
6. How do you know where you can harvest wood? Are there any boundaries that limit the harvesting areas?
7. Are there any other restrictions on where you can harvest wood?
8. What is the effect of the private land on your ability to gather wood i.e. access and development?
9. How does being unable to harvest wood affect the culture of the Hul'qumi'num people?

#### Personal Information

1. Where were you born?
2. Where do you live?
3. Are you married?
4. How long have lived in [XXX]?

5. Where were your parents/grandparents born? Is that far from here?
6. What language do you mainly speak? Do you speak any other languages?
7. What is your occupation?

## Appendix C

**COAST SALISH LEGAL TRADITIONS – A DISCUSSION**  
**Hosted by Sarah Morales (for PhD research)**

**Date: Wednesday, June 16, 2010**

**Time: 9:00 am – 12:00 pm**

**Location: Stz'uminus First Nation Boardroom**

### **INVITEES**

- Arvid Charlie
- Roy Edwards
- Florence James
- Wes Modeste
- Joe Norris
- Willie Seymour
- Laura Sylvester
- Auggie Sylvester
  
- Joey Caro
- Robert Morales

### **BACKGROUND OF MY RESEARCH**

Long before Europeans arrived in our territory, Hul'qumi'num peoples developed social, political and spiritual customs to guide their interactions and relations. These customs developed into a system of laws. Many of our people are still guided by these laws and use them today to govern their relationships with each other, the environment and other First Nations communities.

After Europeans arrived in our territory, another system of laws was introduced to our communities. That system of law has attempted to take over how we govern our relationships with each other, our environment and other First Nations. Although Hul'qumi'num peoples were the earliest practitioners of law within our territory, our laws have often been ignored or overruled by these non-Hul'qumi'num laws.

This failure to recognize Hul'qumi'num laws has led to a situation where there hasn't been a lot written about our laws – historically and contemporarily. My thesis aims to change

this fact. Coast Salish law is a living legal tradition that has great relevance in my life, and in the lives of many people in my territory.

The point of my thesis is to show how Hul'qumi'num laws continue to function within our communities and examine how both legal traditions can exist in harmony within my traditional territory. The end goal of this research is to work towards the recognition of Hul'qumi'num laws within the Canadian legal system. I think that this can only be accomplished by using Coast Salish ways of resolving conflict.

### **PURPOSE OF TODAY'S GATHERING**

Although I know that this project will take years, I would like to begin by talking about the idea of conflict. Conflict as it relates to Hul'qumi'num people, our territory and other First Nations.

Conflicts exist when there is disagreement that must be resolved. At its most basic level, I feel that law is about problem-solving and resolving disagreements. As we have seen, when everything is acting in harmony, there are no problems. However, when conflicts begin to arise, then we begin to see problems in our communities.

I want to learn what our teachings say about how we should resolve problems? What do they say about how we should treat each other when we disagree? What are the steps we should go through to make sure that we handle our problems in a way that respects these teachings?

### **EXAMPLES OF CONFLICTS**

Here are some examples of disagreements or conflicts that could occur:

#### **Community**

- An individual wants to leave his land to his relative after he passes away. However, the receiver of the land is not from the same community as the land owner. Relatives of the land owner disagree with his decision. **How should this problem get resolved? How do our teachings help us work through this problem?**

- An individual wants to give her name to her niece. However, the niece is not related by blood, to the family where the name comes from. Is she still allowed to receive the name? What happens if people object? **How should this problem get resolved? How do our teachings help us work through this problem?**
- A certain group of young people are causing problems within the community. They have been acting out and engaging in harmful activities. Recently they have physically harmed other young people in the community. **How should this problem get resolved? How do our teachings help us work through this problem?**

#### **Environment**

- Individuals have been fishing down the river and have been leaving some of their catch behind to rot. **How should this problem get resolved? How do our teachings help us work through this problem?**

#### **Other First Nations**

- Saanich people have been coming into the Hul'qumi'num territory. They say that they have a right to hunt here under their treaty and that they do not need our permission to hunt here. **How should this problem get resolved? How do our teachings help us work through this problem?**