

WSÁNEĆ Law and the Fuel Spill  
at Goldstream

by

Robert Justin Clifford  
J.D., University of Victoria, 2011

A Thesis Submitted in Partial Fulfillment  
of the Requirements for the Degree of

MASTER OF LAWS

in the Faculty of Law

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## **Supervisory Committee**

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### **Supervisory Committee**

John Borrows, Faculty of Law  
**Co-Supervisor**

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## Abstract

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This thesis examines a fuel spill at Goldstream River, on Coast and Straights Salish People's territory, on southern Vancouver Island in British Columbia. Goldstream is an important salmon spawning and fishing location for the WSÁNEĆ (Saanich) people. In this thesis I step beyond the confines of the common law and its associated narratives and examine the fuel spill through the lens of WSÁNEĆ culture and legal order. In doing so I seek to open nascent possibilities and understandings relating to the fuel spill, its associated harms, and the implications this has for a legal response. My approach is rooted in the field of Indigenous law. In contributing broadly to the revitalization and resurgence of Indigenous law, including its theoretical and methodological aspects, I strengthen my claim that WSÁNEĆ law offers an important legal response to the Goldstream spill. My approach, however, extends beyond the field of Indigenous law. It also draws insights from the fields of postcolonial theory and resurgence theory. Postcolonial theory aids in understanding the processes and power structures that silence and subordinate Indigenous systems of law. The effective revitalization of Indigenous law draws from these understandings. My emphasis, however, does not rest squarely on critique. I argue that colonial power structures are best mitigated and subverted by applying Indigenous narratives, including Indigenous systems of law. I draw on resurgence theory to highlight the empowering effects of strengthening Indigenous

narratives and for transforming relationships between Indigenous peoples and the Canadian state. In applying this theoretical framework I argue that WSÁNEĆ law provides an alternative lens through which to address the Goldstream spill. Through attention to WSÁNEĆ stories and the SENĆOFEN language (the language of the WSÁNEĆ people) I open a narrative of WSÁNEĆ law that provides a distinct normative framework regarding our responsibilities to one another and to the Earth. The benefits of such an approach are far reaching in scope. They reconceptualise foundational assumptions relating to the nature of the harm, as well as the notion jurisdiction. My narrative moves from *thinking and acting with authority over* the environment, to having *mutual responsibilities in relation to* ecology. The scope and contributions of Indigenous law should not be overlooked. To do so is to limit the potential for Indigenous/non-Indigenous reconciliation, as well as the healthy functioning of Indigenous legal orders.

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HÍ,SẂKE SIEM

## **Dedication**

This is for my late grandpa, YELKÁTFE. With honour I carry your name.

## CHAPTER ONE: NES ĆSE LÁ,ES (Myself, Where I'm From) - An Introduction

My name is Robert Clifford. I am WSÁNEĆ (Saanich) from the Tsawout First Nation. The WSÁNEĆ are a Salish peoples. My traditional name is YELKÁTTE, which I received from my late maternal grandfather. I also carry the name Capilano, after Chief Capilano, which I received from my maternal grandmother's Squamish heritage. On my father's side, I have primarily English/Scottish ancestry. I grew up off-reserve but have always lived near Tsawout, spending a great deal of time there with my extended family. While I do not speak SENĆOFEN, the language of the WSÁNEĆ people, I have begun efforts to start understanding the language and attempt to use SENĆOFEN (and the concepts rooted in SENĆOFEN) in my work.

The Tsawout First Nation is one of four bands that comprise the WSÁNEĆ Nation. The WSÁNEĆ rely heavily on marine resources, which are integral to WSÁNEĆ way of life. Salmon are of particular importance to the WSÁNEĆ culture. During ĆENQOLEW (the moon during which the dog salmon return to the earth) the WSÁNEĆ people fish QOLEW (the dog or chum salmon). This is done at SELEKTEL, which is known as Goldstream River. The salmon harvested at Goldstream are dried or smoked and stored away. Goldstream is thus an important location for the WSÁNEĆ people.

As a young boy I grew up fishing on the ocean and in the river. I can still recall the first time I went to Goldstream to watch my uncle and older cousin gaff salmon (one of our traditional fishing techniques). While too young to fish myself, it is a time I will never forget. Not many years later that same uncle taught my younger cousin and I how



to gaff salmon. Since then my cousin and I have gone almost every year in the fall, during ĆENQOLEW, to gaff and smoke salmon to store for the remainder of the year. Once my cousin and I would return to Tsawout with the salmon, my grandma, grandpa, great-grandma, uncles, aunts, and the rest of the family would gather outside to clean the fish and hang them in the smoker. This same fish would be distributed among the extended family and later find its spot on the table at all our large gatherings. In short, Goldstream will always be tied to my family and to part of who I am personally, and as a WSÁNEĆ person.

Not surprisingly, I was troubled to hear of a fuel spill that occurred at this location. On April 16, 2011, a Columbia Fuels truck crashed on the Malahat highway spilling 42,000 L of gasoline and 600 L of diesel. The contents of the spill flowed through a culvert and into Goldstream River, as well as through the river into the estuary and Saanich Inlet.<sup>1</sup> While remedial actions were immediately taken, and as clean-up and monitoring activities continue to date, damage to the ecosystem did occur. The full extent of the damage will not be known until the years to come when hatchlings in the river at the time of the spill return to spawn.

The driver of the vehicle was intoxicated and has since been charged and pled guilty on two counts: one under the Criminal Code and the other under the Fisheries Act. On the criminal count, he has pled guilty to the dangerous operation of a motor vehicle. He received a conditional sentence of three months, plus nine months probation. In addition, he pled guilty to a charge under the Fisheries Act for depositing gasoline and diesel into water frequented by fish, for which he received 200 hours of community

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1 Columbia Fuels, "Columbia Fuels Goldstream River FAQs" online: Columbia Fuels <<http://www.columbiafuels.com/documents/Malahat.pdf>>.

service in the area of conservation of fish and fish management. In response to these guilty pleas the Crown dropped the impaired driving charges.<sup>2</sup>

In terms of ongoing remediation and monitoring activities, a roundtable working group consisting of Columbia Fuels, First Nations representatives, BC Ministry of Environment, Department of Fisheries and Oceans, Goldstream Hatchery, and third party environmental consultants has been formed. The roundtable process has admirable goals in attempting to determine fish numbers, conducting scientific inquiries into impact and remediation efforts, and determining financial allocation to certain activities and processes. Despite its admirable goals, to my understanding the process largely assumes (and reinforces) non-indigenous understandings of the harm, the relationship to Goldstream, and the relationship between the parties (and perspectives) involved.<sup>3</sup> The roundtable narrative fails to incorporate normative understandings of the WSÁNEĆ, as well as WSÁNEĆ legal responses to the spill. While I do not comprehensively analyze the roundtable working group, my response to the shortcomings of the process is to tell a different story. The story I will tell is about the resurgence of indigenous law. I will contextualize that discussion through offering insights about WSÁNEĆ law in relation to the fuel spill. It is in this context that I write this thesis.

In telling a different story I offer insights regarding the deep relationality and visions of proper relationships the WSÁNEĆ have for themselves with the Earth and other elements of creation. I argue that when these patterns of thinking are applied to the

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<sup>2</sup> Kyle Wells, "Driver Handed Conditional Sentence in Goldstream Fuel Truck Rollover" *Cowichan News Leader* (27 September, 2012), online: CowichanNewsLeader.com <<http://www.cowichannewsleader.com/news/171567941.html>>.

<sup>3</sup> In this thesis I primarily use the term "indigenous" in reference to the populations that traditionally occupied what is now Canada. I mean for this to include First Nation, Inuit, and Métis. To be clear I am however speaking specifically from my perspective as a First Nations person. In addition, while I use the term indigenous primarily in the Canadian context, I recognize the term applies more broadly to an international context as well. While I do not speak directly to an international audience, I have personally drawn influence from indigenous law scholars in the United States, Australia, New Zealand, and elsewhere.

Goldstream spill it is necessary to question foundational assumptions about the spill, including our notions of ‘remedy’ and ‘jurisdiction’. Foundational to any legal remedy is understanding the nature of the harm itself (i.e., our conceptions of proper relationships and how they have been damaged as a result of the spill). From a WSÁNEĆ perspective what is at stake are mutual relationships and responsibilities with the water, the salmon, and the WSÁNEĆ ancestors. I argue that a focused emphasis on strengthening and tending to the nature of these relationships is central to the revitalization of WSÁNEĆ law, and foundational to re-envisioning healthier relationships between indigenous and non-indigenous peoples and legal orders.

### **Self-Location and Reflexivity**

In WSÁNEĆ culture, and many indigenous cultures, before speaking it is proper to introduce yourself and your family connections, as well as the context in which you speak. In terms of academic scholarship and indigenous methodologies this is also important because it aids in reflexivity – taking account of how we situate ourselves within our research and the effect this has on our research.<sup>4</sup> Indigenous scholar Margaret Kovach writes, in terms of indigenous methodologies “it is not only the questions we ask and how we go about asking them, but who we are in the asking.”<sup>5</sup> Such an introduction has importance for “self-location, purpose and cultural grounding,”<sup>6</sup> and avoids any perpetuation of “pan-Indianism.”<sup>7</sup> Kovach indicates that such an approach is congruent with “a knowledge system that tells us we can only interpret the world from the place of

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<sup>4</sup> See Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009) at chapter 6 for more on situating self and culture in indigenous methodologies.

<sup>5</sup> *Ibid.* at 111.

<sup>6</sup> *Ibid.* at 109.

<sup>7</sup> *Ibid.* at 110.

our experience.”<sup>8</sup> Importantly, reflexivity and self-location is also “a powerful tool for increasing awareness of power differentials in society.”<sup>9</sup> As indigenous legal scholar Val Napoleon notes, it is important to be continually reflexive about our positions “in relation to various power structures and ongoing power dynamics” around us.<sup>10</sup> For all of these reasons it is important to make clear my objectives and where the author is situated.

This thesis involves a strategy of resistance that moves the narrative of WSÁNEĆ laws and beliefs more to the forefront. This approach requires two qualifications. First, I do not purport to be an expert on WSÁNEĆ laws or beliefs. My intent is not to create an objective understanding of WSÁNEĆ law and culture in its full complexity. Rather, I am building on my own understandings as a WSÁNEĆ person, and with a scope limited to the Goldstream spill. Others may agree or disagree with my use or interpretation of WSÁNEĆ stories. To me, the most important objective is opening the discussion and strengthening the narrative. Second, I do not seek to create a pan-indigenous understanding of indigenous law. I embrace the diversity of indigenous legal traditions.<sup>11</sup> While I offer insights and contributions to the field of indigenous law and indigenous legal theory more generally, I do so through my experience as a WSÁNEĆ person.

As a final note, this introduction begins to tell a different story that runs throughout this thesis – a story about SELEKTEŁ (Goldstream), the WSÁNEĆ, and more

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

<sup>9</sup> *Ibid.*

<sup>10</sup> Val Napoleon, *Ayook: Gitksan Legal Order, Law and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished] [Napoleon, “Ayook”] at 17.

<sup>11</sup> Several authors stress the plurality of indigenous legal orders and approaches to indigenous law. See particularly Gordon Christie, “Indigenous Legal Theory: Some Initial Considerations” in Benjamin Richardson, Shin Imai and Kent McNeil, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009) [Christie, “Indigenous Legal Theory”] at 195 and Val Napoleon, “Thinking About Indigenous Legal Orders” in René Provost & Colleen Sheppard, eds., *Dialogues on Human Rights and Legal Pluralism (Ius Gentium: Comparative Perspectives on Law and Justice)* (Dordrecht: Springer, 2012) [Napoleon, “Indigenous Legal Orders”].

broadly about indigenous laws and their resurgence. Telling a different story is important because the narrative through which we approach problems, such as the fuel spill at Goldstream, frames the issues and solutions that are ultimately deemed possible and appropriate. Approaching an issue from a different narrative can open a new (or slumbering) realm of possibilities and understandings. Yet, the story I seek to tell is not a new story; it is a story that has been submerged and silenced. Therefore, to be effective in telling a different story I must also address the way indigenous laws have (and continue to be) silenced and submerged through the operation of various power structures. I understand a focused emphasis on strengthening the stories we choose to maintain in our own cultural and legal diversity as an effective means to resist the limiting effects of these dynamic power structures.

### **Chapter Outlines**

This First chapter, as demonstrated above, situates myself within my research project and provides the necessary background and context to my inquiry. In addition to introducing the theme of this thesis, I also provide an outline for the chapters that follow.

Chapter Two immerses the reader in a WSÁNEĆ narrative about SELEKTEŁ (Goldstream). In doing so I set out to apply a different lens to the Goldstream spill. In re-conceptualizing the nature of the harm I examine several WSÁNEĆ stories of creation and their associated teachings. WSÁNEĆ law is intimately connected with other elements of WSÁNEĆ life. Therefore, the values and philosophies contained in WSÁNEĆ creation stories illustrate normative understandings that are foundational to the WSÁNEĆ legal order and relevant legal principles. While I cannot relate all of WSÁNEĆ cosmology, my modest objective is to open the door to the WSÁNEĆ

narrative and alternative understandings and approaches to the Goldstream spill. Most evident is the deep relationality and visions of proper relationships the WSÁNEĆ have between themselves, the Earth, and other elements of creation. Finally, given the close connection between WSÁNEĆ law and culture/spirituality, I explore the dynamic interaction between all law and culture (including western law and culture). I highlight the way law and culture interact to shape the narrative through which we approach problems and ultimately frame the issues and solutions we deem possible and appropriate.

Chapter Three aims to strengthen an alternative narrative of indigenous law more generally, including its theoretical and methodological aspects. We are still largely faced with a scenario where we must argue the legitimacy and applicability of indigenous law. This chapter contributes to that discussion while helping illustrate how the WSÁNEĆ stories in the preceding chapter relate to the study of WSÁNEĆ law. After exploring tensions relating to essentialism and originalism within the study of indigenous law, I also explore the sources, methodologies, and cosmological foundations of indigenous law. I emphasize an approach that centers on the roots of the WSÁNEĆ legal order (it's creation stories and associated values and teachings) to provide grounding and direction in our evolving approach to WSÁNEĆ law. I argue the same could hold true for indigenous law more generally. Values and philosophies (for which there is at most general consent) form the basis by which we judge and develop specific legal principles.

Chapter Four takes up the discussion of colonialism and its associated power structures. I explore the way the dominant narrative works to constrain our approaches and understandings of law, as well as the ways we understand and organize our

relationships with each other and with the Earth. It is essential to understand that indigenous narratives and approaches to law have long been ignored, diminished, or silenced by the dominant narrative. Effectively strengthening our focus on narratives of our own construction therefore depends in part on gaining an understanding of these power structures. This includes understanding the nature of colonialism, its associated harms, and the ways in which these power structures continue to operate today, though in more fluid and subtle ways. Ultimately, my argument is that to mitigate and move beyond these power structures we need to focus on strengthening our own stories. The objective in doing so is to foster stronger indigenous communities and form the foundations for healthier indigenous/state relations. In making these arguments I blend insights from the fields of postcolonial theory, indigenous legal theory, and resurgence theory.

Chapter Five contains my concluding thoughts on the Goldstream spill and the revitalization of the WSÁNEĆ legal order. WSÁNEĆ law raises different questions, patterns of thinking, and distinct understandings and approaches to the Goldstream spill. I direct those different patterns of thinking toward the issues of “jurisdiction” and “remedy”. Many issues of “jurisdiction” present themselves from *within* the sovereignty narrative. However, many assumptions also underlie that discussion, including the notion of “jurisdiction” itself. I contrast the idea of having *jurisdiction over* the environment, with the idea of having *relationships and responsibilities* to the environment.<sup>12</sup> Similarly, I highlight that foundational to the notion of “remedy” is an understanding of the harm itself – i.e., our conceptions of proper relationships and how those relationships have

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<sup>12</sup> It is recognized that “jurisdiction” may be used more broadly in accordance with its literal meaning, “to speak the law”. In the context of this thesis however I use the term “jurisdiction” in line with its more common usage, which connotes an element of ‘power’, ‘authority’, or ‘control’ over of that within its scope.

been negatively affected by the issue at hand. It is important to question these foundational assumptions from the outset. The point in having recourse to indigenous law is to utilize a different lens in our legal response. We should not limit this contribution by failing to question and explore the wide range of implications this new lens may have on our approaches and responses to issues such as the Goldstream spill. While I do not reach a full and final WSÁNEĆ legal response to the spill, I emphasize the importance of being guided by our own narratives and understandings.



## CHAPTER TWO: S,OXHELI (Sacred Teachings of Life) – Telling a Different Story<sup>13</sup>

*SŁEMEW, the first WSÁNEĆ man, was placed on the earth in the form of rain. SŁEMEW assisted XÁLS in forming the world. SŁEMEW carved the mountains, the rivers, streams and formed the lakes. He makes things grow and brings life to the land.*

*XÁLS said to SŁEMEW “You will cleanse yourself in the lakes and streams.” He listened to XÁLS and purified himself in the way he was told. XÁLS gave SŁEMEW a gift, a wife and family. SŁEMEW taught his family to be clean of mind, body and spirit, the way XÁLS had taught him. The WSÁNEĆ should never forget SŁEMEW. If he had not followed XÁLS’ teachings, he wouldn’t have been given the gift of his wife and family. Without a wife and family for the first man, there may never have been WSÁNEĆ people. Honour SŁEMEW by always honouring XÁLS’ teachings and XÁLS’ wish for the WSÁNEĆ people.<sup>14</sup>*

All WSÁNEĆ people have a CELÁNEN. CELÁNEN is a word that can equally describe our ‘ancestry’, ‘birthright’, or ‘culture’, as well as the subcomponents of each. For example, the SENĆOFEN language is part of our CELÁNEN. CELÁNEN can also be

<sup>13</sup> The first sections of this chapter are meant to immerse the reader in an introduction to WSÁNEĆ culture and teachings, which are foundational to the WSÁNEĆ legal order. Reference will be made to this section throughout the remainder of this thesis.

<sup>14</sup> Earl Claxton Sr., John Elliott & Philip Kevin Paul, *TĆÁNCIE I TLÁ: “The way we were and the way we are”* (date unknown) [unpublished incomplete draft, in the authors personal possession].

used to describe our “traditional WSÁNEĆ laws and teachings that form the basis for the governance structure.”<sup>15</sup> Therefore, our creation stories are an important aspect of our CELÁNEN, including that which opened this chapter. Contained within our creation stories are our SKÁLS (our beliefs/laws) and our S,OXHELI (sacred teachings of life). Our S,OXHELI describe how things came to be, and therefore contain important lessons. Our SKÁLS and S,OXHELI are ENSXAXE (something we hold sacred/ spiritual). Understanding these concepts is foundational to understanding a WSÁNEĆ approach to law.

The stories in WSÁNEĆ SYESES (our oral history) have characters that are there to remind us of our values, teachings, and our ŠXENÁNS (our way of life). The following passage emphasizes and expands upon this point:

XALS created Saanich and the people in Saanich to care for each other. XALS is our creator. The creation stories of the Saanich People are a journey through Saanich history and across Saanich territory. Though their main purpose can be deemed as being a preservation of Saanich ideas and values, to a Saanich Indian the stories exist as the history of our origin and as the teachings of our creator. A person’s understanding of the value and meaning of these stories changes according to the person’s level of maturity.

In the time of creation, XALS walked on the earth. He transformed the people in Saanich into animals and into stone, and sometimes the animals too were changed. He transformed the creatures of the earth to make an example out of them. Sometimes he made a good example out of them, and sometimes he made a bad example. This is how XALS assured his teachings would remain in the minds of the Saanich People, he would change someone and say “Now the people will always remember what you have done and why you have been changed”.<sup>16</sup>

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15 Nicholas Xumthoult Claxton, “ISTÁ SCÍÁNEW, ISTÁ SXOLE “To Fish as Formerly”: The Douglas Treaties and the WSÁNEĆ Reef-Net Fisheries” in Leanne Simpson, ed., *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring Publishing, 2008) 47-58 at 52.

