

**Sexism and Ts'msyen Law: A Critical Analysis of the Gendered Exclusion
in Holding the Name of Chief in Ts'msyen Society**

by

Christina Debra Gray ('Ałaxsgaaxsił Gaax Aganłak)

Juris Doctor, University of British Columbia, 2013
Bachelor of Arts, University of British Columbia, 2008

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

MASTER OF LAW

in the Faculty of Law

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University of Victoria

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Abstract

Sexism exists in relation to women holding the highest-ranking name of chief within Ts'msyen society (also spelled Tsimshian and Tsimpsean). There are limited historic examples of Ts'msyen women holding the chief names. Some of these examples occurred with colonialism at a time when there was greater church influence in Ts'msyen communities. Today, the sexist pattern persists within Ts'msyen society, including within legal and governance systems where women are excluded based on their gender from holding the highest-ranking names. Despite the sexist pattern, women have legal agency, and they are at the centre of the Ts'msyen matrilineal society. My legal research demonstrates that these exclusionary patterns do not result from legitimate legal reasoning and do not constitute valid Ts'msyen law. First, I engage with Indigenous theories on sources of law. Second, I suggest a path forward based on Jennifer Nedelsky's four-step relational approach to creating transformative change which I apply to the Ts'msyen legal principle of equality for application to gender equality of chiefs' names.

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Figure 1. (BCA Item: G-07293) Image of Victoria Young/Sudaat and Rev. Thomas Crosby in 1879.

Glossary

1. “Wilbaxmaxs” refers to taking up or stone moving feast;
2. “Adaawx” or “adaawk” refers to oral history;
3. “Ayaawx” refers to laws, customs, or precedents;
4. “Antamahlaswx” refer to the stories that are considered collective properties of all Gitksan;¹
5. “Ganhada” refers to the raven clan;
6. “Gidasdzuu” who have amalgamated with the Xai’xais nation refers to the Kitasoo, located at Klemtu;
7. “Gilksyooksk” refers to washing off feast;
8. “Giluts’aaw” refers to the People in Inside;
9. “Ginadoiks” refers to the People of the Swift Current;
10. “Ginhaxangik” refers to the People of the Hemlock;
11. “Gisbutwada” refers to the killerwhale clan;
12. “Gitando” refers to the People of the Other Side;
13. “Gitga’ata” or “Gitga’at” refers to the People of the Poles, at Txagiiw or Hartley Bay;
14. “Gitlaan” refers to the People of the Stern Canoe;

¹ Valerie Ruth Napoleon, *Ayook: Gitksan legal order, law, and legal theory* (PhD Dissertation, University of Victoria, 2009) [unpublished] at 266 [Napoleon Ayook].

15. “Gitsiis” refers to Sealtrap People;
16. “Gitwilgyoots” refers to the People of the Kelp;
17. “Gitxaała” refers to the People on Salt Water, at Lax Klan or Kitkatla, Channel People;
18. “Gitzaxlaal” refers to the People from the Side of—xlaal, a shrub that grows near Dundas Island;
19. “Gixpaxlo’ots” refers to the Elderberry Place People or People of the Place Where Elder Berries are Eaten;
20. “Hana’ax” refers to women;
21. “K’abatgüülk” refers to children of high rank;
22. “K’abawaalksk” refers to princes/princesses;
23. “Laxgibuu” refers to the wolf clan;
24. “Laxskiik” refers to the eagle clan;
25. “Lik’agygyet” refers to house leaders/council men of the chief;
26. “Luulgit” refers to a less formal feast;
27. “Med’ik” or Medeek refers to the grizzly bear clan;
28. “Naxnox” refers to a spiritual being;
29. “Sigidmhana’nax” refers to women of high-rank or matriarchs;
30. “Sm’algyax” refers to the language spoken by the Ts’msyen, Nisga’a, and Gitxsan peoples;
31. “Sm’gyigyet” refers to chiefs;

32. “Sm’ooygit” refers to a chief;
33. “Spanoxnox” refers to spiritual being related to land;
34. “Ts’msyen” refers to people from within the Skeena River. The etymology of the word Ts’msyen includes ‘K’san’ in reference to the Skeena River, ‘Ts’m’ means ‘the inside of a thing’, the ‘t’ of K’san is a prefix that indicates a place name; therefore, Ts’msyen read together means the inside of the Skeena River;²
35. “Waap” refers to house;
36. “Wil’naat’al’” refers to the clan;
37. “Wilxt’u’tsk” refers to a mourning feast; and
38. “Yaowk” or “yaawk” refers to a naming feast.

² Franz Boas & Henry W Tate, *Tsimshian Mythology* (U.S.: Government Printing Office, 1916) at 43 [Boas & Tate, *Tsimshian Mythology*].

Acknowledgements

T'oyaxsut 'nüün to my supervisor, Dr. Val Napoleon, for her encouragement and lending me the moral courage to write this LLM thesis. I am forever grateful.

Thank you to my supervisor, Dr. Astrid V. Pérez Piñán, for her support, compassion, and kindness.

Luk'wil t'oyaxsut 'nüüsm, Liimooks ada Nikdaa 'Wiiksigoop.

Thank you to Christopher Vogt, Danis Alycia Clare, Marlee McGuire, Molly Malone, Rachel Houmphan, Hannah Askew, Zoe Todd, David Gill, Benjamin Ralston, Erick Calder, and La'goot Spencer Greening for their support, feedback, and encouragement.

Thank you to my family, colleagues, friends, mentors, feminist writing group (Lisa Kelly, Gillian Calder, Debra Parkes, and many others), and graduate studies cohort.

Dedication

I dedicate my LLM thesis to my maternal grandmother, Norah Gray (née Wright).

Chapter 1 – Introduction to Ts’msyen Law and Governance

1. A Personal Introduction: A Conversation Across Generations

As a child, I would often sit at the kitchen table listening to my mother talk to our relatives. I was delighted to hear their conversations while we all sat around the table and drank tea together. Through the process of witnessing my relatives’ visit and talk, I learnt about the importance of the process of how Ts’msyen³ women maintained their close relationships with each other through the act of visiting. Moreover, I learned that by listening to their discussions, women often had difficult and uncomfortable conversations. How to sit and listen to difficult conversations is probably one of the most important lessons I have learnt because I listened to my aunts and mother talk as a child. One of the most impactful conversations I had the opportunity to participate in was with my aunt about the fact that there were no female chiefs in Ts’msyen society at the time.

When I was writing this thesis, I had a discussion with my mother about my thesis after dinner. During this conversation with my mother, I recalled a previous conversation I had with my aunt. I do not recall much about the context, when or how old I was when it happened. I only remember vignettes of the conversation I had with an aunt. I remember that we were in the kitchen of my

³ Ts’msyen is also spelled Tsimshian now and Tsimpsean is more of a term that was used in the past.

mother's house and I had asked my aunt if she wanted to participate in a feast as part of the Ts'msyen legal and governance system.

At that time, my family was beginning to connect with our more distant relatives in our Ts'msyen territory, including our reserve of Lax Kw'alaams (also called Port Simpson), in northern British Columbia. My aunt told me that she did not want to participate in our governance system because all the chiefs were men, and that it did not make sense to her since we are a matrilineal society. Our matrilineal line passes rights through our mothers; this conversation caused me to consider that if our governance system is based on our mother line, then why are all the chiefs men?

I was taken back by the question because I did not have an answer. All I remember is that I felt a little sad because I wanted to connect with my Ts'msyen community outside of my own direct family. At that time, the only other Ts'msyen people I knew were my family in East Vancouver. Connecting with the broader Ts'msyen community was important to me because I wanted to explore my Ts'msyen identity, including culture and governance systems. I also wanted to make this connection with our Ts'msyen governance system with my relative as well.

The journey of writing this thesis is also a way to connect to something much greater than myself. It is a way of connecting to that question that my aunt raised with me about why there were no female chiefs if we were a matrilineal

society. My thesis, therefore, addresses the issue of the exclusion of women and 2SLGBTQQIA+ (Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex, asexual, and people of all other sexual orientations and gender diverse people) people based on gender for the highest ranking name of chief within the Ts'msyen legal order and governance system.⁴ This thesis serves as a practice to impart knowledge that I have learned in the process of writing this thesis as a critical inquiry into the sexist practice of exclusion of women in becoming chiefs.

I also view this thesis as a conversation among generations of my family. In writing this thesis, I have thought a lot about the generations that preceded me and the generations that will follow me. This thesis serves as a conversation between generations past and those yet to come.

Writing this thesis has required a great deal of humility. I am still learning and will always be a student of the Ts'msyen legal order and governance system.⁵ The way in which I approach the Ts'msyen legal order is based on my perspective and personal experiences and knowledge. I accept full responsibility for any limitations in my research. My ideas about Ts'msyen law are constantly

⁴ Florence Ashley, "What Is It like to Have a Gender Identity?" (2023) Mind Oxford University Press DOI: < <https://doi.org/10.1093/mind/fzac071> > [Ashley, Gender Identity].

⁵ I first came across the phrase "a student of Indigenous legal orders" from my friend Hannah Askew in discussion around the time of February 2019. It is a phrase that imbues a great deal of humility and grace in learning about Indigenous law.

developing and being revised based on what I learn and experience. I bring different ideas to this conversation about issues of exclusion based on my intersectional perspective as a Ts'msyen and Dene woman, graduate student, and lawyer.

(a) Nourishing Conversations about Exclusion in Ts'msyen Society

Sexist exclusionary practices in Ts'msyen society is a difficult topic to write about because I also feared exclusion from Ts'msyen society. I had spent a lot of time building knowledge, awareness, and engaging with narratives and principles regarding the Ts'msyen legal order, yet I was paralyzed by fear when writing this thesis.⁶ To overcome my paralysis in writing this thesis, I have participated in several nourishing conversations about sexism in Ts'msyen law that have increased my self-confidence and helped me to be able to push beyond my limitations.

My thesis serves to nourish the types of conversations that involve critically engaging with the Ts'msyen law. Ts'msyen people have and continue to engage in the practice of the Ts'msyen law. Ts'msyen law, like all law, is how

⁶ Val Napoleon, "Did I Break It? Recording Indigenous (Customary) Law" (2019) 22:1PER/PELJ, online: <<https://www.ajol.info/index.php/pej/article/view/216408>> at 28 [Napoleon, Did I Break It?].

people govern themselves.⁷ Laws can and do address issues of conflict that arise between people in a society. No human society is immune from conflict, nor are they immune from issues of sexism or racism.⁸ Furthermore, reasoning through issues of sexism is part of a healthy legal order and required for Ts'msyen law to change as people do.⁹

(b) My Thesis Question asks why Women do not hold the Highest-Ranking Name of Sm'ooygit

My thesis pushes beyond politics of silence as acceptance and questions why women do not hold the highest-ranking name of sm'ooygit (chief) in the Ts'msyen legal order and governance system.¹⁰ For example, in Ts'msyen society it is accepted that women have specific gendered roles and not to question the distinct roles and obligations. My LLM thesis is not seeking to diminish or demoralize the importance of women in Ts'msyen society. Instead, I want to have greater clarity on this issue, and to do that, it is necessary to

⁷ Val Napoleon, "What Is Indigenous Law? A Small Discussion" in *Gender inside Indigenous law toolkit* (Indigenous Law Research Unit, Victoria: University of Victoria, Faculty of Law, 2016), at 7, online (pdf): <https://www.uvic.ca/law/assets/docs/ilru/Gender%20Inside%20Indigenous%20Law%20Toolkit%2001.01.16.pdf> [Napoleon, What Is Indigenous Law?].

⁸ Emily Snyder, *Gender, Power and Representations of Cree Law* (British Columbia: UBC Press, 2018) at 134 [Snyder, *Representations of Cree Law*].