16 Claxton, Elliott & Paul, *supra* note 14.

Stories are central to WSÁNEĆ law and there is a clear connection between cosmological understandings and legal principles. In the above passage it is told how the Creator transformed people and animals as a way of setting an example. While not possible to relate here, WSÁNEĆ culture consists of a myriad of stories of this nature. Each story is set in a different context and may contain numerous legal principles that guide the WSÁNEĆ.

A common theme in WSÁNEĆ creation stories is that many elements of nature were once people, whether it is the salmon, water, or the islands.<sup>17</sup> In understanding this, we can draw on the importance of language and concepts rooted in language. Take the example of islands, which in SENĆOTEN are called TETÁĆES. TETÁĆES is a conjunct of two other distinct words in SENĆOTEN: TEĆ (meaning deep) and SCÁLEĆE (meaning relative or friend). Therefore, TETÁĆES literally means ‘Relative of the Deep’. Language “is a way of thinking, or viewing the human experience in the world, as much as it is about communicating.”<sup>18</sup> The significance this has for cosmology, and hence our understanding of WSÁNEĆ legal relationships, is important. To the WSÁNEĆ people, islands are our ‘Relatives of the Deep’. Evident is the deep relationality between the WSÁNEĆ people and the Earth. This theme holds true across WSÁNEĆ stories and is central in guiding any WSÁNEĆ legal response with respect to the environment, including the spill at Goldstream.

This deep relationality can be further exemplified with reference to the creation story of ÆEL,TOS (James Island), an island within WSÁNEĆ territory. The creation

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<sup>17</sup> Animals are also a predominant theme in WSÁNEĆ stories.

<sup>18</sup> Janet Poth, ed., *Saltwater People: as told by Dave Elliot Sr.*, 2nd ed. (Saanich: Native Education School District 63, 1990) at 19.

story describes both the origin of the island and the name ‘ŁEL,TOS’. It also relates how every island is an ancestor to the WSÁNEĆ.

*A long time ago, when the Creator, XÁLS, walked the Earth, there were no islands in the WSÁNEĆ territory. The islands that are there today were human beings (our ancestors). At this time XÁLS walked among the WSÁNEĆ People, showing them the proper way to live. In doing this he took a bunch of the WSÁNEĆ People and threw them out into the ocean. Each of the persons thrown into the ocean became the islands there today. Each of those islands were given a particular name that reflects the manner in which they landed, their characteristics or appearance, or the significance they have to the WSÁNEĆ People. ‘James Island’ was named ŁEL,TOS, meaning ‘Splashed on the Face’. ŁEL,TOS reflects the way the island landed in the ocean. The southeast face of ŁEL,TOS is worn by the wind and the tide.*

*After throwing the WSÁNEĆ People into the ocean, XÁLS turned to speak to the islands and said: “look after your relatives, the WSÁNEĆ People.” XÁLS then turned to the WSÁNEĆ People and said: “you will also look after your ‘Relatives of the Deep’.” This is what XÁLS asked of us in return for the care our ‘Relatives of the Deep’ provide for us.<sup>19</sup>*

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<sup>19</sup> A story told to me by John Elliot in a personal communication (24 September 2010) at the WSÁNEĆ School Board.

The creation story of ŁEL,TOS illustrates a deep relationality, as well as corresponding legal and environmental principles of care. Islands within WSÁNEĆ territory were once our ancestors and were given to us by the Creator to maintain our way of life. With this gift came a reciprocal obligation to care for these islands. This is one of the sources of our laws. It would be a simplification and a distortion of WSÁNEĆ cosmology and legal order to think of them only as ‘islands’ – an inanimate mass of rock surrounded by water.

While this thesis cannot relate the entirety of WSÁNEĆ cosmology, the teachings contained in this section are foundational to understanding the WSÁNEĆ legal order. These teachings hold important values, philosophies, and legal principles that can be extrapolated to environmental harms such as the Goldstream spill. In addition to understanding these broader trajectories of WSÁNEĆ culture and legal order, it is also important to have a more detailed understanding of SELEKTEŁ (Goldstream) in particular.

### **SELEKTEŁ (Goldstream)**

*ŁAŁET TONES  
WEC'ET TONES  
QEM QOMT TONES  
SŁEMEW ĆELÁNEN SLÁM<sup>20</sup>*

There are several foundational cosmological points to discuss in considering the spill at Goldstream; part of which requires understanding the names and geography of the area. There are two aspects to Goldstream - SELEKTEŁ (the splitting stream) and MIOEN (the lesser stream). Immediately adjacent to and overlooking Goldstream is also Mt.

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<sup>20</sup> “Wash me, wake me, strengthen me today, Grandfather Rain”.

Finlayson, which is known as QENELEŁ (looking into the groin). When you look at Mt. Finlayson it resembles a man/boy looking down into his groin, with both of the streams being his legs. There are several implications to this worth further consideration, especially since Goldstream is a ceremonial bathing location. However, let us first consider the WSÁNEĆ notion of water more closely.

In the opening paragraph to this chapter the reader was introduced to the creation story of SŁEMEW (Grandfather Rain), the first WSÁNEĆ man, who originated from rain.<sup>21</sup> SŁEMEW helped form the world. As rain, he also makes things grow and brings life to the land. As part of his role in creating the world, XÁLS told SŁEMEW to cleanse in the water of the lakes and streams. Cleansing makes one clean of mind, body and spirit. Because he followed XÁLS teachings SŁEMEW was given the gift of family, whom he too taught to cleanse. All WSÁNEĆ are descendants of SŁEMEW and in many ways owe everything to Grandfather Rain.

Much can be drawn from this story, including the importance of XÁLS teachings and the sacredness of water.<sup>22</sup> Water originates from rain, and both are closely connected. There is sacredness to water because of this relationality. Water is a pure spirit and thus has the ability to cleanse. The cleanse taught by XÁLS in the creation story of SŁEMEW is done through the ceremony of bathing, which uses water in the lakes, streams, and ocean.

Bathing (and water) is an important part of WSÁNEĆ culture and strengthens us. When we bathe, we honour Grandfather Rain. Reference to the SENĆOŦEN language

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<sup>21</sup> See page 10 of this thesis at *supra* note 14.

<sup>22</sup> Other principles may be drawn from this story as well. My focus here is more narrowly on the importance of water and the importance of bathing, as both relate to the Goldstream spill.

can again emphasize this point. The WSÁNEĆ have distinct words for both water and rain, which reflects the importance of bathing. When we bathe ourselves during ceremony we use the word rain (SĹEMEW), as opposed to water (ĆO), in order to honour our Grandfather Rain. Bathing is therefore both a ceremony and a prayer. The words that opened this subsection:

*ĀAĀET TONES*  
*WEC'ET TONES*  
*QEM QOMT TONES*  
*SĹEMEW ĀELÁNEN SIAM*

are said in prayer during bathing – “wash me, wake me, strengthen me today, Grandfather Rain.”

Ideally, bathing is done every morning in a solitary place before the sun rises. This is because the day is a gift not to be wasted.<sup>23</sup> Bathing is particularly important, however, during sacred parts of our life when our bodies are changing. For instance, during puberty or when our sexuality is becoming stronger, we bathe in cold water to train our minds to be strong – stronger than our bodies when necessary. When a young boy is becoming a man he bathes to learn respect for his own actions. Mt. Finlayson - QENELEĹ (looking into the groin) – reflects this teaching.

It was noted above that the geography of Goldstream and Mt. Finlayson (QENELEĹ) resembled a young man/boy who is looking down into his groin, with both of the streams being his legs. The reason for this is at this location there was a young man who did not respect his own actions and was changed into the mountain commonly called Mt. Finlayson (QENELEĹ). QENELEĹ (looking into the groin) is there to remind us that there is a time and place for sexual life. There are other WSÁNEĆ stories that

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<sup>23</sup> There are WSÁNEĆ stories about always being up before the break of day.

reinforce a related theme. One such story is the creation of the chum salmon. This is closely related to the story of QENELEŁ because the chum salmon is the primary salmon that spawns in Goldstream.

There was once a young man who was changed into the chum salmon. He was sexually going after his own sister. He kept sneaking into her bed at night when it was dark and she couldn't see who it was. The sister used red earth on her hands to mark the person who was coming into her bed so she could see who it was. When she went to look at the different boys the next morning she saw that it was her brother, and she cried. XÁLS came and changed the young man into the chum salmon and thereby made a teaching and example that there should not be incest in the family. In speaking with elders I have been told that people do not often talk about this story today or ask about its real meaning, though its story and meaning should be shared with the young people where the chum are spawning.

The stories of QENELEŁ and the chum salmon (both centered around the Goldstream area) are there to remind us of the danger in neglecting our sexual responsibilities. There are also clear connections with the obvious sexuality of salmon spawning more generally. It opens the possibility to reflect on the fish's experiences in the spawning cycle and create links with these stories about appropriate sexual behaviour. The story of the first WSÁNEĆ man (SĽEMEW), and its corresponding teaching to bathe, is also central. It may specifically be because of the QENELEŁ and the chum salmon stories that SELEKTEŁ (Goldstream) is also an important bathing location for the WSÁNEĆ. There is a strong inter-relationship between all these stories. This is because the bathing ceremony that cleanses us and honours Grandfather Rain is also meant to



remind us to be pure of mind, body, and spirit. It is for this purpose that young men and others used the waters at Goldstream to bathe themselves, and to cleanse the young people. It is supposed to be a pure place.

### **Implications For Goldstream Response**

This chapter has thus far introduced the reader to a number of WSÁNEĆ cosmological understandings connected to Goldstream, and the WSÁNEĆ's relationship with the Earth more generally. A WSÁNEĆ legal response to the Goldstream spill cannot occur outside the context of these understandings. A foundational limitation of the current roundtable narrative is that it begins with a set of assumptions that does not incorporate these WSÁNEĆ stories and understandings.

A detailed analysis and application of the WSÁNEĆ legal order could span well over the limited space this thesis permits. It would also benefit from a plurality of voices in addition to my own. My more modest objective is to open the door to the WSÁNEĆ narrative and to alternative understandings and approaches. There is much left to explore within this narrative and I aim only to highlight several preliminary observations regarding a potential legal response.

Today, the Malahat highway runs directly over and adjacent to Goldstream River. On its own this has a negative impact on the practice of bathing since it is supposed to be a private ceremony. It is likely that no consultation regarding the placement of the highway occurred during its development.<sup>24</sup> The problematic placement of the highway would be of issue in a WSÁNEĆ legal response.<sup>25</sup> It is however unlikely that the

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<sup>24</sup> I state this as an assumption. I cannot say whether consultation did or did not occur.

<sup>25</sup> This is also likely a violation of the so-called Douglas Treaty. The Saanich (North) Douglas Treaty of 1852 includes those lands at Goldstream Park. See Aboriginal Affairs and Northern Development Canada, "Treaty Texts – Douglas Treaties", online: <<http://www.aadnc-aandc.gc.ca/eng/1100100029052/1100100029053>> for further details. See also Tsawout First Nation, "The

roundtable process would address such an issue. The roundtable group was assembled with the narrow purpose of addressing the fuel spill itself. While government representatives are involved, none are present from the Ministry of Transportation.<sup>26</sup> In addition, Aboriginal case law from the Supreme Court of Canada seems to provide little incentive to address past infringements.<sup>27</sup> This points to a narrowness that plagues the Aboriginal law paradigm more generally.

Bathing, and its cultural and cosmological connections, would also be an important issue in a WSÁNEĆ legal response. While perhaps fewer WSÁNEĆ people use the stream today for bathing than once did, it is still a practice that is taught and a location used for that purpose. For instance, the ŁÁU, WELNEW tribal school<sup>28</sup> does at times take its high school students to Goldstream to provide them with these teachings and to learn to be respectful of their sexuality. Learning about bathing also helps the students shape a cosmological understanding and reinforce WSÁNEĆ relationality with their traditional territory, the Earth, and their ancestors – including Grandfather Rain. It also helps put into perspective the full extent of environmental harms. The difficulty with oil and gas spills, such as the one described at the beginning of this thesis, is that it

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Douglas Treaty”, online: <<http://www.tsawout.com/departement/douglas-treaty-elders-working-group/treaty-information/the-douglas-treaty>> for further background and information on the Treaty. *Regina v. White and Bob* [1964] B.C.J. No. 212 (B.C.C.A.) affirmed that the Douglas Treaties are valid treaties under Canadian law. *R v. Bartleman* [1984] B.C.J. No. 1760 (B.C.C.A.) ruled that the Treaty provided the right to hunt on all unoccupied lands that spanned the entire Saanich traditional territory, not just the limited lands covered in the Treaty. *Claxton et al. v. Saanichton Bay Marina Ltd.* [1989] C.N.L.R. 46 (B.C.C.A.) examined the Saanich right to “carry on their fisheries as formerly”. In this case the court ruled that a proposed marina to be constructed in Saanichton Bay would derogate the Saanich right to fish. The court awarded a permanent injunction against the construction of the marina.

26 The reason is that, as far as I am aware, the issue of road placement is not on the radar for the roundtable group.

27 In my opinion, this points to a narrowness that plagues the Aboriginal law paradigm more generally. See *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 in which the Supreme Court of Canada ruled that consultation is required where there is a causal relationship between the proposed government action or decision and the potential for adverse effects on the Aboriginal claimants rights. Therefore, continuing breeches, including past failures to consult, will not trigger the duty to consult unless the present action potentially creates a novel impact. The court ruled that damages are a more appropriate remedy in such circumstances.

28 The ŁÁU, WELNEW tribal school serves the four communities that comprise the WSÁNEĆ Nation. The tribal school offers education that promotes the language, teachings, and values of the WSÁNEĆ people.

detracts from the purity of Grandfather Rain (our ancestor), as well as the bathing ceremony that is intended to cleanse our mind, body, and spirit.

An additional harm caused by the spill at Goldstream relates to the ecosystem and the salmon that spawn in the river each year. An assessment of the harm done to salmon numbers is a central inquiry of the roundtable process. Primary attention seems to have been given to determining casualty numbers and replacement numbers. Addressing the harm to salmon would also be central to a WSÁNEĆ legal response. However, a different starting point would underlie the approach to the response. The salmon, like the rain and the islands, were also once people.<sup>29</sup> The chum salmon is the most abundant salmon spawning in the river. The name for the chum salmon is QOLEW. However, its prayer name, when we are asking the salmon to feed us, is EN ŠWOKE (your brother/sister). This is again evident of a relationality that does not so much view salmon as a ‘resource’, but an ancestor that is intimately connected to WSÁNEĆ cosmology and way of life. There are rich and subjective legal implications flowing from this understanding that would deserve detailed analysis in the application of a WSÁNEĆ legal response to the fuel spill.

The QOLEW (chum salmon) was the last salmon fished in the year.<sup>30</sup> Admittedly, the QOLEW was not the most prized fish and historically was not fished as often as sockeye salmon.<sup>31</sup> However, this in itself in part relates back to the WSÁNEĆ

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29 SĆÁNEW is the SENĆOFEN word for all salmon. SĆÁ means working and NEW means people. There are WSÁNEĆ stories about the Salmon People.

30 This is partly due to the time of season. In addition, chum salmon is larger in size, is easier to dry, and stays dry for a longer period of time.

31 The chum salmon is fished more today than in the past. One reason for this may be a decline in the population of other species.

legal order and the creation story of the chum salmon.<sup>32</sup> The chum salmon are not however the only salmon that spawns at Goldstream. The spring and coho salmon do as well, though in far less numbers. Steelhead and cutthroat trout also live in the river. Each of these species is not fished as diligently by the WSÁNEĆ as the chum salmon. I have been told that even in the past the WSÁNEĆ didn't fish hard after the spring salmon in the river, they were for the most part left alone to spawn. Rather, the spring salmon were fished in the bay prior to spawning when they were more difficult to catch.<sup>33</sup> This too reflects an environmental principle of care reflected in the WSÁNEĆ legal order, and may be of relevance in discussing the impact of the fuel spill on spring salmon in particular.

In short, the values, teachings and philosophies contained in the stories of SĻEMEW, SELEKTEL, QENELEŁ, ŁEL,TOS, TETÁCES, and the like, are central in guiding a WSÁNEĆ legal response. While this points more to the trajectories of a potential WSÁNEĆ legal response, as opposed to a definitive and objective statement of the law, several things become clear – primarily, the deep relationality and vision of proper relationships between the WSÁNEĆ people, the Earth, and other elements of creation. Evident is the close connection between WSÁNEĆ culture/beliefs and the WSÁNEĆ legal order.

### **Law and Culture**

WSÁNEĆ law, and indigenous law more generally, does not draw a distinction between law and culture. The above discussion of WSÁNEĆ cosmology central to a WSÁNEĆ

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<sup>32</sup> Recall that the chum salmon was created to set the example that incest in the family was not to be tolerated.

<sup>33</sup> John Elliott has told me a similar story about deer in a personal communication. When a deer came into the village it was not hunted. He told me that you go to hunt, not try and kill everything that wanders into the village.

legal response to the Goldstream spill demonstrates this point. Yet the interrelationship between WSÁNEĆ law and culture may seem problematic to some readers. In fact, some may go so far as to question whether there is anything ‘distinctively legal’ in the cultural practices identified.<sup>34</sup> These objections may stem in part from an unfamiliarity with the cosmology that informs the WSÁNEĆ legal order. However, they may also stem from a latent understanding of Canadian law as objective or even superior. For instance, it may be that, once enacted, state law is generally seen as an object detached in both its origin and application from cultural influences and values; or alternatively, that the basis of the state law is in accordance with rationalist principles that themselves aim to be universal as opposed to cultural. Regardless, the implication is that the cultural subjectivity of the very nature of law is ignored. That is, we forget that what we consider ‘distinctively legal’ or as the most legitimate and authoritative legal response is itself culturally influenced. While the preceding section began to introduce the reader to the cultural foundations of WSÁNEĆ law, this section will illustrate that law and culture are always intertwined – not just indigenous law and culture. This is significant because it is the manner in which law and culture interact that comes to shape the narrative through which we approach problems and frame the issues and solutions we deem possible and appropriate.

Canadian law is often thought of as being more objective than indigenous law because it supposedly eschews the connection between law and culture, as discussed

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<sup>34</sup> In this thesis I largely begin by accepting as a given the existence of indigenous law. Other indigenous law scholars, specifically John Borrows, have already done a great deal in arguing the existence and legitimacy of indigenous law. I do not duplicate that work here. For more see generally John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) [Borrows, “Recovering Canada”] and John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, “Indigenous Constitution”].

above.<sup>35</sup> Nonetheless, “Canadian law is not objective but rather grounded in Euro-Canadian cultural assumptions” that are embedded within Canadian institutions of government and law.<sup>36</sup> These cultural assumptions are dynamic and far-reaching in Canadian society and law. My narrow point here is how dangerously easy it is for some to judge the applicability and authority of indigenous laws from the vantage of their own cultural values and assumptions.<sup>37</sup> The consequence of this danger is the unfortunate outcome of indigenous laws being “ignored, diminished, or denied as being relevant or authoritative.”<sup>38</sup> From the perspective of the former Chief Justice of the British Columbia Court of Appeal, Lance Finch, “we must do our utmost to recognize and to relinquish our preconceptions of what *objectively* constitutes a “law” or a “system of laws”” to avoid this outcome.<sup>39</sup> Building on this point, in order to recognize these preconceptions it is worth highlighting the many ways western law and culture are entwined.

There has been a longstanding debate as to the meaning of “law” and the relationship between law and society (or culture). Western law often tends to think of itself as (and even tries to be) compartmentalized from other aspects of society; but the relationship between law and culture cannot be escaped. Lawrence Rosen thoroughly

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35 There are many legal theorists, including feminist scholars, critical legal scholars, and others that illustrate the subjectivity of Canadian law and embrace the connection between law and culture. Canadian law does also contain subjective legal doctrines. I point more to a general trend in the common law.

36 Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999) at 49.