⁹ Napoleon, *What Is Indigenous Law?* *supra* note 7 at 8.

¹⁰ Shirley Green, "Looking Back, Still Looking Forward" in Joyce Green, ed, *Making Space for Indigenous Feminism*, 2nd ed (Halifax: Fernwood Publishing, 2017) at 274 [Green, Looking Back].

critically examine historic and ongoing oppressive frameworks that impact Ts'msyen society to better understand power dynamics at issue. I will begin by outlining some of the key historic and ongoing oppressive frameworks that have and continue to impact Ts'msyen society as it pertains to the issue.

(c) Ts'msyen People were and continue to be Subject to Settler Laws

Settler laws and policies gradually began to be imposed by missionaries in Lax Kw'alaams in the nineteenth century. The Hudson's Bay Company Fort ("HBC Fort") was established at present day Lax Kw'alaams in 1834. Port Simpson was then known as Fort Simpson during the time of the HBC Fort. There is much contention by the early colonial provincial government in the 19th century with the Ts'msyen whether the Ts'msyen village site included the HBC Fort. The site of the HBC Fort was first permitted to be used by Legaix (also spelled Ligeex or Legaic) with the marriage of his daughter to an HBC physician and trader at HBC Fort Nass. But the provincial government said to convey the land to the HBC Fort. The establishment of the HBC Fort heavily influenced Ts'msyen cultural way of life including governance, laws, language, and economies.¹¹ Economic trade between settlers and the Ts'msyen had begun to

¹¹ See the correspondence to Thomas Crosby in 1882: Clement F. Cornwall & Joseph Prhys Planta, *Report of Commission-N.W. Coast Indians*. (Victoria: 1888), online: <<https://open.library.ubc.ca/collections/bcbooks/items/1.0221986>> [Cornwall & Planta, Commission]; Clarence R. Bolt, *Thomas Crosby and the Tsimshian: Small Shoes for Feet Too Large* (British Columbia: UBC Press, 2011) at 15 [Bolt, *Thomas Crosby*].

occur as early as the late 18th century. The HBC Fort increased the economic trade of the Ts'msyen at Lax Kw'alaams; although, economic trade occurred between settlers and the Ts'msyen since the late eighteenth century.¹² The HBC Fort operated at the same time along with church missionaries. During the nineteenth century, two influential Christian missionaries worked in Lax Kw'alaams, including William Duncan (1857-1862)¹³ and Reverend Thomas Crosby (1874-1897).¹⁴

Duncan and Crosby had different approaches to Christian proselytism, but both sought to convert and 'civilize' the Ts'msyen people.¹⁵ Missionaries, like Duncan, sought to build a village based on Christian values and convert Ts'msyen people at Lax Kw'alaams (then known as Fort Simpson). For example, he had established a simple set of rules that served as a guideline on how to live

¹² See Susan Marsden & Robert Galois, "The Tsimshian, The Hudson's Bay Company, and the Geopolitics of the Northwest Coast Fur Trade, 1787-1840" (1995) 39:2 *The Canadian Geographer / Le Géographe canadien* 169-183, online:

<https://www.researchgate.net/publication/227632115_The_Tsimshian_the_Hudson's_Bay_Company_and_the_geopolitics_of_the_Northwest_Coast_fur_trade_1787-1840> [Marsden & Galois Geopolitics].

¹³ E Palmer Patterson, *Mission on the Nass: The Evangelization of the Nishga (1860-1890)* (Waterloo: Eulachon Press, 1982) [Patterson, *Mission on the Nass*]; Bolt, Thomas Crosby *supra* note 11 at 22.

¹⁴ Bolt, *Thomas Crosby supra* note 11 at 94.

¹⁵ Viola Edmundson Garfield, *Tsimshian Clan and Society* (Seattle: University of Washington, 1939), online: <<https://digitalcollections.lib.washington.edu/digital/collection/lctext/id/1586/>> [Garfield, *Tsimshian*]; Bolt, *Thomas Crosby supra* note 11; Patterson, *Mission on the Nass supra* note 13 at 24.

a Christian way of life.¹⁶ Duncan had fifteen rules at Metlakatla to form guidelines for the Christian way of life he sought to build. However, things did not go as planned and Duncan decided that Lax Kw'alaams was not suitable for his form of evangelization. Consequently, he left with a group of Ts'msyen people to form a new settlement at the present-day reserve of Metlakatla. Duncan formed Metlakatla with a group of Ts'msyen people in 1862. Metlakatla is geographically located in a location not very far away from Lax Kw'alaams, that is closer to the Prince Rupert harbour. It is important to note that in 1862 there was a smallpox epidemic which resulted in an influx of hundreds of Ts'msyen people who joined his settlement. Only five years later in 1867, Duncan again relocated again with a group of Ts'msyen people and settled at New Metlakatla, Alaska.¹⁷

Crosby sought to convert the Ts'msyen to a new "culture and way of life,"¹⁸ but Ts'msyen legal and governance systems persisted through marriage, funerals, and inheritance laws.¹⁹ He was very much in opposition to the feasting system, which was eventually made illegal by the federal government under the *Indian Act*.²⁰ While the church missionization at Lax Kw'alaams had devastating effects on the cultural way of life of the Ts'msyen; arguably, the lives of many

¹⁶ See Patterson, *Mission on the Nass supra* note 13 at 28.

¹⁷ *Ibid.* at 27.

¹⁸ Bolt, *Thomas Crosby supra* note 11; Cornwall & Planta, *Commission supra* note 11 at 422.

¹⁹ Bolt, *Ibid.* at 71.

²⁰ *Ibid.*

Indigenous people “were controlled within a heavily paternalistic system (dominated by the *Indian Act*)”.²¹ The paternalism of the *Indian Act* includes and defines the types of property rights that Indigenous nations have over their own land.

Ts’msyen people at Lax Kw’alaams have a long and complex history regarding property rights. Historically, the chiefs of Lax Kw’alaams sought to address issues concerning the ownership and title to their land in the 1880s.²² For example, the Ts’msyen people of Lax Kw’alaams (and other Indigenous nations in British Columbia) sought to advocate for their rights according to Canadian law, including the land issue, fishing, and hunting, and express their opposition to the imposition of the *Indian Act* on them.²³ During this time, Port Simpson (as it was then called) was also formally surveyed as an Indian reserve.²⁴ The creation of reserves under the *Indian Act* continues to be imposed on Lax Kw’alaams and other Indigenous nations across Canada.²⁵ The *Indian Act* system is not only oppressive, but as Indigenous legal scholar Gordon

²¹ Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019) at 16 [Christie, Self-Determination].

²² Bolt, *supra* note 11 at 74.

²³ Cornwall & Planta, *Commission supra* note 11 at 422-24.

²⁴ Bolt, Thomas Crosby *supra* note 11 at 76.

²⁵ Formerly cited as *The Indian Act, 1876*, S.C. 1876, c. 18, s. 64, currently cited as *Indian Act*, RSC 1985, c. I-5.

Christie writes in *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis*, it is also a 'repressive' colonial law.²⁶

The *Indian Act* and its earlier iterations have controlled the social, political, cultural, and legal lives of Indigenous people since its inception. One of the sanctions under the *Indian Act* that has and continues to negatively impact Ts'msyen society was the prohibition of Indigenous people from our own legal and governance systems, including a ban on potlatches (e.g., feasts). The 'potlatch ban' (as it is commonly called) was in force in Canada from 1884 to 1951.²⁷ The potlatch ban is an example of assimilationist policies that worked in conjunction with other forms of church and state control. Together, church and state oppression has contributed to limiting the ability of the Ts'msyen people to fully practice our legal and governance systems. After more than a century of colonial imposition of colonial laws, Ts'msyen people are now in the process of rebuilding and reclaiming our Ts'msyen legal order and governance system.

(d) The Revitalization of Ts'msyen Legal Orders and Governance Systems

²⁶ Christie, *Self-Determination supra* note 21 at 17.

²⁷ *An Act to further to amend "The Indian Act, 1880"*, S.C. 1884, c. 27, s. 3.

Many Ts'msyen people including scholars are engaged in the process of revitalizing the Ts'msyen legal order and governance system.²⁸ For example, socio-ethnomusicologist and Ts'msyen/Mikisew Cree scholar, Robin R. Gray (from Lax Kw'alaams), has focused her work on repatriation through the lens of Ts'msyen laws and protocols and on the repatriation of songs of the Ts'msyen people that were recorded, stored in archives, and also sold for profit.²⁹ Another Ts'msyen scholar, Spencer Greening (from Gitga'at), who has written about ayaawx (laws, customs, precedents, and protocols) in relation to the complex web of relationships that form the wil'naat'ał (clan-relations).³⁰ Lastly, the Indigenous Law Research Unit ("ILRU") at the University of Victoria also critically engages with the laws of Sm'algyax speaking people.³¹

²⁸ Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725-754, at 733, online: <<https://lawjournal.mcgill.ca/article/an-inside-job-engaging-with-indigenous-legal-traditions-through-stories/>> [Napoleon & Friedland Inside Job].

²⁹ Robin Gray, *Ts'msyen Revolution: The Poetics and Politics of Reclaiming* (PhD Dissertation, University of Massachusetts Amherst, 2015) Doctoral Dissertations 437, online: <https://scholarworks.umass.edu/dissertations_2/437> [Gray, Ts'msyen Revolution]; Dr. Robin R. R. Gray, "Repatriation: Ts'msyen Law, Rights of Relationality, and Protocols of Return" (University of Manitoba Press, 2022) 9:1 Native American Indigenous Studies 1-27, online(pdf): <https://robingray.ca/wp-content/uploads/2022/11/Gray_-Repatriation-1.pdf> [Gray, Repatriation].

³⁰ Spencer Greening, *Raven bloodlines, Tsimshian Identity: An Autoethnographic Account of Tsimshian Wil'naat'ał, politics, pedagogy, and law* (Master of Arts in Interdisciplinary Studies, University of Northern British Columbia, 2017), online: <<https://unbc.arcabc.ca/islandora/object/unbc:58909>> [Greening, Raven Bloodlines].

³¹ There are other scholars who work on the articulation and expression of Ts'msyen law, my apologies for anyone I have inadvertently not included.

I was also very influenced by scholarship regarding the Gitksan legal order. Two scholars who influenced my research include Saulteau legal scholar, who is also an adopted member of the Gitanyow (Gitksan) House of Luuxhon, Ganada (Frog), and Val Napoleon; the second scholar is Richard Overstall, who is a settler lawyer and scholar, and has written about Gitksan law. Their research assisted my ability to reason and understand Ts'msyen law by referring to Gitksan law, which is very similar in nature (as the Ts'msyen, Gitksan and Nisga'a are closely related and are in the same linguistic group). There remains a need for more critical legal scholarship regarding Ts'msyen law. The more critical scholarship about Ts'msyen law will help to reinforce the understanding that there is room for a plurality of perspectives. I say this partly because in many ways, I thought that if I wrote about gendered oppression and exclusion in Ts'msyen society that others within the Ts'msyen community would view my work as acting in opposition to the revitalization of Ts'msyen culture, including legal and governance systems.

(e) Strengthening my Personal Agency to write this LLM Thesis

I had to overcome the internal limitations that I placed on my LLM research as working against the revitalization efforts of others working to strengthen Ts'msyen law and governance. For a long time, I thought that if I explored the issue of sexism as part of my LLM, that I would be acting contrary to the collective interest of Ts'msyen society with respect to the renewal of the Ts'msyen legal order and governance system. I was afraid of the personal and

professional consequences of publicly sharing this LLM thesis because I thought I could be ostracised from the broader Ts'msyen community and the legal community for my views on sexism.