37 The Honourable Chief Justice Lance Finch makes a similar point. See The Honourable Chief Justice Lance Finch, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” in *Indigenous Legal Orders and the Common Law* (Continuing Legal Education British Columbia, November 2012) at 2.1.8.

38 John Borrows, “Indigenous Constitution”, *supra* note 34 at 6.

39 Finch, *supra* note 37 at 2.1.8.

examines this connection in his work *Law and Culture: An Invitation*.<sup>40</sup> I quote Rosen at length as his work provides many insightful examples.

It is no mystery that law is part of culture, but it is not uncommon for those who, by profession or context, are deeply involved in a given legal system to act as if “The Law” is quite separable from other elements of cultural life. . . . But context is crucial: when we hear a court speak of the “conscious of the community,” “the reasonable man,” or “the clear meaning of the statute,” when we watch judges grapple with parenthood as a natural or functional phenomenon, or listen to counsel debate whether surrogate motherhood or a frozen embryo should be thought of in terms of “ownership,” we know that the meaning of these concepts will come not just from the experience of legal officials or some inner propulsion of the law but from those broader assumptions, reinforced across numerous domains, that characterize the culture of which law is a part. And when we seek law outside of specialized institutions – when a kinsman mediates a dispute or members of a settlement use gossip or an informal gathering to articulate their vision of society – the terms by which they grasp their relationships and order them will necessarily be suffused by their implications in many interconnected domains.<sup>41</sup>

What is clear from the above passage is that law cannot be thought of as separate from culture. As Lawrence Rosen suggests, “law is so deeply embedded in the particularities of each culture that carving it out as a separate domain and only later making note of its cultural connections distorts the nature of both law and culture.”<sup>42</sup> To avoid this implication I have emphasized how WSÁNEĆ law relating to the Goldstream spill is embedded in the creation story of SĽEMEŬ, the teachings of the Creator XÁLS in relation to bathing, normative understandings of the WSÁNEĆ relationship with the Earth, and other particularities of WSÁNEĆ culture. An application of WSÁNEĆ law to the Goldstream spill cannot occur outside this context.

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<sup>40</sup> Lawrence Rosen, *Law as Culture: An Invitation* (Princeton: Princeton University Press, 2006).

<sup>41</sup> *Ibid.* at 6-7.

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

In returning to law and society more broadly, I tend to make the “assumption that law and legal institutions both affect and are affected by the social conditions that surround them.”<sup>43</sup> This is because law is ultimately a “social phenomenon”.<sup>44</sup> As Roger Cotterrell writes, “law constitutes important aspects of social life by shaping or reinforcing modes of understanding social reality.”<sup>45</sup> Consider a concept such as ‘justice’: “justice is a perception of social relations in balance.”<sup>46</sup> What social relations are given primacy and how those relations are constituted is a matter of cultural influence, which is continually subject to contestation and deliberation.<sup>47</sup>

Lawrence Rosen eloquently sums up this relationship between law and culture, highlighting the way both interact to shape and weave us into a narrative of reality with corresponding conceptions of proper relationships. His work provides effective examples in establishing this point and I quote him in depth .

Culture – this capacity for creating the categories of our experience – has, in the view that will be central to our concerns, several crucial ingredients. As a kind of categorizing imperative, cultural concepts traverse the numerous domains of our lives – economic, kinship, political, legal – binding them to one another. Moreover, by successfully stitching together these seemingly unconnected realms, collective experience appears to the members of a given culture to be not only logical and obvious but immanent and natural. This sense of orderliness operates at both a conceptual and relational level, organizing our view of daily life as commonsensical and our ways of orienting our actions to others as systematic and workable. Features that may not seem to be linked are,

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43 Philip Selznick, “Law: The Sociology of Law” in David L. Sills, ed., *International Encyclopedia of the Social Sciences*, vol. 9 (New York: MacMillan Company, 1968) 55-59 at 50.

44 Roger Cotterrell, *The Sociology of Law: An Introduction* (London, Dublin, Edinburgh: Butterworths, 1992) [Cotterrell, “Sociology of Law”] at 2.

45 Roger Cotterrell, *Law, Culture and Society: Legal Ideas In the Mirror of Social Theory* (Aldershot: Ashgate, 2006) [Cotterrell, “Culture and Society”] at 54.

46 *Ibid.* at 60.

47 Several authors emphasize the contested nature of law. See particularly Jeremy Webber, “Legal Pluralism and Human Agency”, (2005) 44(1) *Osgoode Hall L.J.* 167; Napoleon, “Ayook”, *supra* note 10; and Napoleon, “Indigenous Legal Orders”, *supra* note 11.



therefore, crucially related to one another: Our ideas of time inform our understanding of kinship and contract, our conceptions of causation are entwined with categories of persons we encounter, the ways we imagine our bodies and our interior states affect the powers we ascribe to the state and to our gods. In short, we create our experience, knit together disparate ideas and actions, and in the process fabricate a world of meaning that appears to us as real.

Law is one of these cultural domains. Like the marketplace or the house of worship, the arrangement of space or the designation of familial roles, law may possess a distinctive history, terminology, and personnel. But even where specialization is intense, law does not exist in isolation. To understand how a culture is put together and operate, therefore, one cannot fail to consider law; to consider law, one cannot fail to see it as part of culture.<sup>48</sup>

I find the above passage from Rosen to be incredibly useful in thinking about law because it illustrates the way our legal understandings are permeated with cultural concepts that traverse our daily lives. It also goes a long way in explaining why it is so dangerously easy to judge the applicability and authority of another system of laws through one's own cultural values and assumptions. The reason is that the legal and cultural domains of a society weave together and create a social and legal reality that comes to appear "logical and obvious" or even "immanent and natural." Therefore, the fact that WSÁNEĆ law may come from the Creator XÁLS, or that the cosmological understanding of islands in WSÁNEĆ territory as 'Relatives of the Deep' has important and authoritative implications for the WSÁNEĆ legal order, may seem 'illogical' or 'unnatural' to some. But this is only because they approach their response from a narrative that weaves together a different "logical and obvious" conception of proper relationships. Even worse, they fail to open their minds to the culture and worldview that

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<sup>48</sup> Rosen, *supra* note 40 at 4.

informs a legal tradition other than their own. In its totality this reflects the purpose of this thesis in telling a different story about Goldstream and the resurgence of indigenous law, which opens a slumbering realm of possibilities and understandings to the Goldstream spill.

Prior to moving on it is worth expanding upon the notion of ‘proper relationships’ raised in the preceding paragraph. Rosen urges us to consider that “law is so inextricably entwined in culture that” it may be best to view law “as a framework for ordered relationships.”<sup>49</sup> Law as a framework for ordered relationships is “an orderliness that is itself dependent on its attachment to all other realms of its adherents’ lives.”<sup>50</sup> Of course, “different societies may play up one or another institution as a vehicle for creating and exhibiting this sense of order...but nowhere is law (in the sense of ordered relationships) without its place within a system that gives meaning to its people’s life.”<sup>51</sup>

Indigenous scholars Marie Battiste and James (Sákéj) Youngblood Henderson make similar observations to those of Rosen in stating “culture then is the collective agreement of the members of the society about what is accepted, valued, and sanctioned – both positively and negatively – and about what will be the society’s protocol and beliefs.”<sup>52</sup> Battiste and Henderson go on to write that “philosophies and worldviews are the theoretical aspects of cultures, while customs and ways of doing things are the practical and functional applications of philosophies and worldviews.”<sup>53</sup>

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49 *Ibid.* at 7.

50 *Ibid.* at 7.

51 *Ibid.* at 7.

52 Marie Battiste & James (Sákéj) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing Ltd., 2000) at 56.

53 *Ibid.* at 56.

It should, one would hope, be fairly self evident that each culture has different ways of conceptualizing the notion of ‘proper relationships’, as well as different social and legal approaches for tending to them. While there is a relationship between all law and culture, there are distinct approaches to law that vary across societies. The following chapter will explore the nature of indigenous law in greater detail, including its theoretical and methodological aspects.

## **CHAPTER THREE: SKÁLS (Beliefs / Laws) – Indigenous Legal Theory and Methodology**

The stated objective of this thesis is to relate a narrative about SELEKTEŁ, the WSÁNEĆ, and indigenous laws and their resurgence in order to open new or latent possibilities and understandings in relation to the Goldstream spill. This chapter will focus specifically on stepping beyond the common law and developing an alternative narrative about the nature and resurgence of indigenous law, including its theoretical and methodological aspects. Developing a thorough understanding of the nature of indigenous law will strengthen my claim that WSÁNEĆ law can offer an important legal response to the Goldstream spill.

### **Indigenous Law, Culture and Essentialism**

Indigenous law and indigenous culture are intimately connected, as is any law, with the culture from within which it arises. Yet the concepts of ‘law’ and ‘culture’, in their full complexity, are impossibly dynamic to capture in words. Attempting to define ‘indigenous law’ and ‘indigenous culture’ therefore poses difficulties worth exploring in further detail at the outset.

The “pre-existing cultural tenets”<sup>54</sup> (I would call them western cultural assumptions, values, and notions of cosmology and epistemology) underlying Canadian law and legal theory frequently go unquestioned.<sup>55</sup> Consequently, several indigenous scholars writing about indigenous law focus on highlighting how indigenous law is

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<sup>54</sup> Finch, *supra* note 37 at 2.1.5.

<sup>55</sup> I note that this is not always the case. Legal scholars writing from a feminist or critical legal studies lens do raise similar points. However, there are many scholars who begin their analysis without this questioning.

founded on different values, worldview, and cultural assumptions than western law.<sup>56</sup>

The work of these scholars offers a postcolonial critique of western law and Eurocentrism as the backdrop to their characterization of indigenous law. The work of James (Sákéj) Youngblood Henderson in *Postcolonial Indigenous Legal Consciousness* is a suitable example.<sup>57</sup> Youngblood Henderson offers a characterization of indigenous law as part of an ecological order in which everything is interrelated, holistic, and which, through shared relationships with nature, works to sustain harmony and balance.<sup>58</sup> For Henderson, indigenous law then is based on “the implicate order” of the “surrounding ecology”.<sup>59</sup> Youngblood Henderson recognizes that “all life forms and forces are in a process of flux”, and thus indigenous law operates to constantly adapt to that flux. Youngblood Henderson’s approach to indigenous law makes important contributions regarding the different philosophical foundations of indigenous law, though also creates space to push the resurgence of indigenous law further.

A potential critique of Youngblood Henderson’s work is it takes an essentialist view of indigenous law. That is to say, he homogenizes indigenous law in terms of generalized values and principles, such as harmony and balance. Part of this critique may be a hesitancy to step completely into a different normative framework. However, to the extent Youngblood Henderson does take an essentialist approach, I understand it as more

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<sup>56</sup> In similar discussions outside of law scholars also point to the different foundations of indigenous knowledge. See for example Vine Deloria Jr., *God Is Red: A Native View of Religion* (Golden: Fulcrum Publishing, 1973). Deloria Jr. examines First Nations spirituality and how it contrasts with Christianity and other non-Native religions.

<sup>57</sup> James (Sákéj) Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” 1 *Indigenous L.J.* 1 [Henderson, “Legal Consciousness”].

<sup>58</sup> *Ibid.* at 44-45. Refer to this article in general for a more thorough understanding of Youngblood Henderson’s approach to indigenous law.

<sup>59</sup> *Ibid.* at 12-13 and 27.

of a strategic essentialism.<sup>60</sup> Strategic essentialism is a tool used by postcolonial theorists to temporarily bring forward a simplified identity of an ethnic or minority group to achieve a political agenda. Despite presenting an essential core identity for these purposes, differences and contestation continue to exist between members of the group. There are benefits and disadvantages to this approach. I will begin with the many benefits.

Youngblood Henderson uses strategic essentialism to both simultaneously critique the oppressive operation of ‘Eurocentric law’ and offer an alternative vision for ‘Indigenous law’. His approach has a political component that is effective in pushing back against the dominant narrative of law, thereby creating space for alternative conceptions of law. Creating space for alternative narratives and conceptions of law is important if we accept that the narrative through which we approach problems works to frame the issues and solutions we ultimately deem possible and appropriate. What Youngblood Henderson provides then is a different lens through which to consider our understanding and application of law. He centers on ecology, harmony, and interrelationships as the foundational values and philosophies that serve as the starting point for indigenous law. This contrasts with a liberal paradigm that centers on the individual. Identifying a different starting point and guiding philosophies for indigenous law is an important and powerful tool, and will ultimately have significant implications for the legal order’s response.

In Chapter Two of this thesis I related several WSÁNEĆ stories I argued are critical in understanding the implications of the Goldstream spill. A significant purpose

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<sup>60</sup> See Gavatri Chakravorty Spivak, “Subaltern Studies: Deconstructing Historiography” in D. Landry & G. MacLean, *The Spivak Reader* (London: Routledge, 1996) for more on strategic essentialism. I note that Spivak herself has come to reject the way strategic essentialism has often been used, and that the term is not without some contention.

of doing so was to relate a worldview (a particular set of values and philosophies) connecting the WSÁNEĆ with the Earth. A striking example was the WSÁNEĆ understanding of TETÁĆES (islands) as ‘Relatives of the Deep’, which contrasts sharply with a view of islands as an inanimate rock. The implications for a potential legal response are immense. Of course, in making this observation I recognize that today not every WSÁNEĆ person recognizes islands as their ‘Relatives of the Deep’, or that such an understanding is essential to being a WSÁNEĆ person. Nonetheless, I understand it as a major trajectory within WSÁNEĆ beliefs, and therefore as primary in discussion on the application of the WSÁNEĆ legal order. Temporarily presenting a unified understanding in the process of application is what makes coming to a particular legal response possible.<sup>61</sup> This does not negate that there is a subjective component to assessing the implications of this cosmological understanding.

While forms of strategic essentialism can be important, they may also have drawbacks. First, while there are benefits to speaking broadly about ‘indigenous’ law, indigenous legal orders across Canada are diverse and care must be taken not to oversimplify matters.<sup>62</sup> For instance, Mathew Fletcher fears that speaking only at the level of generalized ‘indigenous’ values and principles may risk the application of “broad, vague notions of pan-[Indigenous] culture” that might not be applicable to the particular community or context in question.<sup>63</sup> In order to avoid this concern we need to

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61 Jeremy Webber makes a similar point in discussing the role of law and human agency in establishing norms against the backdrop of disagreement. See Webber, *supra* note 47 for further discussion.

62 Borrows, “Indigenous Constitution,” *supra* note 34 at 24. Borrows speaks broadly about indigenous law in order to argue for its legitimacy, authority, and role in Canada. Borrows does, however, in other sections of this work also speak in detail about identifiable indigenous legal traditions, including the Mi’kmaq, Haudenosaunee, Anishinabek, and others.

63 Mathew Fletcher, “Rethinking Customary Law in Tribal Court Jurisprudence” (Occasional Paper delivered at Michigan State University College of Law, Indigenous Law and Policy Centre Occasional Paper Series, 2006), online at <http://www.law.msu.edu/indigenous/papers/2006-04.pdf> at 35.

dig deeper to understand the substantive and procedural complexity of identifiable legal orders, as well as how to locate and apply indigenous laws. Only then will indigenous peoples increasingly turn to their own laws for legal responses. Second, we must take care not to fall into essentialism itself. Law, culture, and identity are dynamic and always subject to contestation and debate at some degree. The reality is that people disagree over values, how to interpret them, how to weigh them when they conflict, and how to apply them in different contexts.<sup>64</sup> While this is true at a level, care must also be taken not to fall into assuming that the same individual oriented liberal paradigm dominant today has always existed (or should necessarily continue to exist).<sup>65</sup> The point of Henderson's work is to push back against such perspectives and identify a different philosophical foundation to indigenous legal orders (both historically and contemporarily). This philosophical foundation is directed much more at the collective and the web of interrelationships we are embedded within.

The objective then, is to balance the benefits of strategic essentialism with the drawbacks. We can use the values and philosophies of an identifiable indigenous legal order (for which there is at best overlapping consent) to function as the flagship that guides the application of specific legal principles.<sup>66</sup> These values and philosophies, a product of the culture in which the legal order arises, are what give the legal order its distinctive quality. Without such a flagship it is possible to be inadvertently caught in a

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64 Val Napoleon et al., "Where is the Law in Restorative Justice?" in Yale D. Belanger, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues, 3rd Edition* (Saskatoon: Purich Publishing Ltd., 2008) [Napoleon, "Restorative Justice"] at 20.

65 While my reference is generally in regard to classical liberalism, I do recognize that many forms of neo-liberal thought exist today.

66 Johnny Mack and Paul Nadasdy both present a similar idea that the cultural groundings of an indigenous society should be the flagship that orients our interactions with the state. See Johnny Mack, "Hoquotist: Reorienting through Storied Practice" in Hester Lessard, Rebecca Johnson & Jeremy Webber, eds., *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2011) 287-307 [Mack, "Hoquotist"] and Paul Nadasdy, *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon* (Vancouver: UBC Press, 2004).



process that cycles our emancipatory strivings back into the framework we intended to escape.<sup>67</sup> My approach then is similar to that used by Raymond Austin with the Navajo legal order.<sup>68</sup> The generalized values of the Navajo are *hózhq* (glossed as peace, harmony, and balance), *k'é* (glossed as kinship unity through positive values), and *k'éí* (glossed as descent, clanship, and kinship). While these values and philosophies are important, they function similar to a western notion of 'justice'. That is, they form the basis by which we judge the application of specific legal principles, and the soil from which those legal principles grow. They are not a romantic ideal, at least no more than the notion of individual freedom and non-interference. They are what we strive for. They are central in this respect, though they do not comprise the specific process or substance of the legal order in and of themselves.<sup>69</sup>

### **Indigenous Legal Theory**

The WSÁNEĆ values and philosophies introduced in Chapter Two centered on a cosmological understanding of the Earth contained in the creation stories of the WSÁNEĆ. To argue that these stories of creation (and associated values and philosophies) are, or should be, central in judging the creation and application of specific WSÁNEĆ legal principles may seem like a form of originalism. That is, WSÁNEĆ law could be thought of as an attempt to return to something that once was. This is not the case. True, indigenous legal orders “have ancient roots, but they are not stunted by time.”<sup>70</sup> Indigenous law is therefore more akin to the living tree approach; its branches

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<sup>67</sup> Mack, “Hoquotist”, *supra* note 66 at 293.

<sup>68</sup> Raymond Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Government* (Minneapolis: University of Minnesota Press, 2009).

<sup>69</sup> See *Ibid.* for a more thorough discussion.

<sup>70</sup> Borrows, “Indigenous Constitution”, *supra* note 34 at 244.

continue to grow and develop to meet contemporary application.<sup>71</sup> However, alongside the metaphor of branches are the roots of the tree – that which anchors and stabilizes.

While the branches of the tree may grow, its roots continue to run deep.

I do not mean the roots of the tree to signify a fallback on essentialism – a core of indigeneity from which change may be measured. My point is that the WSÁNEĆ have always occupied a normative universe that governed how to ask and answer questions of law. I take a dynamic approach to law and culture – that these were ever evolving and changing (some unfortunately through an oppressive assertion of power from the outside). Yet, they have never been erased. The reason they remain is that, despite their dynamic nature, we have (through choice, struggle, and contestation) held on to them over the generations. Why have we held on to them? Because they have been (and continue to be) central to what binds us – how we identify as a distinct political, cultural, and legal community.

The reason indigenous law can slip into originalism and essentialism (aside from strategic essentialism) is a fear of losing what binds us as a people and community.<sup>72</sup>

Identity is of course multi-layered, crosscutting, and contextual. However, through the processes of colonialism indigenous peoples have often come to face a false dichotomy in which they are either traditional (and therefore stuck in the past) or contemporary (and therefore inauthentic).<sup>73</sup> The Canadian legal system and its determination of Aboriginal

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71 I use this metaphor from the common law only to indicate that indigenous law is not stuck in time. John Borrows' work focuses on indigenous law as living law. Borrows work has thoroughly argued the application of indigenous law in a contemporary context. I do not duplicate his work here. See generally Borrows, "Indigenous Constitution", *supra* note 34 and Borrows, "Recovering Canada", *supra* note 34.

72 I recognize that any legal system may struggle with a tension between originalism, essentialism, and a living tree approach to law.

73 See particularly Jean O'Brien, *First and Lasting: Writing Indians Out of Existence in New England* (Minneapolis: University of Minnesota Press, 2010). See also Jean Dennison, *Colonial Entanglement: Constituting a Twenty-First-Century Osage Nation* (Chapel Hill: University of North Carolina Press, 2012) and Bonita Lawrence, *Fractured Homeland: Federal Recognition and Algonquin*

rights is a problematic example of the legal freezing of culture to pre-contact practices;<sup>74</sup> however, this occurs at the societal level in terms of cultural expectations as well.<sup>75</sup> Defining indigeneity through blood quantum is equally problematic.<sup>76</sup> Conversely, should indigenous peoples embrace change and adaptation, there may be a fear of becoming labelled inauthentic, assimilated, or colonized.<sup>77</sup> Unfortunately, indigenous people often face these same critiques and pressures from within, as well from external sources.

A living tree approach to indigenous law, properly understood, need not threaten identity; that is, fear of losing what binds us as a people and community. I do not deny that some indigenous legal orders may choose to be more ‘modern’ or ‘traditional’ in their approach; but in making this choice it is wise to be conscious of power structures implicated with that decision.<sup>78</sup> My sense is that in revitalizing indigenous legal orders the roots of the tree should guide us – they have withstood the test of time and give us strength, grounding, and direction. I consider the creation stories of the WSÁNEĆ to be the roots of the WSÁNEĆ legal order. My analysis of the Goldstream spill is an example of taking guidance from the deep roots of the WSÁNEĆ legal order in its application to a

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*Identity in Ontario* (Vancouver: UBC Press, 2012) for additional discussion on identity construction and the impact of outside forces on identity construction.

74 John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997) 22, No. 1, *Am. Indian L. Rev.* 37 [Borrows, “Frozen Rights”]. Consider *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 and its test for Aboriginal rights under the common law. Under the *Vanderpeet* test, to be an aboriginal right an activity must be tied to a pre-contact practice, custom, or tradition that was integral to the distinctive culture. While pre-contact practices are allowed to evolve, Aboriginal culture cannot adopt new elements and still remain authentic.

75 Charlotte Coté, *Spirits of Our Whaling Ancestors: Revitalizing Makah & Nuu-chah-nulth Traditions* (Vancouver: UBC Press, 2010). Coté illustrates the anger raised in response to the Makah whale hunt in general, but also in specific response to their use of contemporary hunting tools.

76 Consider the blood quantum requirements in the *Indian Act*, R.S.C. 1985, c. I-5 in determining who is a status Indian. The outcome of this approach may be the eventual elimination of people considered to be status Indian through the passage of time.

77 See generally O’Brien, *supra* note 73; Dennison, *supra* note 73; and Lawrence, *supra* note 73 for further discussion relating to identity construction.

78 These power structures will be explored in greater detail in the following chapter.

contemporary ecological harm. Through this approach WSÁNEĆ law remains fundamentally rooted in WSÁNEĆ culture and beliefs, while also being a living tradition that can grow and remain relevant to contemporary life. I would say a similar observation could hold true for indigenous law more broadly.

### **Sources of Indigenous Law**

I have argued that creation stories are central to the WSÁNEĆ legal order and its application. There are however many potential sources of indigenous law and it would be a misconception to think there is a single way to imagine indigenous legal orders.<sup>79</sup> Many people understand the judiciary or formal centralized state processes as being the only potential sources of law. Yet many indigenous legal orders arise within non-state, often decentralized societies.<sup>80</sup> We therefore need to divorce ourselves of any narrow conception of ‘law’ and look to the broader sources of indigenous law. John Borrows’ work is foundational in locating indigenous laws.

Borrows recognizes that indigenous legal orders may be “based on many sources, including sacred teachings, naturalistic observations, positivistic proclamations, deliberative practices, and local and national customs.”<sup>81</sup> Understanding the diversity of these sources creates space for dialogue about indigenous laws and negates the notion that there is one right source or way to think about indigenous law. The specific ‘resources’ for finding indigenous law are also much broader than the sources themselves. For instance, sacred law may be embedded in stories, language, ceremony,

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<sup>79</sup> Several authors stress the plurality of Indigenous legal orders. See for example Christie, “Indigenous Legal Theory”, *supra* note 11 at 195 and Napoleon, “Indigenous Legal Orders”, *supra* note 11.

<sup>80</sup> Napoleon, “Indigenous Legal Orders”, *supra* note 11 at 231. This is true of the WSÁNEĆ legal order and others within British Columbia. However, this is not always the case. Indigenous laws in the United States, New Zealand, and other contexts may be centralized and state focused. See also Napoleon, “Ayook”, *supra* note 10 for further discussion.

<sup>81</sup> Borrows, “Indigenous Constitution,” *supra* note 34 at 23-24.

masks, dances, the knowledge of elders, and many other locations. How to locate, interpret, and apply the law embedded in these locations will vary depending on the legal order and context. Nonetheless, it is worth considering the sources of indigenous law (sacred law, natural law, deliberative law, positivistic law, and customary law) in greater detail.

Sacred law comes from the Creator and may be located in creation stories or ancient teachings.<sup>82</sup> Sacred laws are given the highest respect and are meant to be binding upon all members. Sacred laws are also often foundational to the operation of other laws and to the belief system of the indigenous group in general.<sup>83</sup> Natural law involves close observation and interaction with the physical world.<sup>84</sup> Humans can draw from these observations and use analogy to govern themselves by the principles found throughout nature.<sup>85</sup> Deliberative law refers to law formed through reasoning, persuasion, deliberation, and discussion.<sup>86</sup> The setting for deliberative law may include talking circles,<sup>87</sup> feasts,<sup>88</sup> council,<sup>89</sup> or Band council meetings.<sup>90</sup> Deliberative law is broad in that other sources of law require human recognition, enforcement and

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<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* at 25.

<sup>84</sup> *Ibid.* at 28-29.

<sup>85</sup> *Ibid.* at 25.

<sup>86</sup> *Ibid.* at 35.

<sup>87</sup> *Ibid.* at 39.

<sup>88</sup> See Napoleon, "Ayook," *supra* note 10 for an in-depth analysis of the role of feasts in the Gitksan legal order.

<sup>89</sup> The Haudenosaunee Confederacy use council in their legal order. Refer to Borrows, "Indigenous Constitution", *supra* note 34 at 72 for further discussion.

<sup>90</sup> *Ibid.* at 42.

implementation.<sup>91</sup> Positivistic law can be found in proclamations, rules, regulations or teachings. Proclamations are followed because they are made by a group or individual (i.e. chief, clan leader, headmen or respected elder) viewed by the community as authoritative.<sup>92</sup> Positivistic law may or may not be grounded in other sources of law, though it is most effective when it is. Finally, customary law is “developed through repetitive patterns of social interaction” that come to be accepted as binding through “unspoken or intuitive agreements.”<sup>93</sup>

In most cases indigenous legal orders will involve a combination of many sources of law. Borrows’ identification of the sources of indigenous law creates space for thinking about the complexities of indigenous legal orders and for locating substantive indigenous laws. It also allows us to ask critical questions about the sources of law, including how (and why) the application and interpretation of each source may change over time.

### **Cosmological Foundations**

In identifying the sources of indigenous law, Borrows notes that sacred laws are often foundational to the operation of other laws and to the belief system of the indigenous group in general.<sup>94</sup> Therefore, while creation stories may be an important source of law, they can also be thought of as much more. This has been a central theme throughout this thesis, though deserves elaboration in discussion of indigenous legal theory in particular.

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91 *Ibid.* at 35. See generally Napoleon, “Indigenous Legal Orders,” *supra* note 11 for a perspective that emphasizes the role of deliberation and reasoning in indigenous law. The role of deliberation and human agency in indigenous legal orders is a theme that runs throughout Napoleon’s work.

92 Borrows, “Indigenous Constitution”, *supra* note 34 at 47.

93 *Ibid.* at 51.

94 *Ibid.* at 25.

In this section I use the term cosmology (understanding the nature of the universe) broadly to signify an understanding of who we are and how we envision ourselves in relation to one another and the Earth. My use of cosmology may therefore at times include ontological (understanding the nature of being) and epistemological (understanding the nature of knowledge) components.

Although a number of authors have written about indigenous values, principles, or spirituality<sup>95</sup> – which can be extrapolated to our study of indigenous legal orders – less work has been done explicitly identifying cosmology as foundational to indigenous legal theory.<sup>96</sup> One author who has clearly done so is Christine Black in her book *The Land is the Source of the Law: A Dialogic Encounter With Indigenous Jurisprudence*.<sup>97</sup> Black develops a framework for understanding indigenous jurisprudence, primarily based on her experience and connections to her grandmother’s Kombumerri clan and her grandfather’s Munaljarlai clan, in what is now Australia.

Black takes cosmology to be the largest of three concentric circles that are the organizing principle for the structure of her book and for understanding her legal order. Black organizes her work into a set of three concentric circles: cosmology; law of relationship; responsibilities and rights.<sup>98</sup> For Black, the outermost circle is cosmology “so that humans never forget that they are inside a universe – and this universe has a law. This law is located in the second circle,” which is a law of relationship aimed at

<sup>95</sup> See for example Deloria Jr., *supra* note 56 for a discussion on indigenous spirituality.

<sup>96</sup> See Henderson, “Legal Consciousness”, *supra* note 57; James (Sákéj) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Native Law Centre of Canada, 2006) [Henderson, “First Nations Jurisprudence”]; and Monture-Angus, *supra* note 36 for examples of scholars that engage with the conceptual foundations from which understandings of indigenous laws emerge. See also Christie, “Indigenous Legal Theory”, *supra* note 11 for an assessment of indigenous legal theory more generally.

<sup>97</sup> Christine F. Black, *The Land is the Source of the Law: A Dialogic Encounter With Indigenous Jurisprudence* (New York: Rutledge, 2011).

<sup>98</sup> See *Ibid.* at 14-16 for further discussion of the nature of each concentric circle.

balancing the fluxing nature of the universe.<sup>99</sup> The innermost circle relates specifically to the “responsibilities and rights of humans” within these broader concentric circles.<sup>100</sup>

I do not adopt Black’s entire approach to conceptualizing indigenous law, primarily because it is a reflection of her particular indigenous group. I do, however, agree with the importance she places on cosmology in understanding indigenous law. Opening one’s mind to the cosmology of the group and the relationship between cosmology and law is essential. Black argues that it is “by understanding the cosmology that an outsider can come to terms with the manner in which the laws of that society and the individual’s behaviour are understood.”<sup>101</sup> That is to say, “to come into the Indigenous world..., the outsider must first enter the cosmology of the particular group with which they wish to engage, otherwise knowing of the people is only superficial.”<sup>102</sup> That is because “a people’s cosmological Creation story and events define their principles, ideals, values and philosophies, which, in turn, inform the legal regime.”<sup>103</sup>

Cosmology then, to Black, can be analogized to a “theory,” which ultimately is a “story of how things occurred, what is valued, and so on.”<sup>104</sup> A Creation story (or stories in the case of the WSÁNEĆ) can be viewed as “a particular group’s theory of how things came to be and, more specifically, how people should lawfully conduct themselves in a

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<sup>99</sup> *Ibid.* at 14.

<sup>100</sup> *Ibid.* at 16.

<sup>101</sup> *Ibid.* at 24.

<sup>102</sup> *Ibid.* at 15. Christine Black is concerned with emphasizing that “the outsider” must first understand the indigenous cosmology that informs the indigenous legal order. This argument, however, is equally applicable to indigenous people seeking to reconnect with or revitalize their own indigenous culture or legal order.

<sup>103</sup> *Ibid.* at 15.

<sup>104</sup> *Ibid.* at 15.



particular place.”<sup>105</sup> Understood in this way, cosmology is the conceptual foundation for understanding a group’s indigenous law, and thus should be central to indigenous legal theory.

I do not consider it necessary to have comprehensive knowledge of a group’s cosmology in order to begin constructing an understanding of the indigenous legal order. I do however consider cosmology and law to be closely related and that it is necessary to have a working understanding of the group’s cosmology as a foundation to understanding the indigenous legal order. Of central importance is having an open mind to the effect cosmology may have on conceptions of proper relationships; whether it is to each other, the Earth, the ancestors, or otherwise. This is because (at its most general) law is about relationships.

Vince Deloria Jr. uses the term tribal religion as opposed to cosmology to argue a similar point, stating “the task of tribal religion, if such a religion can be said to have a task, is to determine the proper relationship that the people of the tribe must have with other living things and to develop the self-discipline within the tribal community so that man acts harmoniously with other creatures.”<sup>106</sup> Ultimately, “recognition that the human holds an important place in such a creation is tempered by the thought that they are dependent on everything in creation for their existence.”<sup>107</sup> Deloria Jr.’s principle point is indigenous cosmologies tend to recognize that “each form of life has its own purpose, and there is no form of life that does not have a unique quality to its existence.”<sup>108</sup> This is

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<sup>105</sup> *Ibid.* at 15. Black uses the term theory in a way this is not meant to address “abstract questions of existence” but rather to understand “how humans were patterned into a certain tract of land.”

<sup>106</sup> Deloria Jr., *supra* note 56 at 87.

<sup>107</sup> Deloria Jr., *supra* note 56 at 87.

<sup>108</sup> *Ibid.* at 87.

meant as a general statement, though has also been exemplified by the WSÁNEĆ stories previously related. These WSÁNEĆ creation narratives were meant to provide the reader with insights into the cosmological foundations of the WSÁNEĆ legal order. Aside from that purpose the stories provided also have further methodological uses for the interpretation and application of WSÁNEĆ law.

### **Indigenous Law Methodology**

The resurgence of indigenous legal orders requires methods aimed at locating and applying specific indigenous laws and legal principles.<sup>109</sup> The reader has been implicitly exposed to several of these methods in connection with the WSÁNEĆ narrative I have provided in relation to the Goldstream spill. This section will clarify how the WSÁNEĆ stories and teachings that opened this thesis can be used to draw out specific WSÁNEĆ legal principles.<sup>110</sup>

### **Stories**

Stories have a central role in understanding the structure and content of an indigenous legal order, and in indigenous culture more generally. Indigenous oral traditions have always used stories to teach, guide, and reinforce behaviour. The late Angela Sidney, Tlingit elder and storyteller, says:

They used to teach us with stories.  
They teach us what is good, what is bad, things like that...  
Those days they told stories mouth to mouth.

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109 Hadley Friedland has argued that while greater recognition has recently been given to the revitalization of indigenous legal traditions, less attention has been given to the practical question of how to identify and implement methods aimed at finding, understanding, and applying indigenous law in a contemporary context. See Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” 11:1 *Indigenous L.J.* 2012 1-40 for a detailed overview of potential indigenous law methodologies.

110 See John Borrows (Kegeedonce), *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) [Borrows, “Drawing Out Law”]. In this work Borrows uses an Anishinabek legal methodology to explore the multi-juridical engagement between indigenous law and the common law. The methodology draws heavily upon narrative and allows the reader to use their own agency and subjectivity to explore Anishinabek philosophy and law, as well as its interactions with Canadian law.

That's how they educated people.<sup>111</sup>

The centrality of stories in indigenous culture means that they can be used to create architecture for understanding relationships and obligations, decision-making processes, and deviations from accepted standards.<sup>112</sup> In this sense stories can be viewed as a form of “precedent because they attempt to provide reasons for, and reinforce consensus about, broad principles and to justify or criticize certain deviations from generally accepted standards.”<sup>113</sup> While some stories will focus on identifying and resolving legal wrongs, others will contribute to normative understandings of the indigenous culture more generally.

Legal scholars Val Napoleon and Hadley Friedland draw heavily on the use of stories in their work on indigenous legal traditions. I find their approach useful in identifying the nature of stories in indigenous law and quote it at length:

Our starting place is that some indigenous stories are about law and that they contain law, and as such, they are a deliberate form of precedent. In other words, the stories are a way to record information for future recall, and they are important enough to have been passed down for tens of thousand of years. Each indigenous society has its own political and legal order, and the oral traditions will reflect those overall structures and find meaning within them. Most indigenous societies were non-state, so the stories are decentralized forms of precedent that are drawn upon by decentralized, but collective authorities. Some stories are formal and collectively owned (e.g., Gitksan *adaawk*), others are in the form of ancient and recent legal cases (e.g., Gitksan and Cree law cases), and others are structured to record relationships and obligations, decision-making resolutions, legal norms, authorities and legal processes. Still others record violations and abuses of power, and responses to these

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111 Angela Sidney quoted in Julie Cruikshank, *Life Lived Like a Story* (Lincoln: University of Nebraska, 1990) [Cruikshank, “Like a Story”] at 73.

112 Val Napoleon & Hadley Friedland, “An Inside Job: Developing Scholarship From An Internal Perspective of Indigenous Legal Traditions” in Val Napoleon, Hadley Friedland & Emily Snyder, eds., *Thinking About and Working With Indigenous Legal Traditions, One Approach: A Community Handbook* [2012, unpublished] at 8.

113 Borrows, “Recovering Canada”, *supra* note 34 at 14.

breaches of law. All of these stories provide an architecture that enables thinking with analogy and metaphor as a form of problem solving.<sup>114</sup>

Napoleon and Friedland's description of stories as an architecture emphasizes that an indigenous legal order "cannot be understood without an appreciation of how each story correlates with others. A full understanding of [indigenous] law requires familiarity with the myriad of stories of a particular culture and the surrounding interpretations given to them by their people."<sup>115</sup> In beginning to understand the myriad of stories within an indigenous culture and legal order, the most productive location to start is with creation narratives.

Christine Black explains, "to explore the establishment of law in any Indigenous culture, one must first enter the cosmology via the cosmological narrative. Central to that narrative are the constitution of authority and the jurisprudence that legitimates such authority."<sup>116</sup> Black argues that understanding the creation narrative is "essential for any knowledge of people's intellectual landscape, which consists of their decision making and what they value in their society – that is, a system of Law that looks to the management of relationships on all levels of being..."<sup>117</sup>

While many indigenous groups may have a central creation narrative, I understand WSÁNEĆ cosmology to more appropriately be characterized as having several. The WSÁNEĆ have creation narratives for all aspects of life and Earth, each contributing to a central cosmological theme. Therefore, I sense the need to look at a collection of stories in understanding architecture of WSÁNEĆ law. The stories of

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114 Napoleon & Friedland, *supra* note 112 at 8.

115 Borrows, "Recovering Canada," *supra* note 34 at 16.

116 Black, *supra* note 97 at 24. I do not agree that the creation narrative is the only place to look in understanding the "constitution of authority and the jurisprudence that legitimates such authority." It is, however, a central starting point.

117 *Ibid.* at 180.

SĚEMEŰ (the first man), ĚEL,TOS (or islands more generally), SELEKTEĚ (Goldstream) and QENELEĚ (Mt. Finlayson), QOLEŰ (the chum salmon), as well as how they correlate, are the stories I find useful in beginning to build architecture of ŰSĀNEĆ law as it relates to the Goldstream spill. There may be others, but these are an important start to identifying legal principles and values that could guide our response.

A question that might then arise is how do we know what stories to use? First, stories are not always static, “for each telling passes on different elements that are important to the audience at the time of the telling.”<sup>118</sup> Therefore, indigenous legal orders do “not depend on finding the ‘authentic’ first telling of [a story], uncorrupted by subsequent developments. In fact, the reinterpretation of tradition to meet contemporary needs is a strength of this methodology.”<sup>119</sup> Second, listening to stories is not a passive activity that yields a particular *ratio*. Stories are not about transmitting “explicit rules,” but rather are “anecdotes” focused on the “processes of knowing.”<sup>120</sup> With that said, it may be more contentious to state that sacred and creation stories are subject to flexibility and interpretation in this manner.<sup>121</sup> In the end, what specific story to use becomes less important when you realize that stories are an active process in which “listeners and learners are as much a part of as elders and other storytellers.”<sup>122</sup>

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<sup>118</sup> *Ibid.* at 4.