Napoleon writes that raising critical questions are integral to the robust and respectful engagement with Indigenous law.³² She states that the “articulation and restatement of indigenous law facilitates an internal view of indigenous law that enables its argumentation, application and practice in the real world – and is a way to keep alive and in practice so that it does not become a romanticized historic artifact”.³³ She cautions that it is important that these critical questions not paralyze or narrow the work of Indigenous law.³⁴ This article is critical to note here, as I too experienced a paralysis based on fear in writing this LLM thesis.

(f) Coming to Terms with Sexism Existing in Ts'msyen Society

One might think that because I am a lawyer and occupy spaces of privilege that I would not experience personal feelings of fear in exploring Ts'msyen law. However, I was quite afraid to write about the exclusion of women from holding the highest-ranking name of chief. I was overcome with fear in engaging with the critical question of sexism in Ts'msyen law because I simply

³² Napoleon, *Did I Break It?* *supra* note 6 at 22.

³³ *Ibid.*

³⁴ *Ibid.*

did not want to acknowledge that sexism exists in Ts'msyen society now nor in the pre-contact past.³⁵ In order to overcome my own paralysis in writing my LLM thesis, I had to come to terms with sexism existing in Ts'msyen society today.

To write this LLM thesis, it was necessary for me to strengthen my own sense of personal agency. Napoleon writes that individual legal agency makes law legal and a necessary legality in Indigenous legal orders.³⁶ I have had to strongly lean on such statements about Indigenous law to strengthen my own individual legal agency to be able to reason through the issue of sexism in Ts'msyen law. I, therefore, thought it was imperative to complete this LLM thesis to help me and others understand my interpretation of why Ts'msyen women and LGBTQ2IAS+ people are excluded from holding the highest-ranking names based on sexism.³⁷

There are “strengths and principles of Indigenous legal orders to deal with contemporary issues”.³⁸ A contemporary issue that Ts'msyen people are impacted by today includes sexism. In “Thinking About Indigenous Legal Orders”,

³⁵ Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, ed, *Dialogues on Human Rights and Legal Pluralism Ius Gentium: Comparative Perspectives on Law and Justice* (Dordrecht: Springer Dordrecht, 2013) 229 at 243 [Napoleon, Thinking About Indigenous Legal Orders].

³⁶ Napoleon, Did I Break It? *supra* note 6 at 25. Originally citing: Kristen Rundle, *Forms liberate: Reclaiming the Jurisprudence of Lon L Fuller*, 1st ed (Oxford: Hart Publishing, 2012) at 99.

³⁷ I have chosen to focus on arguments related to sexism.

³⁸ Napoleon, Thinking About Indigenous Legal Orders *supra* note 35 at 243.

Napoleon writes that sexism is a reality in Indigenous communities.³⁹ Indigenous communities like the Ts'msyen also continue to experience issues concerning sexism today.

Socio-legal scholar Emily Snyder in *Gender, Power, and Representations of Cree Law* writes that Indigenous people are romanticized and idealized as living in harmony in the pre-contact past.⁴⁰ The idealized perspective of Indigenous people, including the Ts'msyen, as living in a utopia in the pre-contact past makes it possible to turn away from issues of oppression like sexism impacting Ts'msyen women today. The consideration of sexism impacting Ts'msyen women now and in the past is a subtle shift in perspective that enables a critical inquiry into Ts'msyen law and governance issues.

In the next section, I will introduce Ts'msyen law and governance issues to provide greater understanding of its key concepts.

2. Introducing Ts'msyen Legal and Governance Systems

I am a Ts'msyen citizen and hana'ax (woman). I am also a member of the house (waap) of Liyaam Laxa and Waasibax. I am matrilineally a part of the Waasibax house. Both the territories of the house of Liyaam Laxa and Waasibax are located adjacent to each other near the Exchamiks River, a majour tributary

³⁹ *Ibid.*

⁴⁰ Snyder, *Representations of Cree Law supra* note 8 at 134.

to the Skeena River. The houses of Liyaam Laxa and Waasibax were and are closely related yet remain separate and distinct.⁴¹

Both the house of Liyaam Laxa and Waasibax are part of the Gisbutwada clan (Killerwhale). It is through our house of Liyaam Laxa that we held two yaowk feasts (naming feasts) on our reserve of Lax Kw'alaams (Port Simpson) in 2012 and 2015. In March 2024, the house of Liyaam Laxa held a soup feast in Prince Rupert. At this soup feast, my brother Darryl and I were bestowed names. The name I now hold is 'Ałaxsgaaxsił Gaax Aganłak which translates from the Sm'algyax language to the raven caws its name early in the morning. It is an ancient name that was passed down for many generations. My name connects me to the past, present, and future generations of Ts'msyen people, but most importantly it connects me to our land. It is through participating in these feasts, I have begun to broaden my understanding of the complex kinship networks in Ts'msyen society, including how Ts'msyen law functions within governance.

Names form the basis for the Ts'msyen legal order and governance system. Napoleon writes that "chiefs' names, kinship networks, and corresponding obligations are part of an overall political, economic and legal system that connects the past with the present, the people with the land, and the

⁴¹ Social-cultural and linguistic anthropologist, Christopher Roth, writes that, "two houses might repeatedly exchange adoptees to replenish each other's population," and I think that this is the case with my own two houses: Christopher F. Roth, *Becoming Tsimshian: The Social Life of Names* (Seattle: University of Washington Press, 2008) at 78 [Roth, *Becoming Tsimshian*].

people with each other.”⁴² Consequently, the names that belong to the houses of Liyaam Laxa and Waasibax have political, economic, and legal obligations as part of the Ts’msyen governance. Holding a name is one way to participate in the legal and governance system, such as through feasts.⁴³

3. Feasts as Legal Forum for Ts’msyen Society

Feasting is the most important facet of Ts’msyen society as it forms the central legal forum for the legal and governance process to occur. The Ts’msyen governance system is participatory based on those people within each house structure. In that way, it is a horizontal system of governance rather than vertical.⁴⁴ Another way to frame Ts’msyen society is as a decentralized society in the “absence of centralized, state authorities”.⁴⁵ Similar to the Gitksan society (as well as other Indigenous societies), there are no central authorities in Ts’msyen society.⁴⁶ For example, members of a house participate in house meetings and discuss legal issues and collectively make legal decisions that will later be carried out through a feast. But it is the public nature of the feast that includes the

⁴² Napoleon, *Ayook supra* note 1 at 99.

⁴³ Not everyone participates in feasts and not everyone who attends a feast has a name.

⁴⁴ Napoleon, *Ayook supra* note 1 at 163.

⁴⁵ Napoleon & Friedland, *Inside Job supra* note 28; Napoleon, *Thinking About Indigenous Legal Orders supra* note 35 at 234.

⁴⁶ Napoleon, *Ayook supra* note 1 at 217.

recognition of and oral recording as precedent by witnesses that make the decisions of a house a legal decision.

(a) Feasts Recognize the Laws and Oral Histories of a House

Feasts are legal events that publicly recognize the ayaawx (laws, customs, and precedents) and adaawx (oral histories) of a house. The adaawx is part of a matrilineal kinship group known as a house.⁴⁷ The adaawx connects a house with “its territories and establishes ownership of the land and resources”.⁴⁸ Furthermore, each house has a territory, and the adaawx connects a particular house to its territory.⁴⁹

Adaawx also includes “oral records of historical events of *collective* political, social, and economic significance, such as migration, territorial acquisition, natural disaster, epidemic, war, and significant shifts in political and economic power”.⁵⁰ For example, a limx’ooy or ancient song expressing loss that gives rise to visual images, such as clans depicted on poles or regalia represents

⁴⁷ Napoleon, Did I Break It? *supra* note 6 at 3.

⁴⁸ Napoleon, *Ayook supra* note 1 at 7.

⁴⁹ For an example see Roth, *Becoming Tsimshian supra* note 41 at 35.

⁵⁰ Susan Marsden, "Adawx, Spanaxnox, and the geopolitics of the Tsimshian" (2002) 135:1 BC Studies 101, online (pdf): <<https://ojs.library.ubc.ca/index.php/bcstudies/article/view/1639/1684>> at 103 [Marsden, Adawx].

the ayaawx of a house.⁵¹ It is through the feast that each house recreates and performs its complex legal relationships and connections with other lineages.⁵²

Ayaawx are validated through the public witnessing of a feast by those in attendance.⁵³ Ayaawx is a complex set of Ts'msyen laws related to the territorial and intellectual property of houses, such as names, dances, songs, and dzepek (crest images).⁵⁴ The public aspect of a feast is represented through the attendance of guests who provide for the validation of the substantive and procedural aspects of the feast through the act of witnessing.⁵⁵ For example, when other chiefs, spokesmen, matriarchs, and Elders attend a feast, it validates the feast as a public legal event.⁵⁶ The public validation of a feast is a public legal event, which is an aspect of Ts'msyen governance.⁵⁷ Although, all feasts are public legal events, not all feasts focus on the same subject matter.

⁵¹ "Limx'oy retain the ancient language in which they were composed, unlike adaawx, which are told in the language of the time": Marsden, *Ibid.* at 103.

⁵² Napoleon, *Did I Break It?* *supra* note 6 at 19.

⁵³ Marjorie M Halpin & Margaret Seguin Anderson, ed, *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks* (Vancouver: UBC Press, 2011) at 16–17 [Halpin & Anderson, *Potlatch*].

⁵⁴ Gray, *Ts'msyen Revolution* *supra* note 29 at 25; Napoleon, *Ayook* *supra* note 1 at 97.

⁵⁵ Halpin & Anderson, *Potlatch* *supra* note 53; Napoleon, *Ayook* *supra* note 1; Garfield, *Tsimshian* *supra* note 15 at 289–290.

⁵⁶ Gisday Wa & Delgam Uukw, *The Spirit in the Land: Statements of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia, 1987-1990* (Reflections, 1992) at 8 [Gisday Wa and Delgam Uukw, *Spirit in the Land*]; Roth, *Becoming Tsimshian* *supra* note 41 at 131.

⁵⁷ Napoleon, *Ayook* *supra* note 1 at 314.

(b) Feasts Represent Legal Events

There are several types of feasts that represent different types of legal events. Types of feasts include luulgit (a less formal feast), yaowk (naming feast), gilksyooksk (washing off feast), wilxt'u'tsk (mourning feast), and 'wilbaxmaxs (taking up, but generally referred to as stone moving feast).⁵⁸ Each of these feasts represent a different type of recognition of a legal event of a house. For example, yaowk feasts are an important legal event for members of a house to pass down names to members that belong to that house. Names within a house need to be moved at a feast and with so many decades of a house not feasting due to colonial disruption, Ts'msyen people are now holding yaowk feasts in order to continue to pass on names.

Yaowk feasts are currently the most prevalent type of feasts held by the Ts'msyen. One of the reasons why Ts'msyen people are holding more yaowk feasts in comparison to other types of feasts is to pass down names within a house after decades of inactivity. There may be many reasons why a house may not have feasted, most of which relate to colonial oppression and assimilationist policies like residential schools and the potlatch ban. While Ts'msyen people may not have feasted for many decades, Ts'msyen culture is still passed on matrilineally, including rights to names, clans, and house affiliation, for example.

⁵⁸ Kenneth Campbell, *Persistence and Change: A History of the Ts'msyen Nation* (Prince Rupert: First Nations Education Council, 2005) [Campbell, *Persistence and Change*]; Roth, *Becoming Tsimshian supra* note 41 at 112.

These are central concepts to Ts'msyen culture, including legal and governance systems, that I will discuss further below.