<sup>119</sup> Borrows, “Recovering Canada, *supra* note 34 at 14.

<sup>120</sup> Battiste & Henderson, *supra* note 52 at 77-78. Also see this work for a detailed discussion of stories in relation to Mi’kmaw language and thought.

<sup>121</sup> For example contrast the perspectives of Napoleon, “Indigenous Legal Order”, *supra* note 11 at 234; Christine Zuni Cruz, “Law of the Land – Recognition and Resurgence in Indigenous Law and Justice Systems” in Benjamin Richardson, Shin Imai and Kent McNeil, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009) 315-335 at 315; and Borrows, “Indigenous Constitution”, *supra* note 34 at 25. Napoleon makes the distinction between believing laws themselves are sacred and thus outside human control, with understanding that law is founded on a particular worldview and cosmology. Zuni Cruz, on the other hand, understands laws contained in indigenous creation narratives as being a constant reference that may potentially not change. Borrows indicates that sacred laws “may be less flexible than laws flowing from other sources”.

<sup>122</sup> Napoleon & Friedland, *supra* note 112 at 7.

Often intimately connected to indigenous stories are indigenous languages. Like stories, language is an important component of indigenous methodologies and holds insights into indigenous law and legal principles.

### **Language**

Much can exist ‘between the lines’ in stories that is easy to miss, yet vital to understanding the implications of the story itself. Anthropologist, Julie Cruikshank notes:

Storytelling may be a universal human activity, but understanding what one hears requires close attention to local metaphor and local narrative conventions. When speaking in story-like constructions, Yukon elders tend to make generous assumptions about their listeners’ or readers’ understandings of such precepts. ... It is, of course, precisely the absence of such knowledge that often makes cross-cultural communications so fraught.<sup>123</sup>

Given this difficulty, stories on their own are likely not enough to understand an indigenous legal order. I have already discussed at length the importance of establishing grounding in the culture and cosmology of the indigenous legal order. But what other specific methods are available to ensure important precepts existing ‘between the lines’ in stories are not overlooked? One such method involves an emphasis on language.

Indigenous scholars regularly place an emphasis on indigenous languages. For instance, Leanne Simpson stresses that “if one is truly interested in fully and responsibly engaging with Indigenous Knowledge, then one needs to learn the language.”<sup>124</sup> This is because indigenous languages “carry rich meaning, theory and philosophies within their

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123 Julie Cruikshank, *Do Glaciers Listen? Local Knowledge, Colonial Encounters, & Social Imagination* (Vancouver: UBC Press, 2005) [Cruikshank, “Glaciers”] at 66.

124 Leanne Simpson, “Our Elder Brothers: The Lifeblood of Resurgence” in Leanne Simpson, ed., *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring Publishing, 2008) 73-87 [Simpson, “Elder Brothers”] at 78.

structures.”<sup>125</sup> Therefore, “our languages house our teachings and bring the practice of those teachings to life in our daily existence.”<sup>126</sup> For Simpson, “the process of speaking Nishnaabemowin, then, inherently communicates certain values and philosophies that are important to Nishnaabeg being.”<sup>127</sup> Marie Battiste and James (Sákéj) Youngblood Henderson offer a similar position in emphasizing that, “through their shared language, Indigenous people create a shared belief in how the world works and what constitutes proper action. Sharing these common ideals creates the collective cognitive experience of Indigenous societies, which is understood as Indigenous knowledge.”<sup>128</sup> Stated more directly, indigenous languages are a “philosophical system”<sup>129</sup> that “provide the deep cognitive bonds that affect all aspects of Indigenous life,” including law.<sup>130</sup>

WSÁNEĆ elders often provide an emphasis on language that is similar to the scholars above. It has been said: “you cannot learn the Saanich language without learning Saanich ideas, you cannot truly learn Saanich ideas without learning Saanich language.”<sup>131</sup> While I do not take a fundamentalist stance on language, I do consider WSÁNEĆ law and beliefs to be intimately tied into the WSÁNEĆ language (SENĆOTEN).<sup>132</sup> For those not fluent in SENĆOTEN, engagement with the WSÁNEĆ legal system could ideally be coupled with a master-apprentice relationship to learn the

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125 Leanne Simpson, *Dancing on Our Turtle’s Back: Stories of Nishnaabeg Re-creation, Resurgence and a New Emergence* (Winnipeg: Arbeiter Ring Publishing, 2011) [Simpson, “Turtle’s Back”] at 49.

126 *Ibid.* at 49.

127 *Ibid.* at 49.

128 Battiste & Henderson, *supra* note 52 at 49.

129 Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2009) [Alfred, “Wasáse”] at 247.

130 Battiste & Henderson, *supra* note 52 at 49.

131 Claxton, Elliott & Paul, *supra* note 14 at no page numbers available.

132 See *Ibid.* Claxton, Elliott & Paul write “a natural occurrence when working with the SENCOTEN language is the interweaving of place name, history, belief, law and idea.”

SENĆOFEN language. Leanne Simpson advocates a similar master-apprentice approach to engaging indigenous knowledge more generally.<sup>133</sup> This may be accomplished informally, though a SENĆOFEN master apprenticeship program is also available from the WSÁNEĆ School Board.<sup>134</sup> But what options exist aside from working to become fluent in the language?

Tribal court judge Mathew Fletcher advocates a linguistic method for the location and application of indigenous law.<sup>135</sup> His essential point is that language, as an integral component of thinking and knowing, can contain law. The linguistic method therefore requires the identification of a principle or legal concept within an indigenous word or phrase, which can then be applied to the particular context or legal issue. While Fletcher recognizes the potential link between language and legal principles, I favour a more nuanced approach similar to that also adopted by Leanne Simpson.

In using the SENĆOFEN language to engage the WSÁNEĆ legal order it is helpful to break down certain words into its roots, thereby revealing a deeper embedded meaning. Leanne Simpson recognizes that “breaking down words into the “little words” they are composed of often reveals a deeper conceptual – yet widely held – meaning” that can be very insightful.<sup>136</sup> I have used this approach in relation to the Goldstream spill. A striking example was the WSÁNEĆ understanding of islands (TETÁĆES). TETÁĆES is a conjunct of TEĆ (meaning deep) and SCÁLEĆE (meaning relative or friend). I related how the concept of islands therefore literally translates as ‘Relative of the Deep’. This

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133 See Simpson, “Elder Brothers,” *supra* note 124 at 81.

134 See WSÁNEĆ School Board, “The SENĆOFEN Master Apprenticeship Program” online: <<http://wsanecschoolboard.ca/education/sencoten-apprentice-program>> for further information.

135 See Fletcher, *supra* note 63.

136 Simpson, “Turtle’s Back”, *supra* note 125 at 49.



methodology therefore reveals a cosmological principle that is significant to our understanding of the WSÁNEĆ legal order. I argued specifically that it revealed a larger trend characterizing a deep relationality between the WSÁNEĆ people and the Earth that should be central in guiding any WSÁNEĆ legal response with respect to the environment, including the spill at Goldstream.

The advantage of this methodology is that it provides both non-WSÁNEĆ and non-fluent WSÁNEĆ people with “a window through which to experience the complexities and depth of our culture.”<sup>137</sup> Being a non-fluent SENĆOŦEN speaker I find this approach very useful, and will continue to utilize this approach to grow my knowledge of the WSÁNEĆ legal order.

### **Conclusion: Resurgence of Indigenous Law**

In Chapter Two the reader was immersed in a WSÁNEĆ narrative about Goldstream. The objective was to begin by patterning the reader’s thinking into WSÁNEĆ law and cosmology.<sup>138</sup> I began by assuming that WSÁNEĆ law can (and should) provide important insights into the fuel spill at Goldstream. Yet we are still faced with a scenario where we have to argue the legitimacy and applicability of indigenous law. This chapter engaged in that discussion, thereby telling a different story about ‘law’.

There are many ways to think about indigenous legal traditions and the revitalization and application of indigenous law on the ground.<sup>139</sup> I have emphasized an approach that centers on the cosmology of the WSÁNEĆ. In this way the roots of the WSÁNEĆ legal order (its creation stories and associated values) give us grounding and

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<sup>137</sup> *Ibid.* at 49.

<sup>138</sup> See Black, *supra* note 97 at 178. Black explicitly states her goal of patterning her readers mind into the indigenous cosmology.

<sup>139</sup> For instance, some may focus on indigenous law at the state level and the interaction between legal orders, while others may have more of a community focused approach. Each different approach is important.

direction in our evolving approach to WSÁNEĆ law. It frees us to re-construct our own societies and legal understandings, as opposed to constructing them completely within an imposed and constrictive paradigm we intended to escape.<sup>140</sup> From this position we can open the realm of possibilities and use them to shape our political struggles for a better and brighter future for indigenous peoples, and healthier relationships with the state. This ground-up approach to the revitalization of indigenous law has the potential to re-create a foundation for guiding broader subsequent questions relating to the role of indigenous law in Canada.

The work of scholars such as John Borrows has opened the door to focusing more intently on the revitalization of identifiable legal orders. My sense is that a priority for the field of indigenous law should be to focus on internally strengthening our own diverse legal orders and approaches to law, particularly their application.<sup>141</sup> This is no simple task and requires significant commitment and dedication. Further, in seeking to strengthen our own narratives of law we must however recognize the barriers and power structures created by colonialism.

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140 See Black, *supra* note 97 at 111 and Mack, “Hoquotist”, *supra* note 66 at 293 for more discussion on this idea.

141 This does not mean we should lose sight of the fact that indigenous nations across Canada (and beyond) face similar struggles and that we can draw strength from and align with one another in our struggles.

## CHAPTER FOUR: QEM QOMPT TFE WUĆISPTENS ŁTE (To Strengthen Our Teachings) – Colonialism and Indigenous Narratives

I have thus far engaged in a narrative about SELEKTEŁ, the WSÁNEĆ, and indigenous laws and their resurgence. However, power is always implicated in telling a different story. That is, where an alternative narrative exists in relation to the dominant narrative and its associated power structures. Telling a different story is therefore only part of the matter. The focus of this chapter will be to step back and challenge the power of the dominant narrative to constrain our imagination of what is possible.<sup>142</sup> I will also expand upon the resiliency of indigenous narratives and the power of strengthening those narratives in order to “meet stories with stories” as a form of resistance.<sup>143</sup>

### **Narrative Primer: A Constraint on Imagination**

Gordon Christie, in his article *Indigeneity and Sovereignty in Canada’s Far North: The Arctic and Inuit Sovereignty*, explores the narrative of ‘sovereignty’ (and its associated limitations and impacts) as it applies to the ‘opening up’ of the Arctic. Christie proposes the term ‘Indigeneity’ as an alternative narrative in resistance to that of ‘sovereignty’. While Christie’s analysis is focused on the Arctic, the notion of sovereignty has broader relevance to almost all indigenous issues. I find Christie’s article nuanced and insightful in its analysis of the power of narrative and I will draw upon it heavily in this section.

Christie begins by “noting that certain linguistic elements do not simply instrumentally *assist* in the formation of plans and strategies, rather, they serve to *define* a

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<sup>142</sup> Gordon Christie, “Indigeneity and Sovereignty in Canada’s Far North: The Arctic and Inuit Sovereignty” (2011) 110:2 *The South Atlantic Quarterly* 329 [Christie, “Indigeneity and Sovereignty”] at 339.

<sup>143</sup> *Ibid.* at 330.

range of possible plans and strategies.”<sup>144</sup> Christie exemplifies this point in application to the notion of ‘sovereignty’:<sup>145</sup>

Quietly residing in the background, [the term sovereignty] provides a certain kind of conceptual structure to be applied to the very acts of investigation, assessment, and planning. Not only are certain parties simply assumed to be vested with the proper authority in making decisions that will affect all those who live in the Arctic, but how these parties think and act are assumed to be the only vehicles or mechanisms by which legitimate actions are first imagined and then instantiated. Here forms of language and action outcomes are linked together in a way that seems to preclude the sensibility of other ways of thinking and acting.<sup>146</sup>

In short, “narratives function, then, to both carry along commonalities of meaning and to police meaning. They are the carriers of meaning itself – the stories we tell define who we are and how we think of the world – while they also work to control what can be thought (and so what we can see as “possible” action).”<sup>147</sup> It is from this backdrop that Christie contrasts an approach to resisting “the second wave of colonization by reacting *within* the web of meaning built up around this fundamental notion” of sovereignty with one that challenges “this story [of sovereignty] *as a story*” from “up and beyond the level wherein sovereignty functions” to constrain what is possible.<sup>148</sup>

In resistance from *within* the sovereignty model indigenous peoples must engage the law that “was historically constructed by (and, some would argue, almost entirely *for*)

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<sup>144</sup> *Ibid.* at 332.

<sup>145</sup> Christie defines sovereignty as follows: “First, sovereignty is understood as denoting territorially based power, the ability to act in relation to defined lands (and not, for example, directly in relation to persons, objects, or events). A nation-state holding sovereign power does so in relation to its defined territory and enjoys under this power the highest degree of deference in relation to decisions it makes. Second, all other decision-making bodies either within or outside this territory must accede to the decisions made by this sovereign power within the scope of its territory. Finally, accession to decisions made by the sovereign applies to all within the territory, generating obligations on all to follow its commands – authority is conceived of as designating a right held by the sovereign to be obeyed by all parties.” *Ibid.* at 333.

<sup>146</sup> *Ibid.* at 332.

<sup>147</sup> *Ibid.* at 338.

<sup>148</sup> *Ibid.* at 334.

the nation-state.”<sup>149</sup> Nonetheless, “this web of law...now entangles states and Indigenous peoples in multiple strands of mutual obligations and responsibilities (on international, domestic, and subdomestic levels).”<sup>150</sup> Through “masterfully pushing and pulling all the levers available in the sovereignty model”<sup>151</sup> indigenous peoples can force “state powers to acknowledge the rule of law [and] to accept the legal trappings that they themselves are bound by.”<sup>152</sup> Resistance from within the sovereignty narrative can therefore improve the lives of indigenous peoples when faced with resource exploitation and other threats.<sup>153</sup> However, Christie asks, “imagining maximal impact from the voices of Indigenous communities, what can we conceive of as favourable outcomes for Indigenous peoples” flowing from within the sovereignty narrative?<sup>154</sup>

The sovereignty model carries with it a “legitimacy” or “rightfulness” in the sense that the “sovereign state is the legitimate source, ground, and site of decision making over a territory.”<sup>155</sup> Residing behind that “legitimacy” is a web of meaning and presumed ways of thinking and acting.<sup>156</sup> Challenging this legitimacy from within involves a “closing off of imagination” according to Christie.<sup>157</sup> That is, challenges are limited to arguments such as “the nation state in question does not enjoy jurisdiction over this piece of land”, or there is some reason to “temper the exercise of absolute power in relation to a

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149 *Ibid.* at 336.

150 *Ibid.* at 336.

151 *Ibid.* at 335.

152 *Ibid.* at 336.

153 *Ibid.* at 337.

154 *Ibid.* at 335.

155 *Ibid.* at 338.

156 *Ibid.* at 332

157 *Ibid.* at 339.

particular subject matter”, or there is reason to “question the standing of the decision-making authority as constituting a sovereign entity.”<sup>158</sup> Central is that “all these *cognizable* challenges are understandable only *within* the sovereignty model.”<sup>159</sup> That is, the “conceptual universe” and “sovereign authority of nation-states is the assumed backdrop” to any successes achieved within the sovereignty narrative.<sup>160</sup> Therefore, according to Glen Coulthard, the background “structures of colonial power” remain largely unchallenged.<sup>161</sup> The UN’s Declaration on the Rights of Indigenous Peoples,<sup>162</sup> perhaps the strongest advocator for indigenous rights within the sovereignty model, is a telling example. While Article 3 of the Declaration promotes indigenous peoples right to self-determination,<sup>163</sup> this must be read against the backdrop of Article 46 – that nothing in the Declaration is meant to impair the “territorial integrity or political unity of sovereign and independent States.”<sup>164</sup>

My argument is that the Goldstream roundtable process suffers from a similar closing off of imagination. It is not that the roundtable process – its assessment of fish numbers, remediation activities, and determination of financial allocations – is without benefit. In fact, from within the sovereignty model it is favourable to other processes.

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158 *Ibid.* at 339.

159 *Ibid.* at 339.

160 *Ibid.* at 337. This is true at the international, domestic and subdomestic levels.

161 Glen Coulthard, “Beyond Recognition: Indigenous Self-Determination as Prefigurative Practice” in Leanne Simpson, ed., *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring Publishing, 2008) 187 [Coulthard, “Beyond Recognition”] at 195.

162 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UNGAOR, 2007, [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

163 Article 3: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” See *Ibid.*

164 Article 46: “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.” See *Ibid.*

Nor am I claiming that it is never worth engaging in roundtable type processes.

Nonetheless, the backdrop to the roundtable process is Crown sovereignty and associated assumptions regarding what is legitimate and appropriate in terms of determining harms and remedies, as well as what processes and standards ultimately matter most. The BC Ministry of Environment and Department of Fisheries and Oceans for instance are certainly present precisely because of Crown sovereignty and their staked authority over matters relating to environment and fisheries. Even the fact that the Department of Highways is not present says something about the assumed harms and remedies – that a provincial highway running through this location is not a problem in and of itself. The point is that the starting point is a particular set of assumptions and understandings. Stepping beyond these assumptions and understandings opens alternative approaches.

It is clear that there are pressures and incentives to seeking change within the sovereignty model, and that “resisting on multiple fronts” continues to be necessary.<sup>165</sup> However, I agree with Christie that within the sovereignty model our imagination tends to be constrained and “our plans and strategies can reach out only [so] far.”<sup>166</sup> In other words, what is brought into question and what the potential transformative effect is tend to be limited. While I believe this to be true on most levels, it need not be the case on all levels. John Borrows in *Canada’s Indigenous Constitution* has skilfully shown the transformative effects indigenous law can have within Canada’s legal system.<sup>167</sup> In many ways, what Borrows has done in this piece of work is take Christie’s argument one step further. Borrows has told a different story – one about indigenous law and its resurgence

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<sup>165</sup> Christie, “Indigeneity and Sovereignty”, *supra* note 142 at 337.

<sup>166</sup> *Ibid.* at 339.

<sup>167</sup> See Borrows, “Indigenous Constitution”, *supra* note 34 for further discussion.

– while managing to weave that story with the dominant narrative on Aboriginal rights in Canada, thereby envisioning a truly multi-juridical Canada. Borrows has also shown elsewhere that the problem is not so much Section 35 of *The Constitution Act of Canada* where “Aboriginal rights are hereby recognized and affirmed” – which read broadly possesses significant transformative potential – but the narrow construction the highest courts in Canada have given to its meaning.<sup>168</sup>

I share Borrows’ vision of a Canadian legal system that contributes, as opposed to resists, the resurgence of indigenous law. My objective in this section is however less far-reaching than Borrows’ and I aim only to tell a different story and highlight the benefits of strengthening alternative narratives. Therefore I adopt Christie’s foundational point that entirely distinct resistance strategies are available – “strategies that do not work within the stories told by others.”<sup>169</sup> It is at this level that stories meet stories and the sovereignty model becomes “but one way of making sense of how people can think of themselves in relation to one another and to land.”<sup>170</sup> An example of this approach was contained in Chapter Two in which I raised different questions, approaches and understandings related to the Goldstream spill.

The fact that the dominant narrative constrains imagination and limits other potential stories from taking root is certainly one reason why I have emphasized the application of WSÁNEĆ law to the Goldstream spill, as well as the resurgence of indigenous law more generally. The implications however of having to live within the stories told by others extend beyond Christie’s more narrow concern of a constraint of

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168 Borrows, “Frozen Rights”, *supra* note 74.

169 Christie, “Indigeneity and Sovereignty”, *supra* note 142 at 337.

170 *Ibid.* at 339-340.



imagination. Before we can get to the point where stories meet stories, and where we debate the extent to which we should engage the state, we need to better understand these impacts and the processes by which indigenous narratives are silenced.

### **Postcolonial Theory**

Indigenous narratives are not new stories, but silenced stories. Therefore, envisioning the means to strengthen our own stories in order to forge a stronger future for indigenous peoples and a legal framework that fosters a healthier relationship with the state in part depends on understanding the forces and processes that have damaged and continue to hinder the realization of both these objectives. The point is not to become bogged down in critique, which on its own does little to strengthen indigenous narratives, remedy the damage caused by colonialism, or build a lasting alternative to colonialism. Nor is it to claim that all aspects of the dominant narrative and legal framework are without merit. The more narrow objective of critique is to target aspects of the dominant narrative that can be used as a justification of colonial power structures, and thereby the functional silencing of indigenous narratives. The purpose then is to carve out space where story can meet story, and where we can question fundamental premises about how we should relate to one another and the environments that sustain us all. It is in this way that postcolonial theory is a foundational framework for considering the revitalization of indigenous legal orders.

The term “postcolonialism is used most obviously and simplistically to demarcate the transition from colonialism to self-determination among formerly colonized nations.”<sup>171</sup> Of course, in nations such as Canada that are now settler states, the transition

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171 Eve Darian-Smith, “Postcolonialism: A Brief Introduction” (1996) 5 *Social & Legal Studies* 291-299 at 292.

becomes increasingly complex. Postcolonial theory examines and critiques the “continuing, and often veiled, oppression by the West over the rest of the world.”<sup>172</sup> Untangling the relationship and power imbalances created by colonialism is a daunting task.<sup>173</sup> A prominent concern for postcolonial thinkers is the way law and legal theory has historically (and continues to) legitimate and perpetuate colonialism.<sup>174</sup> This is important because as Johnny Mack notes, even if we may conceive of indigenous legal orders operating distinct from the state, the two orders must inevitably interact.<sup>175</sup> Importantly, we must recognize that this interaction occurs within complex power dynamics that can function to shape or restrict indigenous law.

Canada’s legal landscape has too often ignored the authority and applicability of indigenous legal orders. From an indigenous perspective, colonialism consists of power structures that work to continually invalidate indigenous culture, knowledge, and systems of law and governance. The damage caused to indigenous peoples by these power structures is multi-faceted and should not be understated. The power structures of colonialism still exist, though in more subtle forms. An important element of escaping these power structures and forging a stronger future for indigenous peoples therefore depends on confronting the invalidation of indigeneity head on. Indigenous legal theory and the revitalization of indigenous systems of law and governance is an important component of this objective. With that said, in order to mitigate these power structures we must first have an understanding of the nature of colonialism and its harms, as well as the restrictive nature of power structures that still exist. Without this understanding we

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172 *Ibid.* at 292.

173 Monture-Angus, *supra* note 36 at 11.

174 See *Ibid.* for an in-depth discussion of the many ways Canadian law continues to perpetuate colonialism.

175 Mack, “Hoquotist”, *supra* note 66.

risk further entrenching these power structures.<sup>176</sup> As Taiaiake Alfred states, “without clarity on the full meaning and depth of our situation, understanding the landscape of our colonial existence and achieving a clear-eyed and sober vision of our goals... Our energies, unchannelled and misdirected, will fall short of an effective challenge to the status quo.”<sup>177</sup> It is important then to assess the extent we engage the state from within the dominant narrative and the extent we work outside that narrative to strengthen our own stories.

### **The Nature of Colonialism and its Harms**

To understand the harms already inflicted by colonial power structures we need to understand the nature of colonialism itself. Stated simply, colonialism has subordinated indigenous peoples. It is difficult to pinpoint the many and varied ways this has impacted indigenous peoples. In the wake of colonialism indigenous peoples are often burdened with poverty, low self-esteem, depression, alcohol and drug-abuse, and the like. These are the symptoms of colonialism. But if these are the symptoms, what is the root of the problem (i.e., the nature of colonialism)?

While many indigenous communities are poverty stricken, it is a mistake to view the root or the answer to these complex issues “purely in terms of a politico-economic solution”.<sup>178</sup> Paulo Freire,<sup>179</sup> leading scholar in critical pedagogy, and his student

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176 Mack, “Hoquotist”, *supra* note 66 presents a similar idea. Alfred, “Wasáse”, *supra* note 129 also raises a similar concern in relation to the Aboriginal law paradigm. He argues that engaging Aboriginal law under the common law ends up “locking us into a perpetual relationship with the force we are opposing”.

177 Alfred, “Wasáse”, *supra* note 129 at 101.

178 Black, *supra* note 97 at 65.

179 See Paulo Freire, *Pedagogy of the Oppressed: 30th Anniversary Edition* (New York: Continuum, 2000).

Richard Trudgen<sup>180</sup> are both critical of the assumption “that, among [indigenous peoples] poor health conditions and poverty are due to economic disparity and that equal rights and personal autonomy will solve the problem.”<sup>181</sup> Certainly in today’s world economic stability is important for any community. However, the significant contribution these authors make is the ability to look beyond the symptoms to the root of the problem, which includes the invalidation of indigenous culture, law, authority structures, and what constitutes valued knowledge in society.<sup>182</sup>

The intent of colonialism was an expansion of empire and an exercise in exploiting and acquiring territory and resources. The justification for such an endeavour, according to Johnny Mack, is “a claim to lands and authority...based on a conceptualization of indigenous people as less advanced in the scale of historical development” thus negating “equivalent territorial and political rights” for indigenous peoples.<sup>183</sup> Taiaiake Alfred offers a similar critique aimed at the “false assumption of Euroamerican cultural superiority.”<sup>184</sup> Nowhere was this belief and agenda more evident than in the policy and operation of residential schools.

The harms resulting from colonialism are numerous and complex. In understanding the nature of this harm the insights of Martinique-born Afro-French psychiatrist, philosopher, and revolutionary, Frantz Fanon, are notable.<sup>185</sup> Fanon was

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180 See Richard Trudgen, *Why Warriors Lie Down and Die: Towards an Understanding of Why the Aboriginal People of Arnhem Land Face the Greatest Crisis in Health and Education Since European Contact* (Darwin: Aboriginal Resources and Development Services, 2000).

181 Black, *supra* note 97 at 65.

182 *Ibid.* at 66.

183 Mack, “Hoquotist”, *supra* note 66 at 288.

184 Alfred, “Wasáse”, *supra* note 129 at 103.

185 See generally Frantz Fanon, *Black Skin, White Masks*, rev. ed. (New York: Grove Press, 2008) [Fanon, “BSWM”] and Frantz Fanon, *The Wretched of the Earth*, rev. ed. (New York: Grove Press, 2004) [Fanon, “The Wretched”] for a more thorough discussion.

instrumental in understanding the numerous complex psychological ramifications and loss of self-worth the colonized experience as a result of colonialism. Fanon forcefully argued how the colonial structure significantly relies on the internalization of the racist aims of colonialism, and how the colonized eventually come to subjectively associate with the derogatory images and attitudes of the colonizer as directed at the colonized. Fanon argued that the colonized develop a “psycho-affective” attachment to the relationships of dominance found in the structures of colonialism.<sup>186</sup> For Fanon then the “problem of colonization, therefore, comprises not only the intersection of historical and objective conditions but also man’s attitude toward these conditions.”<sup>187</sup> What I take as Fanon’s main point is his understanding of the colonized’s internalization of the relationship of domination and the need for the colonized to regain their own self-worth outside the recognition of the colonizer, which works only to substantiate the relationship of domination.

Arguably, Fanon’s arguments in regard to the internalization of racism rest somewhat on an essentialist notion of culture and race (i.e., ‘Black’ and ‘White’ or the ‘colonizer’ and the ‘colonized’), and their relationship to identity construction. That is to say, he leaves little room for variation within each category. It seems that the processes of constructing identity, with all its subjectivities and experiences, are much more multi-layered, crosscutting, and contextual than portrayed by Fanon. This however may in part be a strategic essentialism by Fanon given the new ground his work covered, or a reflection of race being represented as such a stark binary in the dominant discourse. Aside from this type of essentialism, his work also lacks a gendered analysis of identity

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<sup>186</sup> See generally Fanon, “BSWM”, *supra* note 185 and Fanon, “The Wretched”, *supra* note 185.

<sup>187</sup> See Fanon, “BSWM”, *supra* note 185 at 65.

construction.<sup>188</sup> In addition, his approach to liberation through violence is likely context specific and holds little sway in a contemporary Canadian context, and does not with me.<sup>189</sup>

I acknowledge these critiques of Fanon, and make note that I am not a Fanon scholar.<sup>190</sup> Rather, my narrow purpose and understanding of Fanon in this section is to draw upon a foundational premise of his work - that there is an element of internal (as well as external) damage that can be caused to colonized peoples by colonialism. The invalidation of central societal structures (including indigenous law, culture, knowledge, and authority structures), along with the forced adherence to the structures of another society, is oppressive in nature and damaging to indigenous populations as *peoples*. These harms may be varyingly described. Richard Trudgen relates this harm to a “loss of humanity” or sense of “being in control.”<sup>191</sup> Johnny Mack describes the effect as “*hoquotist*” - a “Nuu-chah-nulth metaphor used to describe a disoriented person or people.”<sup>192</sup>

Connecting these observations with my emphasis on narrative, the primary insight I wish to draw from this section is that the implications of having to live within the narratives told by others (with the corresponding silencing of indigenous narratives) can be damaging and problematic beyond the concern of a constraint of imagination discussed above. It gives reason to favour an emphasis on strengthening the narratives

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188 See generally Fanon, “BSWM”, *supra* note 185 for examples.

189 See Alfred, “Wasáse”, *supra* note 129 at 45-61 for a more detailed discussion of paths of resistance, including the role of violence. Alfred’s discussion extends beyond the Canadian context to contemplate various movements and resistance strategies across indigenous populations. I note that Alfred does not advocate violence, but rather favours “non-violent militancy” in resistance against the state.

190 See Derek Hook “Frantz Fanon and Racial Identity in Post-Colonial Contexts” in Kopano Ratele & Norman Duncan, eds., *Social Psychology: Identities and Relationships* (Cape Town: UCT Press, 2003) 107-129 at 125 for a summary of critiques of Fanon.

191 Black, *supra* note 97 at 66 summarizing her understanding of Trudgen, *supra* note 180.

192 Mack, “Hoquotist”, *supra* note 66 at 295.

and stories of our own construction, as argued by Gordon Christie, as opposed to struggling only within those that are imposed. It is in this vein that indigenous political theorist, Glenn Coulthard, has drawn heavily on the work of Fanon in questioning whether the colonial relationship in Canada and the self-determination of indigenous peoples can be adequately achieved through the politics of recognition.<sup>193</sup>

Although colonialism has damaged indigenous ways of life and governance, and work remains to remedy these longstanding harms, an emphasis on strengthening stories and narratives of our own construction is an empowering process. This, however, is not always as simple or straightforward as it may seem.

### **Contemporary Colonial Power Structures**

The effects and processes of colonialism are not relegated to the past. Contemporary colonial power structures often operate in a much more subtle and fluid manner in contrast to past colonial practices. Nonetheless, they continue to function to restrict and limit the operation of indigenous law and governance, including its legitimacy, applicability and operation. In short, indigenous narratives continue to be silenced and submerged. The dominant narrative will not, on its own, simply make way for alternative narratives. While the objective may be to make space for alternative narratives, there are innumerable pushes and pulls in the direction of the dominant narrative. In relation to indigenous issues the dominant narrative is for the most part Canadian courts, Treaty Commissions, and the Aboriginal law paradigm.<sup>194</sup>

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193 See generally Glen Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6 *Contemporary Political Theory* 4 [Coulthard, "Subjects of Empire"] and Coulthard, "Beyond Recognition", *supra* note 161.

194 I recognize that there is also political engagement with the state outside of legal disputes, however I consider these political engagements to be significantly informed by the legal parameters contained in Aboriginal law. Negotiations always have a best alternative to a negotiated settlement that works to shape the compromises each party are willing to make throughout a negotiation. I sense that Aboriginal law is for the most part this backdrop in indigenous-state negotiations.

Understanding these power structures is a prerequisite to a debate on the extent to which we engage the state (the dominant narrative) in order to strengthen, incorporate, or make space for alternative narratives.

In relation to the Gordon Christie article it was discussed that there are limitations in engaging the dominant narrative from *within*, namely a constraint of imagination.<sup>195</sup> There are, however, stronger and more direct critiques of the dominant narrative than that presented by Christie. For example, Taiaiake Alfred argues that the most significant barrier to achieving healthier indigenous-state relations is a notion of Euroamerican superiority and an attempt “to design solutions from within the same intellectual and moral framework that created the problems in the first place.”<sup>196</sup> That is to say, Alfred argues that the state continues to adhere to its ideological foundations with little departure in fashioning its interaction with indigenous peoples.<sup>197</sup> Major ideological foundations discussed by Alfred include, for example, “liberal political theory, neoliberal capitalist economics,” and their associated values. While I largely agree with Alfred’s point that the state departs little from its ideological foundations, I would add to this discussion Christie’s recognition that the state has in fact entangled itself and indigenous peoples in a web of “mutual obligations and responsibilities.”<sup>198</sup> With that said, both Christie and Alfred, each to varying degrees, question the transformative potential possible through this web of responsibilities and obligations. My critique then, in drawing on each of these scholars, is aimed at the refusal of the state to make space for, or even engage in an

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195 See Christie, “Indigeneity and Sovereignty”, *supra* note 142.

196 Alfred, “Wasáse”, *supra* note 129 at 111.

197 *Ibid.* at 111

198 Christie, “Indigeneity and Sovereignty”, *supra* note 142 at 336.



open dialogue with, indigenous peoples, indigenous values, and indigenous systems of law and governance that pre-existed the imposition of the common law.

Legal scholar Johnny Mack expresses other notable concerns regarding engagement with the state. Mack notes that in seeking to engage the state to resolve relational issues indigenous peoples in Canada lack the power to determine the legal “forums or manner of engagement.”<sup>199</sup> Mack argues that the resultant dilemma is that indigenous peoples are “directed into hegemonic deliberative institutions such as Canadian courts of law or Treaty Commissions” through which self-determination may be achieved, but only to the extent that indigenous peoples remain “organized under constitutions and a liberal economic order that allows for the continuation of imperial penetration.”<sup>200</sup> Therefore, “what emerges is a less formal mode of imperialism that has more democratic legitimacy because [indigenous peoples] are able to participate in it through the exercise of limited powers of self-government.”<sup>201</sup> Mack’s critique is that by being funnelled into these forums, indigenous peoples are in actuality left with little to no space to question or negotiate foundational notions of sovereignty, citizenry, or differences in epistemology, cosmology and ontology. As such, indigenous peoples are forced to accept, and in many ways further entrench, the imperial foundations that form the backdrop to these forums of engagement.

In adding to Mack’s observations it is worth referencing other perspectives. It has already been noted above that John Borrows, in *Canada’s Indigenous Constitution*, has illustrated the potential for Canadian courts to incorporate diversity and the operation of

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199 Johnny Mack, *Thickening Totems and Thinning Imperialism* (LL.M Thesis, University of Victoria, Faculty of Law, 2009) [unpublished] [Mack, “Thickening Totems”] at 75.

200 *Ibid.* at 60.

201 *Ibid.*

indigenous law, as opposed to falling into hegemony.<sup>202</sup> The point then is that Canadian courts need not necessarily be hegemonic institutions, and in fact engagement between indigenous law and the state could lead to a multi-juridical Canada and healthier indigenous-state relations. To be fair, Mack's argument is I believe directed more at the way these institutions have functioned, as opposed to their potential for change. Beyond that, the role of tribal courts is also worth brief mention. Raymond Austin, in *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance*, presents Navajo tribal courts in a way that could be seen as an effective and available opportunity to escape the hegemonic institutions Mack is concerned with.<sup>203</sup> This is not to say that Austin negates an imperial origin to tribal courts, or necessarily believes them to be a full and final escape from hegemony. In the end, the issue is again the extent one sees tribal courts as an actual means to escape hegemony and achieve self-determination or as a continuation of less formal imperialism dressed in "democratic legitimacy."<sup>204</sup>

The power of the state to direct the disputes of indigenous peoples into certain forums may raise additional concerns to those mentioned above. Glen Coulthard identifies that "the state institutional and discursive fields within and against which Indigenous demands for recognition are made and adjudicated can subtly shape the subjectivities and world views of the Indigenous claimants involved."<sup>205</sup> The point Coulthard is making is that the power structures of these institutions "have the ability to asymmetrically mould and govern how Indigenous subjects think and act, not only in

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202 See generally Borrows, "Indigenous Constitution", *supra* note 34.

203 See Austin, *supra* note 68. Note that here I am extrapolating Austin's discussion of Navajo tribal courts more generally to draw specific comparisons and discussions with the work of Johnny Mack. I am reading in to Austin's work this observation or argument.

204 Mack, "Thickening Totems", *supra* note 199 at 60.

205 Coulthard, "Beyond Recognition", *supra* note 161 at 196-197.

relation to the topic at hand (the recognition claim), but also to themselves and to others.”<sup>206</sup> The concern then is that the “rights and identities” of indigenous peoples become shaped only “in relation to the colonial state and its legal apparatus,” as opposed to through indigenous peoples own construction.<sup>207</sup> I have already stated my understanding of identity as being multi-layered and dynamic. As such, I would not overlook the way indigenous identity construction continues to exist outside oppressive power structures.<sup>208</sup> Nonetheless, I understand the concerns being raised by these authors regarding engagement with the state – particularly when it functions to asymmetrically redefine our rights and responsibilities on its own terms.

### **State Engagement**

Ultimately, the preceding section is meant to highlight contemporary colonial power structures and the need to be critically aware of their operation. From this awareness there continues to be a debate regarding the extent indigenous peoples should engage the state and its institutions. Framing this debate in relation to the Christie article, the question remains whether to resist from *within* the dominant narrative or resist from *outside* the confines of that narrative.<sup>209</sup>

My sense is this issue should not be characterized as an either/or position. There are benefits and concerns with engaging the state, as there are with not engaging the state. In addition, there are also ambiguities. For instance, this debate sometimes plays out as whether or not to engage ‘law’. It is however important to differentiate between

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<sup>206</sup> *Ibid.* at 197.

<sup>207</sup> *Ibid.* at 197.

<sup>208</sup> I understand these authors to also recognize that identity can be shaped outside these processes. In fact, their argument is that indigenous populations are at their healthiest when they do.

<sup>209</sup> See Christie, “Indigeneity and Sovereignty”, *supra* note 142.

Aboriginal law and indigenous law. To discount ‘law’ fails to account for indigenous law and that indigenous communities once governed themselves (and still do where possible) by their own systems of law and governance, completely distinct from the laws of the state. I would therefore recast the debate as the extent to which we should engage Aboriginal law, the branch of the common law that deals with Aboriginal issues.

I characterize Aboriginal law as a complex example of Christie’s point of entanglement – i.e., the multiple strands of mutual obligations and responsibilities that exist within the sovereignty paradigm.<sup>210</sup> While “pushing and pulling all the levers available”<sup>211</sup> within this paradigm can produce benefits, there are concerns as to the extent it is possible to escape colonial and imperial power structures. These concerns are significant and bring into question a long-term strategy aimed only at engagement within the Aboriginal law paradigm.

Dale Turner, in *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy*, gives one example of a strategy employed largely from within the dominant narrative.<sup>212</sup> Turner seems to accept a reality that, as things stand, indigenous peoples must engage the state at its own game, so to speak.<sup>213</sup> That is, he accepts that:

*If* Aboriginal peoples want to assert that they possess different world views, and that these differences ought to matter in the political relationship between Aboriginal peoples and the Canadian state, they will have to engage the Canadian state’s legal and political discourses in more effective ways.<sup>214</sup>

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<sup>210</sup> *Ibid.* at 336.

<sup>211</sup> *Ibid.* at 335.

<sup>212</sup> Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006).

<sup>213</sup> Contrast this with a perspective that the ‘rules of the game’ will simply change once indigenous peoples begin to achieve desirable results under the current rules. See for example Henderson, “Legal Consciousness”, *supra* note 57.