(c) House Groups are the Primary Legal Entity of the Ts'msyen Governance System

The house is the main kinship unit within the Ts'msyen governance system.⁵⁹ The house consists of people who are within the same wil'naat'ał (clan).⁶⁰ The Ts'msyen people are matrilineal, which means that the collective rights and obligations are passed down through the matrilineal line (e.g., a mother to her children).⁶¹ For example, it is through the matrilineal line that the territorial and intellectual property of a house, such as clans, names, songs, dances, and oral histories, are passed from one generation to the next.⁶²

The house makes governing decisions about its territorial and intellectual property. For example, the house will collectively make governance decisions that become a public legal event at a feast. This is an example of a governance

⁵⁹ A house is different from a tribe; a tribe consists of several houses from different clans that act as political and economic alliances. For reference, I have listed the names of the tribes that belong to Lax Kw'alaams and other nearby reserves in the glossary.

⁶⁰ There is some difficulty with interpreting the word for clan in Sm'algyax. The word in Sm'algyax for clan is pdeex but some have also interpreted it as wil'naat'ał. James A. McDonald, "Tsimshian Wil'naat'ał and Society: Historicising Tsimshian Social Organization" (2017) 8:1 New proposals, at 11 and 28 [McDonald, Wil'naat'al].

⁶¹ Garfield, *Tsimshian supra* note 15 at 174.

⁶² Gray, *Ts'msyen Revolution supra* note 29 at 26.

decision as to who will become a successor to the chief.⁶³ Lastly, members of a house have obligations to defend their territory, but also to participate, witness, and validate feasts. There are also specific feast obligations pertaining to children. For example, historically when a child was born, the father's or his house or house chief would announce the birth of the newborn child.⁶⁴

(d) The Clan is a Kinship Group that is Passed Down Matrilineally

The clans are another kinship group within the Ts'msyen governance system. The clan affiliation is another way in which people relate to each other in the Ts'msyen legal order (but with other legal orders as well). For the Ts'msyen, there are four main clans, including Laxskiik (Eagle), Ganhada (Raven), Gisbutwada (Killerwhale), and Laxgibuu (Wolf). One of the four clans is passed down through the matrilineal line from mother to child. But there are also other ways in which a clan could be passed down, such as through an adoption of an individual(s) into a house.

Adoptions occur at feasts when the house holding the feast adoptions an individual into the house. The adoptee may be from another house or may be without a house. There are various reasons why a person is adopted into a house. There are many reasons why a house may adopt people, including for the continuation of a house if it is near extinction, for a woman to pass on her

⁶³ Garfield, *Tsimshian supra* note 15 at 180.

⁶⁴ Napoleon, *Ayook supra* note 1 at 69. Garfield, *Ibid.* at 221.

matrilineal line, and so that a person may participate in feasting activities. For example, a person might be adopted into a house because the house might not have enough people. A house might need to adopt people in order to continue.⁶⁵ When a person is adopted into a house, he or she then holds a name, but the name belongs to the house.⁶⁶ When a person who holds a name passes away, that name reverts back to the house. The reasoning behind the reversion of a name to a house is because a name is part of the collective intellectual property of a house.⁶⁷

(e) Names Connote Recognition of Status

Names are generally divided according to gender and status. For example, it is common practice that matriarchs hold the highest-ranking names of women within the house.⁶⁸ Women have a special place within Ts'msyen society as sigidmhana'nax (matriarch) within the house group. Women are the holders of knowledge regarding the names that are owned and passed down intergenerationally within the house. But women are generally excluded from holding high-ranking names other than matriarch names in Ts'msyen society.

⁶⁵ Garfield, *Tsimshian supra* note 15 at 228.

⁶⁶ Roth, *Becoming Tsimshian supra* note 41 at 62–63.

⁶⁷ Gray, *Ts'msyen Revolution supra* note 29 at 25; Napoleon, *Ayook supra* note 1 at 97.

⁶⁸ Roth, *Becoming Tsimshian supra* note 41 at 58.

The high-ranking names for men within a house are chief, post, and speaker.⁶⁹ I understand the posts to be men who are symbolic posts who hold up the four corners of a house. The speaker is also a man who speaks on behalf of a house in public, such as at feasts, for example. My contention is that there are very few leadership roles identified for women within the Ts'msyen legal and governance system aside from the gendered role of matriarch.⁷⁰

I wanted to first introduce some primary concepts of the Ts'msyen legal order and governance structure as they relate to feasts and names. It is also necessary to have at least a broad understanding of the centrality of women in Ts'msyen society, oral history, laws, customs, precedents, the structure of the house, clans, feasts, and the importance of names before delving into the question raised earlier in this thesis.

4. Outlining my LLM Thesis

In this LLM thesis, I write about the issue of exclusion of women, including 2SLGBTQQIA+ people, from holding the highest-ranking name in the Ts'msyen

⁶⁹ *Ibid.*

⁷⁰ I highlight gender roles within Ts'msyen society, but it is a small component of my thesis. Further research is required as part of a broader discussion regarding gender within Ts'msyen society.

society, including legal and governance systems.⁷¹ The next chapter introduces six sources of law as an approach to my theory. It also includes the four-step relational approach of Canadian legal scholar Jennifer Nedelsky in *Law's Relations: A Relational Theory of Self, Autonomy, and Law*.⁷² The third chapter builds on theories of relationality as a core concept to the Ts'msyen legal order and governance system, which will be explored with the application of Nedelsky's four-step relational approach. The fourth chapter explores transformational change that can be part of the process of remedying the sexist legal pattern of exclusion of women from holding the highest-ranking name in Ts'msyen law and governance. Finally, in the conclusory chapter, I write about why my efforts worked, including what I learned, and what further work could be done on the subject matter.

⁷¹ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Napoleon Val, "What is Indigenous law? A small discussion by Val Napoleon", online: <ilru.ca/wp-content/uploads/2020/08/What-is-Indigenous-Law-Val-.pdf>; originally citing: Rundle, *supra* note 36.