<sup>214</sup> Turner, *supra* note 212 at 5.

To be sure, Turner recognizes that this creates a tension between forms of indigenous knowledge and the highly specialized discourses of the state. Turner sees indigenous ‘Word Warriors’, a community of indigenous intellectuals, as being tasked with alleviating this tension. ‘Word Warriors’ have the intellectual task of forcing indigenous voices into the mainstream narrative while being guided by (and protecting) their indigenous philosophies.<sup>215</sup> The end objective is to shape the legal and political relationship between indigenous peoples and the state so that it respects indigenous world views.

Turner’s approach provides a carefully thought out strategy for engaging the dominant narrative. I agree that having a sound strategy when engaging the state is necessary. However, I would add at least two lines of inquiry to Turner’s discussion. The first involves further problematizing the power dynamics of the state and the ways in which they can function to shape and restrict indigenous voices within the dominant narrative.<sup>216</sup> Glen Coulthard’s critique of Turner in this regard relates to how Turner undervalues the “assimilative power” that the legal and political discourses of the state “potentially hold in relation to the word warriors who are to engage them.”<sup>217</sup> Second, in accepting that indigenous peoples must engage the legal and political discourses of the state in more effective ways, Turner seems to also undervalue the potential of resisting from outside the dominant narrative as well. I have throughout this thesis argued, and

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<sup>215</sup> See *Ibid.* for a more thorough discussion.

<sup>216</sup> Glen Coulthard, Book Review of *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* by Dale Turner, (2008) 77:1 University of Toronto Quarterly 164 [Coulthard, “Review Turner”]. Also refer to Coulthard, “Beyond Recognition”, *supra* note 161 at 196-197 and associated discussion regarding how the power structures and institutions of the Canadian state can function to asymmetrically mould indigenous peoples ways of thinking and acting.

<sup>217</sup> Coulthard, “Review of Turner”, *supra* note 216 at 165.

attempted to illustrate in relation to the Goldstream fuel spill, the strength of such an approach.

While I do not agree that engaging the state in its own discourse is the only answer, I do not think it can be completely ignored either. The main reason is that engagement with the legal system, whether we like it or not, is still necessary at times. State law and policy impact indigenous legal traditions and life-ways in a manner that makes non-engagement with the state difficult, if not outright impossible. We must engage the state in order to protect indigenous lands and rights, and to fulfill our responsibilities to our people and territories. If we do not engage the state, there is a real possibility that there will be very little left to protect. Second, even when other forms of resistance are favoured, for instance blockades, the ultimate result might be a forced engagement with the legal system. Finally, even if one conceptualizes indigenous legal orders operating separate from the common law, the legal systems will inevitably have to interact with one another at some level, which requires serious and deliberate attention. While we are not there now, I would not want to renounce as possible a Canadian legal system that respects the operation of indigenous law.

With that said, there are enough reasons to question a strategy aimed only at engaging state structures. There are those who fight tirelessly and passionately from within the system, and deserve great respect. However, in scrambling to provide immediate protection for indigenous rights and interests we should not lose sight of long-term goals. That is to say, we cannot let Aboriginal law redefine our rights and responsibilities. Our most effective long-term goal is I think aimed at strengthening our own stories and narratives outside the restrictive confines of the dominant narrative. The

Aboriginal law paradigm tends to be open to very little flexibility and compromise, and fails to seriously account for indigenous values and legal orders. Indigenous narratives open space to question the deeply held assumptions about law and governance, thereby illustrating the need and legitimacy of ideologies outside the framework that currently exists. Strengthening our own stories could create a foundation for transforming the relationship that exists between indigenous peoples and the Canadian state. If the Canadian legal landscape recognized the legitimacy and applicability of indigenous legal orders in a meaningful way, this would go a long way in avoiding the paternalistic relationship that has plagued colonial history, as well as setting the stage for healthier and more prosperous indigenous communities.

Johnny Mack concisely summarizes this point in stating that, “by looking to our own stories and attending to the health of our connection to them, we would become a more grounded, healthier peoples, better equipped to identify, withstand, and/or subvert the imperial impetus of treaty processes as well as imagine more balanced modes of reconciliation that respect [indigenous] stories.”<sup>218</sup>

### **Resurgence Theory**

My emphasis on strengthening our own stories as a starting point for empowering indigenous communities and building toward healthier indigenous state relations finds connections with aspects of resurgence theory. At its core, resurgence theory calls for a focused regeneration of indigenous culture, values, and philosophies.<sup>219</sup> My particular emphasis on resurgence theory in this section rests centrally on turning our focus to strengthening indigenous peoples own narratives and responsibilities (outside the external

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<sup>218</sup> Mack, “Hoquotist”, *supra* note 66 at 293.

<sup>219</sup> See generally Alfred, “Wasáse”, *supra* note 129 as the leading text on resurgence theory.

pressures from the state) with respect to how we relate to one another and to the Earth. My emphasis is also on identifying how resurgence theory and indigenous legal theory (at least their foundations) are not necessarily as diametrically opposed as is sometimes thought.<sup>220</sup> Chapter Two and my work to revitalize WSÁNEĆ law and culture in relation to the Goldstream spill is in many ways resurgence in action, and is an example of an approach that blends indigenous legal theory with aspects of resurgence theory and postcolonial theory.

Leading scholars in resurgence theory include Taiaiake Alfred and Leanne Simpson. Admittedly, resurgence theory as a whole reflects a more precise political vision in indigenous state relations than reflected here. In general, resurgence theory reflects a political movement toward indigenous nationhood. The motivation of resurgence theory is decidedly less focused on dedicating energy to critiquing and interrogating the state, but rather on rebuilding and resurging indigenous cultures and ways of being.<sup>221</sup> Leanne Simpson describes this as a “living commitment to meaningful change in our lives and to transforming society by recreating our existences, regenerating our cultures, and surging against the forces that keep us bound to our colonial past.”<sup>222</sup> Despite this shift in focus, strong critiques of the state frequently underlie the emphasis resurgence theorists place on cultural regeneration and forms of resistance.<sup>223</sup>

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220 In fact, the notion of resurgence more broadly first arose in relation to indigenous law. See Borrows, “Recovering Canada”, *supra* note 34 for more.

221 Simpson, “Turtle’s Back,” *supra* note 125 at 55 emphasizes a similar point. Simpson states: “critique and revelation alone cannot create the magnificent change our people are looking for.”

222 *Ibid.* at 68.

223 For example, Alfred provides a strong critique of the state and of sovereignty in both Alfred, “Wasáse”, *supra* note 129 and Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto, 2d ed.* (Toronto: Oxford University Press, 2009) [Alfred, “PPR”]. Alfred is also critical of what he calls the aboriginalism approach. He argues that the aboriginalism approach wrongly “purports that the solution to our people’s problems consists in the delusional notion that legal argumentation in colonial courts can dislodge centuries of entrenched racisms and imperial privilege and thus transform colonial societies.” See Alfred, “Wasáse”, *supra* note 129 at 224.



Resurgence theory differs from the Native nationalist approach, which focuses on gaining political space for self-government.<sup>224</sup> It is also a departure from the traditionalist approach espoused by Alfred in his earlier work, *Peace, Power, Righteousness*, in which he called for the revival of traditional forms of government in their full complexity.<sup>225</sup> In Alfred's transition to his later work, *Wasáse*, he came to question whether the traditionalist approach gave enough attention to the damage created by colonialism.<sup>226</sup> In *Wasáse*, a cornerstone of resurgence literature, Alfred therefore shifts focus to the processes by which to create strong and healthy people and communities rooted in indigenous language, culture, spirituality, and relationships with each other and the land.<sup>227</sup>

In achieving its vision a central theme in resurgence theory appears to be a focus on a resurgence that begins with the individual. Indigenous resurgence begins with the *self* and reverberates outward in a political movement that eventually shapes indigenous relationships and resistance against the state. In making this point Taiaiake Alfred and Jeff Cornassel write that “Indigenous pathways of authentic action and freedom struggle start with people transcending colonialism on an individual basis – a strength that soon reverberates outward from the self to family, clan, community and into all of the broader

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224 See Alfred, “Wasáse”, *supra* note 129 at 224-225 for an overview of “native nationalism” thinking. In Alfred, “PPR”, *supra* note 223 at 4 Alfred advocated a shift from the Native nationalist approach to a traditionalist approach. Alfred argued that self-government meant little if you did not “fill it up with indigenous content.”

225 See Alfred, “PPR”, *supra* note 223 for more on a traditionalist approach. A central message in Alfred, “PPR”, *supra* note 223 at 105 was that “by bringing forward core values and principles from the vast store of our traditional teachings, and selectively employing those aspects of their tradition that are appropriate to the present social, political, and economic realities, the community has begun to construct a framework for government that represents a viable alternative to colonialism and that respects Native traditions.”

226 Alfred questions “if it makes any sense to try to bring back [traditional] forms of government and social organization without first regenerating our people so that we can support traditional government models.” See Alfred, “Wasáse”, *supra* note 129 at 31.

227 See *Ibid.* for a more thorough overview of Alfred's approach to resurgence.

relationships that form an Indigenous existence.”<sup>228</sup> Alfred and Corntassel go on to argue that it is in this way that “Indigenoussness is reconstructed, reshaped and actively lived as resurgence against the dispossessing and demeaning process of annihilation that are inherent to colonialism.”<sup>229</sup>

Alfred views decolonization at the personal level as foundational to the resurgence movement: He writes:

I believe it is absolutely crucial to start decolonizing at the personal level: the self is the primary and absolute manifestation of injustice and recreating ourselves is the only way we will ever break the cycle of domination and self-destruction it breeds in us and in our communities. Individual decolonization means focusing on the mental, spiritual, and physical aspects of being colonized and living the effect of such a condition.<sup>230</sup>

I have argued that a focused emphasis on narratives of our own construction, particularly in relation to indigenous systems of law, is an important starting point that can in the end expand to provide a foundation to shape healthier indigenous-state relations. My approach to indigenous law draws influence from resurgence theory in this way. I therefore see value in focusing inward in terms of strengthening our own narratives, thereby allowing that strength to reverberate outward. It is however worth pausing here for a number of other considerations.

Indigenous legal orders, and governance more generally, is necessarily a community practice. I understand that Alfred would argue that these types of community practices are not possible without a focus first on a cultural regeneration aimed at creating

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228 Taiaiake Alfred & Jeff Corntassel, “Being Indigenous: Resurgences Against Contemporary Colonialism” in Richard Bellamy, ed., *Politics of Identity – IX* (Oxford: Blackwell Publishing, 2005) 597 at 612.

229 *Ibid.*

230 Alfred, “Wasáse,” *supra* note 129 at 164.

people and communities capable of supporting these types of practices.<sup>231</sup> There is, however, still a tension worth exploring in relation to a focused start with the individual. I understand the difficulties faced in building momentum in a political movement, which often begins by building momentum one person at a time. However, too much focus on the individual could potentially risk aspects of an individual oriented liberalism that resurgence theory is clearly aiming to escape.<sup>232</sup> In breaking the “cycle of domination and self-destruction” in our communities I would not undervalue the strength and support of the community as a whole.<sup>233</sup> In fact, it might be argued that any strength within an indigenous individual stems in large part from their community, including the ways in which it grounds, supports, and allows the strength of that individual to flourish.<sup>234</sup> My point is that it may also be strength as a *community* that lifts *individuals* from the despair that can result from colonialism. Indigenous communities have been incredibly resilient in the face of colonialism and I would not want to undervalue this strength.

Finally, while I agree with Alfred regarding the importance of cultural regeneration, I am not sure that it must necessarily come prior to engaging in the community practices of law and governance – they can happen and regenerate at the same time.<sup>235</sup> That is to say, we can focus on strengthening our own stories and cultural

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231 See Alfred, “Wasáse”, *supra* note 129 at 31.

232 Alfred and other resurgence theorists emphasize that the individual is only the first step in the process. In the end, Indigenous philosophies, which presumably include strong collective orientations to begin with, must reverberate out to the community and beyond. Therefore, I raise this potential concern more generally.

233 Alfred, “Wasáse,” *supra* note 129 at 164. See *supra* note 230 for more context and for this passage in its entirety.

234 I recognize that any number of personal scenarios may be possible, depending on the conditions of that individual’s life and the community. My point is resurgence need not necessarily always begin with individuals and work out to communities, but can work from communities down to individuals as well.

235 I am unclear of the full extent to which Alfred understands resurgence as having to prefigure the operation of traditional governance structures or forms of community practices. Alfred does, however, see a clear divide between the traditionalist perspective and the resurgence perspective, indicating fairly clearly that resurgence must at least in large part come first. In Alfred, “Wasáse,” *supra* note 129 at 31 he writes: “Some people believe in the promise of what they call “traditional government” as the ultimate solution to our

regeneration at the same time as we work to revitalize indigenous legal orders and other forms of governance and community practices. They can grow and build momentum together, and in fact in many ways likely feed off one another.

I understand the reasons for emphasizing the self as a starting point in building political momentum in resurgence, but the above considerations are also worth noting. My comments are meant to highlight my own approach and how I envision the resurgence of WSÁNEĆ law. There is no singular path for resurgence, but a need for many visions and approaches to resurgence taking place on the ground.<sup>236</sup> In the end, each takes up the objective of strengthening indigenous culture and narratives.

In returning to resurgence theory, the call is for “Indigenous Peoples to delve into their own culture’s stories, philosophies, theories and concepts to align themselves with the processes and forces of regeneration, revitalization, remembering, and visioning. It is a call for Indigenous Peoples to *live* these teachings and stories in the diversity of their contemporary lives, because that act in and of itself is the precursor to generating more stories, processes, visions and forces of regeneration, propelling us into new social spaces based on justice and peace.”<sup>237</sup> As a central message of resurgence theory, I find this

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problems, as if just getting rid of the imposed corrupt band or tribal governments and resurrecting old laws and structures would solve everything. I used to believe that myself. But there is a problem with this way of thinking, too. The traditional governments and laws we hold out as the pure good alternatives to the imposed colonial systems were developed at a time when people were different than we are now; they were people who were confidently rooted in their culture, bodily and spiritually strong, and capable of surviving independently in the natural environments. We should ask ourselves if it makes sense to try to bring back these forms of government and social organization without first regenerating our people so that we can support traditional government models. Regretfully, the levels of participation in social and political life, the physical fitness, and the cultural skills these models require are far beyond our weakened and dispirited people right now.”

236 Simpson, “Turtle’s Back,” *supra* note 125 at 68 emphasizes this point. Also see generally Leanne Simpson, ed., *Lighting the Eight Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring Publishing, 2008). In this collection Susan Hill revives Haudenosaunee land ethics in an effort to restructure relations with the Crown; Nick Claxton outlines the resurgence of traditional WSÁNEĆ reef net fisheries; Renée Elizabeth Mzinegiizhigo-kwe Bédard emphasizes the importance of (and Nishnaabeg responsibilities to) water at the grassroots level; and Brock Pitawanakwat explores resurgence in an urban Indigenous context, among others.

237 Simpson, “Turtle’s Back,” *supra* note 125 at 148.

compelling and have delved into WSÁNEĆ stories and philosophies to align our response to the Goldstream spill with the teachings contained in those stories.

The foundations of resurgence theory and indigenous legal theory are not as diametrically opposed as it sometimes seems. Both involve an emphasis on strengthening indigenous narratives. The hope for both is that this can help us escape, in the words of Leanne Simpson, the “cognitive box of imperialism”,<sup>238</sup> or in returning to Gordon Christie, the constraint of imagination of the dominant narrative.<sup>239</sup> The paths of each do diverge, approaching issues from a different vantage point. This is an advantage as opposed to a problem. We will need a diversity of perspectives to surmount the obstacles we face. Taiaiake Alfred explains “it is very important to distinguish between the various elements of Settler population and to develop appropriate strategies of contention for each.”<sup>240</sup> Resurgence theory tends to engage the political. As I envision it, indigenous legal theory engages the arena of ‘law’ (in its broadest terms), but with a focus on indigenous narratives and approaches to law. Postcolonial theory makes clear that there is much to critique about Canadian law and its associated power structures. However, by strengthening our own narratives on law, indigenous legal theory can place itself to “withstand” or “subvert” these power structures and position ourselves to negotiate “more balanced modes of reconciliation.”<sup>241</sup> This includes, but is not limited to, how indigenous and non-indigenous systems of law can interact or exist together, even if they function as independent systems of law. In the end, a plurality of

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238 *Ibid.* at 148.

239 Christie, “Indigeneity and Sovereignty”, *supra* note 142.

240 Alfred, “Wasáse”, *supra* note 129 at 105.

241 Mack, “Hoquotist”, *supra* note 66 at 293.

perspectives, goals and approaches exist across both fields, and we are in a position to draw strength from them all.

### **Conclusion: Strengthening Our Stories**<sup>242</sup>

Life is full of ambiguity and all we can do is attempt to be aware of the challenges we face and devise the best strategies available. My approach blends insights from each of the three fields discussed in this thesis: indigenous legal theory, postcolonial theory, and resurgence theory. These too often disparate fields can be brought into dialogue with one another, bringing important contributions to our understanding of indigenous issues and the resurgence of indigenous law. Postcolonial theory analyzes the damage caused by colonialism and the barriers we face in the revitalization of indigenous law. Indigenous legal theory, through arguing for the legitimacy and applicability of indigenous law, resists the silencing of indigenous narratives and approaches to law while providing a different lens through which to approach issues such as the spill at Goldstream.

Revitalizing indigenous law involves a series of normative understandings regarding how we relate to one another and to the Earth. Resurgence theory, with a call for a focused regeneration of indigenous culture and narratives, can help in the process of strengthening our own stories and turning to indigenous teachings as a first and natural response.

Drawing from each of these theoretical fields creates an empowering platform that opens valuable possibilities and approaches across disciplines. It allows story to meet story. Whereas Chapter Two began by introducing the reader to WSÁNEĆ stories and philosophies that relate to the Goldstream area, the following chapter will explore the

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<sup>242</sup> Johnny Mack uses a similar phrase in Mack, “Hoquotist”, *supra* note 66. In that context Mack addresses the need for, as well as how to maintain and strengthen, connections with Nuu-chah-nulth stories.

broad implications and transformative potential of utilizing the teachings contained within those stories to guide our legal response to the spill.

## **CHAPTER FIVE: EQÁTEL TĚE MEQ (Our Relationships To All) - ‘Jurisdiction’, ‘Remedy’, and Relationships**

The previous chapter discussed the power of the dominant narrative to silence alternative narratives and/or draw them within the scope of the dominant narrative. The fourth chapter has, in itself, actually illustrated that point in that engaging in that discussion has to a large extent drawn me away from what I originally set out to speak about – SELEKTEĚ (Goldstream), the WSÁNEĆ, and indigenous laws and their resurgence.

I do not have all the answers to the Goldstream spill. However, beginning from a WSÁNEĆ and indigenous law narrative can lead to different types of questions, different patterns of thinking, and distinct understandings and approaches to addressing the issues that present themselves. In exploring the implications of this approach it is important to consider the ultimate purpose for which we envision the revitalization of indigenous systems of law. Focusing on strengthening our stories as a predominant step necessarily leaves, to a significant extent, the final expectations and goals in the revitalization of indigenous legal orders to be guided by those stories themselves. Nonetheless, without taking away from that flexibility, there are themes that become apparent.

### **Distracted by ‘Jurisdiction’**

Whether we conceive of indigenous legal orders as operating in conjunction with or as a component of the Canadian common law, or as separate legal orders that run parallel to the common law, the reality is that the distinct legal systems will inevitably have to bump up against or interact with one another in some fashion.<sup>243</sup> Contemplating the operation

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<sup>243</sup> Underlying this statement is the assumption that the Canadian state and Canadian common law are not going anywhere. However, I do not assume that indigenous law must be subsumed by or subservient to the Canadian common law.



of an indigenous legal order within a colonial state may therefore trigger immediate reaction and potential tensions relating to “jurisdiction” or “boundaries”. This can be exemplified through the Goldstream example.

Several issues are easily perceptible in relation to the Goldstream spill. First, the incident occurred at Goldstream, which is within WSÁNEĆ traditional territory but off reserve lands. While the Goldstream Indian Reserve, which is held in common by the Malahat, Pauquachin, Tsartlip, and Tsawout First Nations, is located in the area of Goldstream Park off highway 1, the specific location of the crash itself was outside those lands. Second, a non-Indigenous person perpetrated the act leading to the contamination. Each of these points has several implications.

Our first question might be whether indigenous law would apply off reserve lands but within traditional territory? Various perspectives could create a multitude of different answers. One approach could be to reference the unjustifiable imposition of the common law and support for the operation of indigenous systems of law across the indigenous territory. This claim is greatly strengthened when coupled with the additional point that the site of the crash is within Douglas Treaty lands.<sup>244</sup> Nick Claxton has argued that the WSÁNEĆ right to “carry on our fisheries as formerly” under the Douglas Treaty protects not only the right to fish, but a system of laws and governance in relation to those fisheries.<sup>245</sup> A second approach may be grounded in the notion of reconciliation between indigenous and non-indigenous peoples, thereby creating an open and equal dialogue

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<sup>244</sup> These lands are covered by the so-called Douglas Treaties of 1852. Two separate treaties were made with the WSÁNEĆ – The Saanich Tribe (North Saanich) and the Saanich Tribe (South Saanich). Each treaty covers different areas of land, though are otherwise the same in content. See Aboriginal Affairs and Northern Development Canada, “Treaty Texts – Douglas Treaties”, online: <<http://www.aadnc-aandc.gc.ca/eng/1100100029052/1100100029053>> for further details. See also Tsawout First Nation, “The Douglas Treaty”, online: <<http://www.tsawout.com/departement/douglas-treaty-elders-working-group/treaty-information/the-douglas-treaty>> for further background and information in relation to the Treaty.

<sup>245</sup> See generally Claxton, *supra* note 15 for further discussion.

between indigenous law and the common law, and thus a bi-juridical approach to the spill. A third may prefer a narrower approach and advocate that indigenous law may apply but only on reserve or Aboriginal lands. Of course, the Goldstream spill occurred off reserve lands but clearly created harm that manifest itself on Aboriginal lands. What then is the solution? Within this web of jurisdiction any number of potential responses may exist, and even when over simplified to three potential approaches, the debate is not straightforward.

A second potentially contentious question in relation to the Goldstream spill is whether indigenous law should apply to non-indigenous peoples. Of course, this question would become increasingly complicated when coupled with the fact that the incident occurred off Aboriginal lands, but within traditional territory. Again, a multitude of approaches are possible. One perspective may be to argue that indigenous law should apply to non-indigenous peoples on Aboriginal lands. After all, every individual is subject to laws of the jurisdiction they enter, why should it be any different with indigenous law? Yet, I doubt that even such a straightforward argument as that would be met without resistance. Resistance to this argument may stem from several sources. One source may be linked to the unknown or an uncertainty of what indigenous law would require.<sup>246</sup> In large part this simply reflects the lack of traction indigenous laws have been provided throughout the processes of colonialism. Other concerns might stem from unease with the often close connection between indigenous law and indigenous culture/spirituality. This troubling tendency has been addressed at length in the second

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<sup>246</sup> See Borrows, "Indigenous Constitution", *supra* note 34 at Chapter 6 for further discussion of potential barriers to recognizing indigenous legal traditions.

chapter and will not be revisited here, though is a potential source of resistance to indigenous laws applying to non-indigenous peoples.

There are other jurisdictional questions that come to mind beyond those mentioned. An element of the harm caused by the Goldstream spill relates to fish and damage to the salmon spawning grounds. Fish are migratory and are thus important to several indigenous groups and non-indigenous people. Thus, even if WSÁNEĆ law were presumed to apply, the legal order would bump up against the interests and legal orders of others. At a minimum the Malahat First Nation, who are Hul,qumi,num speaking (though related to the Salish WSÁNEĆ people) may have their own distinct legal traditions to deal with these disputes given they too rely on Goldstream.<sup>247</sup> How would these two legal orders interact? Second, federal fisheries law has already clearly applied in this instance. How could these two legal orders function to come to a mutual solution, without simply assuming that federal law is paramount? These are a fraction of the complex political questions that might arise. While each cannot be fully and adequately answered here, we can ask – is this where we should start?

My point is not to negate the importance of these questions. Each raises significant issues that require further thought and discussion. Ultimately, if indigenous law is to gain momentum and have increased applicability then many of these scenarios will need to reach some form of working consent, even if subject to continued contestation.<sup>248</sup> My point is to illustrate the web we are entangled in through this type of inquiry into “jurisdiction”. More importantly and specifically, I want to highlight that

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<sup>247</sup> There are a myriad of indigenous legal orders across Canada. In my mind, it is an open question as to how each of these legal orders should operate in relation to one another. For instance, while there may be several similarities between neighbouring legal traditions, there are bound to be differences as well. It is a matter of balancing local difference with regional similarity.

<sup>248</sup> See Webber, *supra* note 47 for discussion on the role of human agency in law and the processes of coming to working consent in the face of continued contestation in the law.

what is at stake in speaking of “jurisdiction” and “boundaries” in this way is conceptions of sovereignty and struggles for indigenous self-determination and governmental authority. The work of Gordon Christie raised concerns and limitations in this type of thinking and dialogue.<sup>249</sup>

If we step back from the conception of “jurisdiction”, several things become apparent. Jurisdiction may be exclusive, shared, or some combination therefore, but each tends to reflect a certain *authority over* a given area or issue.<sup>250</sup> For example, the Department of Fisheries and Oceans has jurisdiction *over* fish and oceans. In drawing on Gordon Christie, this is an example of a “conceptual structure” that is “quietly residing in the background” within the sovereignty narrative.<sup>251</sup> That is, this *thinking and acting with authority over* the environment and fish becomes assumed. Yet, if we look back to Chapter Two of this thesis and my discussion of WSÁNEĆ beliefs, this notion may be in many ways inconsistent with the WSÁNEĆ legal order.

Chapter Two stressed a deep relationality between the WSÁNEĆ people, the Earth, and other elements of creation. Several stories exemplified this point. The creation story of TETÁĆES, the islands within WSÁNEĆ territory, contain the following teaching:

*After throwing the WSÁNEĆ People into the ocean, XÁLS turned to speak to the islands and said: “look after your relatives, the WSÁNEĆ People.” XÁLS*

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249 See Christie, “Indigeneity and Sovereignty”, *supra* note 142.

250 See *supra* note 12 for more. While I recognize that “jurisdiction” may be used more broadly in accordance with its literal meaning, “to speak the law”, in the context of this thesis I use the term in line with its more common usage, which connotes an element of ‘power’, ‘authority’, or ‘control’ over of that within its scope.

251 Christie, “Indigeneity and Sovereignty”, *supra* note 142 at 332.

*then turned to the WSÁNEĆ People and said: “you will also look after your ‘Relatives of the Deep’.”<sup>252</sup>*

Evident is that the WSÁNEĆ do not have an *authority over* the islands within their territory; rather, they each (the WSÁNEĆ and the TETÁĆES) have a series of *responsibilities in relation to one another*. We see multiple other examples as well. SĻEMEW (Grandfather Rain), with associated connections with water, was the first ancestor of the WSÁNEĆ. Salmon were also once people, and when the WSÁNEĆ say a prayer to the chum salmon asking them to feed us, we refer to them as EN ŠWOKE (your brother/ sister). Each of these represents an emphasis on relationships. The shift from *authority over* to *responsibilities in relation to* may be subtle, but is a significant shift from the thinking that underlies “jurisdiction”.

The questions relating to jurisdiction that opened this section illustrates how it may be possible to step beyond the dominant narrative in some ways, yet remain constrained in others. While exploring the jurisdiction of indigenous law steps beyond the narrower narrative of ‘law’ (strictly the common law), it may fail to step beyond other commonly held assumptions that underlie the sovereignty model more generally. This is another way the sovereignty model may function to “*define* a range of possible plans and strategies.”<sup>253</sup> That is, the jurisdiction questions above largely exemplify the limited options that are “understandable only *within* the sovereignty model.”<sup>254</sup> Although it is possible to take broader or narrower understanding of jurisdiction, the certain conceptual

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<sup>252</sup> See *supra* note 19 for the complete creation story, as well as further discussion.

<sup>253</sup> Christie, “Indigeneity and Sovereignty”, *supra* note 142 at 332.

<sup>254</sup> *Ibid.* at 339.

structures that underlie function so that “our plans and strategies can reach out only [so] far.”<sup>255</sup>

If an objective of revitalizing indigenous law is to enable a different lens with which to approach issues, then it makes sense to step beyond as many of the conceptual barriers of the dominant narrative as possible. That is not to say that they all must be overturned, but that they are all open to discussion and negotiation. If we are to have the open dialogue required for true reconciliation then why automatically begin by limiting ourselves through accepting as given underlying assumptions and their associated values and perspectives? To do so is to limit the potential and contribution of indigenous law. It is also to maintain an imperial stance toward indigenous law and allow the powers of hegemony to maintain limited space for alternative conceptions and understandings.

A point I want to emphasize is that by becoming focused on who gets to do what, we may inadvertently lose sight of what our responsibilities under the WSÁNEĆ legal order actually entail (unconstrained by issues of jurisdiction). In addition, it may also be the case that we lose sight of underlying assumptions (such as that discussed in relation to jurisdiction) as they go unnoticed and unquestioned. It is not that these are in each instance bad, but we do not want to constrain what is possible and neglect other opportunities and approaches that might better serve us. In short, we become distracted and lose an eye to the subtle operation of power dynamics. To avoid these pitfalls I return to my emphasis of focusing on and strengthening our own stories. It was through an attention to WSÁNEĆ stories that I came to question underlying assumptions contained in the notion of jurisdiction. This is a continuous process, filled with

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<sup>255</sup> *Ibid.* at 339.

subjectivity, but my sense is we are best served by maintaining a focus on key values and philosophies that guide the legal order.<sup>256</sup> From this position we can seek to apply indigenous law in particular context as best as is possible.

If we are to negotiate the manner in which indigenous and non-indigenous laws are to interact, I expect information within the WSÁNEĆ legal tradition involving interaction with neighbouring societies would serve us well. First however we must engage in the hard work of understanding the specifics of the indigenous legal order. Beginning with notions of “jurisdiction” actually distracts us from what the operation of the indigenous legal order would entail without imposed external limitations applied from the outset. The same is true with expectations regarding the final result or remedy flowing from the contemporary operation and application of indigenous law.

### **Beyond ‘Remedy’**

In seeking to protect another legal order we are not aiming to protect a separate system of rules, but a distinct way of organizing ourselves in relation to each other and to the Earth.<sup>257</sup> We restrict this objective, and the potential contribution of indigenous law, if we simply look to protect the application of a ‘remedy’ in a fixed instance. By ‘remedy’ I mean – the application of a legal rule to reach a solution in a fixed instance. Granted, the concept of remedy can be broad. In western approaches it might include restitution, specific performance, damage for lost use, and others. There may be somewhat analogous notions in indigenous law, as well others. These may be important and powerful tools in the application of indigenous law. My point, however – as made in

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256 See the “Indigenous Law, Culture and Essentialism” section of this thesis at page 29 for a discussion of the role I see values and philosophies having in guiding the substance and application of indigenous legal orders.

257 Webber, *supra* note 47 at 170 makes a similar point. He argues that in protecting indigenous legal orders we should not aim to protect a predetermined body of norms, but practices of normative deliberation and decision making as well.

relation to ‘jurisdiction’ – is that we need to first take a step back. In taking this step back we might again ask what is the “conceptual structure” that is “quietly residing in the background” with the notion of remedy?<sup>258</sup>

The answer is simple, though perhaps easily overlooked. A remedy is the response we choose in application to *the harm* we are seeking to address. Understanding the nature of the harm is foundational to any application or understanding of remedy. If we begin with a focus on remedy we are in many ways looking only at a separate system of rules, as opposed to a distinct way of viewing and organizing ourselves in relation to one another and to the Earth. Again, the shift in focus may be subtle but significant. Our inquiry needs to be much deeper than an application of remedy. However, as discussed with ‘jurisdiction’, it may be easy to become distracted and lose sight of underlying assumptions regarding the harm, and instead jump to remedy.

In setting out on this thesis project I assumed a series of questions about WSÁNEĆ environmental and fisheries law that could be asked and answered. What are the sources of WSÁNEĆ law as they relate to fisheries and the environment? What are the substantive and procedural elements of WSÁNEĆ fisheries and environmental law? What are the remedies and recourses for when fisheries and environmental laws are broken? Who are the decision makers relating to fisheries and environmental issues, and in what contexts? And, given the migratory nature of fish, what are the “international” elements of WSÁNEĆ law in this regard?

I do not negate that distinct elements of WSÁNEĆ law may exist, though I do recognize how closely entwined WSÁNEĆ law is with other elements of WSÁNEĆ life.

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258 Christie, “Indigeneity and Sovereignty”, *supra* note 142 at 332.



I also do not claim that these types of inquiries are without merit. However, in thinking deeper about indigenous law I question whether these types of queries should be our starting point, and if they are, what we are overlooking. My sense is we should start much more foundationally and look broadly to the values and philosophies that inform normative understandings of proper relationships. These are what guide the specific application of the legal order. We need not become paralyzed by this quest, but use it as best we can to assess how those relationships have been disturbed by the issue at hand, and thereby more fully determine the nature of the harm itself. Only with an adequate understanding of the nature of the harm are we positioned to choose a remedy that best fulfils our responsibilities and promotes our vision of proper relationships. In short, as opposed to remedies we should first be thinking in terms of harms and processes because those have serious implications for what ‘remedies’ are ultimately most appropriate.

Stepping back to foundational understandings of ‘harm’ may mean that we need to consider far-reaching remedies to properly address that harm. It may be that indigenous law remedies do not always apply as narrowly to a fixed and given instance as normally expected under the common law. The common law determines relevance based on notions of causality that are informed by a particular set of broader normative understandings. Anything outside those understandings of relevance and causality need not be considered. However, indigenous law will clearly bring a different set of normative understandings, and thus interpretations of relevance and causality. This may result in different scopes of inquiry and remedy. We should not shy away from this. If we begin by assuming that the scope of remedies (albeit potentially different remedies) in the application of indigenous law will always (and should always) be akin to those of the

common law, we will necessarily limit the functioning and potential contribution of the indigenous legal order from the outset.

Several indigenous law scholars understand a primary objective of indigenous legal orders as seeking to maintain balance and harmony.<sup>259</sup> This balance and harmony relates to not only between people, but also between the physical and metaphysical (people and the cosmos) and the physical and geographical/ecological (people and the land and ecology).<sup>260</sup> This creates a broad web of mutual and legal relationships.<sup>261</sup> In this way, indigenous law may tend to be less anthropocentric than the common law, which may have implications for what is required to maintain balance and proper relationships across this web. This process is dynamic and open to constant flux.<sup>262</sup>

Chapter Two immersed the reader in a discussion of the web of inter-relationships and WSÁNEĆ normative understandings that are applicable to the Goldstream spill. In many ways it involved a focused re-conceptualization of the harm. I need not duplicate that discussion here, but several points are worth briefly highlighting. It was seen how the harm resulting from the oil spill could not be assessed without first considering several WSÁNEĆ stories. These stories included SĹEMEW (Grandfather Rain), and the importance of bathing, as well as those of SELEKTEĹ (the splitting stream) and MIOEN (the lesser stream), and their relation to QENELEĹ (Mt. Finlayson - looking into the groin). Closely tied with these stories was also the creation story of the chum salmon

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259 See for example Henderson, "Legal Consciousness", *supra* note 57; Battiste & Henderson, *supra* note 52; Austin, *supra* note 68; and Black, *supra* note 97.

260 Black, *supra* note 97 at 32.

261 *Ibid.* at 107

262 See generally Black, *supra* note 97; Deloria Jr., *supra* note 56 at 66; and Battiste & Henderson, *supra* note 52 at 78-79. Battiste & Henderson note that, as the ecology is always changing, indigenous law is not about fixed and abstract rules, but a certain way of living in context.

(QOLEW). The stories of TETÁĆES (Relatives of the Deep) and ŁEL,TOS also explored more generally a broader and deep relationality between the WSÁNEĆ and the Earth, as well as corresponding environmental principles of care.

It can be seen how identifying the harm resulting from the Goldstream spill quickly expands to broader normative understandings and conceptions of proper relationships. A WSÁNEĆ legal response (remedy) would need to reflect these larger notions of proper relationships. However, the disconnection between indigenous and non-indigenous understandings of the nature of the harm that occurred can create a tension in what the scope of an appropriate remedy should be. These tensions are not irreconcilable, but deep and open engagement is required. Specific instances (or remedies) on their own can move us either closer or farther away from our perceptions of proper relationships. Yet, in the end, what is at stake is much more. The real challenge (and advantage) in enabling a full revitalization of indigenous law involves negotiating the much broader relational issues involved (the different ways we choose to interact with each other and the Earth).

### **Resurging Our Relationships**

Law is about maintaining and promoting a understandings of proper relationships. These normative understandings in indigenous and non-indigenous systems of law may differ, but they are not irreconcilable. The current relationship between these legal orders is however not a healthy one. As opposed to having an open dialogue where story meets story, there is a hesitancy to question underlying assumptions and promote alternative perspectives and approaches. If we take seriously that the environment and land we live in is truly shared, then there needs to be space for both indigenous and non-indigenous

laws and perspectives. Resurging our relationships will be difficult, given colonial history and how entrenched the current imperial relationship is. Ultimately, we need to be aware of and move beyond these power structures in order to relate with one another in healthier ways. This involves an open dialogue where story meets story.

Refusing to engage in an open dialogue or compartmentalizing the impact indigenous legal orders and perspectives can have will only function to limit the possibility of healthy relationships. While I have argued that the WSÁNEĆ legal order can provide important contributions to thinking about the fuel spill at Goldstream (or any similar contemporary struggle), I am arguing for a much broader conclusion as well. I am arguing that we need to re-think our relationships with each other and with the Earth. The benefits of this approach may be wide and varied, and continue to expand as we focus on strengthening these narratives. While I have opened the door to the narrative of WSÁNEĆ law, though there is much left to explore and to do.

## **AFTERWORD: WSÁNEĆ Laws Emerging Once Again**

*In the beginning XÁLS (Our Creator) taught the Saanich People how to take care of this land.*

*For many years, the Saanich remembered XÁLS words. They were happy and had plenty of food.*

*But as many years passed, some people broke XÁLS words and forgot his teachings.*

*XÁLS became unhappy and told the people that there would be a flood over the land. They were to prepare.*

*They prepared a long rope of cedar bark. They gathered food and possessions. The tide water began to rise. The people packed their belongings into their canoes.*

*Some people did not heed XÁLS teachings. They were not prepared and were washed away. Their canoes were destroyed.*

*The water rose higher and higher.*

*The people paddled to the highest mountain nearby. The trees were still above the water.*

*They tied themselves to an arbutus tree on top of the mountain.*

*Soon the tops of the trees were covered with water. They were afraid and prayed to survive the great flood. They asked XÁLS to take pity on them.*

*After many days, a raven came and landed on the bow of the canoe. He was carrying a stick and was talking to the people. The raven had brought the good news.*

*Suddenly a mountain began to emerge in the distance. One of the men said “NI QENNET TFE WSÁNEĆ” (“Look at what is emerging”), as he pointed to the mountain emerging in the distance.*

*Before they left the mountain, they gathered around the huge coil of cedar rope and gave thanks. They said from now on this mountain will be called LAU, WELNEW (Place of refuge, escape, healing). They further said we will be called the WSÁNEĆ (The emerging people).*

*XÁLS heard their prayers. XÁLS said he would not punish the people by flood again.*<sup>263</sup>

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<sup>263</sup> Earl Claxton and John Elliott, *LÁU, WELNEW* (Brentwood Bay: Saanich School Board and Saanich School District #63, 1993).

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