⁷² Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011), at 236–249 [Nedelsky, *Law's Relations*]; Estair Suarez Van Wagner, *The Place of Private Property in Land Use Law: A Relational Examination of Ontario's Quarry Conflicts* (Ph.D Dissertation, York University, 2017) online: <<https://digitalcommons.osgoode.yorku.ca/phd/37>> at 276–281 [Van Wagner Private Property].

Chapter 2 – Introduction of Theoretical and Methodological Approaches

1. Introduction

In this chapter, I write about the six sources of law approach as a theory. According to Anishinaabe legal scholar, John Borrows, in *Canada's Indigenous Constitution*, he illustrates that there are five pre-existing sources of laws, including sacred, natural, deliberation, positivism, and customary.⁷³ Additionally, Napoleon has written about a sixth source of law based on human interaction (e.g., human-interactive law).⁷⁴ These six sources of law rarely act in isolation from each other since deliberation is a necessary process for all sources of law.⁷⁵

I conclude this chapter by introducing Nedelsky's four-step relational approach to dispute resolution from *Law's Relations: A Relational Theory of Self, Autonomy, and Law*. Nedelsky methodological approach assists in reasoning through the legal issue of how law should construct relations based on the issue of inquiry.⁷⁶

2. Introducing Indigenous Sources of Law

⁷³ Borrows, *Canada's Indigenous Constitution* *supra* note 71 at 25.

⁷⁴ Napoleon, *Ayook* *supra* note 1 at 263.

⁷⁵ Borrows, *Canada's Indigenous Constitution* *supra* note 71 at 36.

⁷⁶ Nedelsky, *Law's Relations* *supra* note 72 at 236–249; Van Wagner, *Private Property* *supra* note 72 at 276–281.

Indigenous legal theory is a theoretical approach to interpreting and analyzing Indigenous laws. Tracey Lindberg's dissertation titled *Critical indigenous legal theory* examines the principles, values, and laws of critique, conflict, and good relations.⁷⁷ However, Borrows offers a slightly broader approach to Indigenous legal theory. The expansion on the reasoning processes of how Indigenous people interact with each other and the practices or protocols (e.g., procedures) that guide those deliberative legal processes.⁷⁸ Indigenous legal theory can include how Indigenous people interact with each other but also with the natural world or the sacred, for example. These are regarded as sources of law for which law is derived and exists in Indigenous societies.

Sources of law help lay the foundation for the existence of laws. I will illustrate in the next chapter that these sources of law can apply independently or in tandem with one or many sources of law. These sources of law help to provide a greater context to how Ts'msyen law has framed the issue in dispute. But first, in the following section, I provide a description of the sources of law.

(a) Sacred Law

The sacred laws are guided by higher spiritual beings. Beliefs related to higher spiritual beings help inform Indigenous people's spiritual beliefs, values,

⁷⁷ Tracey Lindberg, *Critical indigenous legal theory* (Thesis, University of Ottawa, 2007) [unpublished] at 125 [Lindberg, *Critical Indigenous Legal Theory*].

⁷⁸ Borrows, *Canada's Indigenous Constitution supra* note 71 at 35.

and processes of resolving conflicts.⁷⁹ Sacred law, as a source of law, is reflected in different types of oral histories of Indigenous people. Examples of the sacred law exist within narratives based on the creation of an Indigenous nation; these are often referred to 'creation stories' by Indigenous people on the northwest coast. Every Indigenous people has a an 'origin story' that informs where they came from, who brought them into being, and includes challenges that their ancestors endured.⁸⁰

(b) Deliberative Law

Indigenous legal orders consider the law of deliberation or deliberative law. Deliberations form the basis of many Indigenous legal orders and other areas of law as well (such as the common law, for example). It is the process of incorporating different viewpoints through discussions. The deliberative process of collaboration enables law to be law; it includes putting forward principled reasoning processes along with these ideas which is a type of legal reasoning.

Deliberative law could involve lengthy discussions in various forums (private and public). In these settings, people's perspectives could be spoken out loud, where others can take into consideration their changing ideas through the

⁷⁹ *Ibid.* at 25.

⁸⁰ Origin stories are sometimes called creation stories by many different Indigenous people.

act of listening. Deliberative legal reasoning is a source of law that takes into consideration the points of view and perspectives of a group.⁸¹

(c) Positivistic Law

Positivistic law (or legal positivism) is a source of law based on proclamations, legislation, statute, regulation, bylaws, or other forms of written down laws based on rules.⁸² These proclamations can exist in Indigenous legal orders as well as other legal orders (e.g., Canadian). Borrows illustrates that legal positivism may have weight within Indigenous legal orders because of “a person or group of people who are regarded by a sufficient number of people within a community as authoritative ... Their laws may be regarded as positivistic because they rely more on the authority and intelligence of those who issue them (such as chiefs or Elders, for example) than on the notion of creation, nature, or community deliberation”.⁸³ These legal decrees or declarations form the basis for written laws that can become rules to be followed through bylaws, regulations, or other forms of protocols or procedures. These legal declarations may have developed from other sources of law, but over time have become separated from them.⁸⁴

⁸¹ Borrows, *Canada's Indigenous Constitution supra* note 71 at 38.

⁸² *Ibid.* at 46.

⁸³ *Ibid.* at 47.

⁸⁴ *Ibid.* at 46.

(d) Customary Law

Many scholars have written about customary law as a source of law, but one interpretation of customary law is that it is an area of law based on customs.⁸⁵ Customary law exists in both non-Indigenous, the common law, and civil law in addition to Indigenous law. Customary law is often regarded as the unwritten law that binds people based on customary practices. Often many non-Indigenous people regard Indigenous law solely as customary because it is known to be a law based on unwritten texts.

Customary law is collectively shaped by people through repetition and binds a group of people.⁸⁶ These deliberative processes are often unwritten but can be written down as well. A customary practice involves learning a custom, specific set of routines, or procedures, within a community on how to conduct oneself in relation to the community.⁸⁷

(e) Social Interactive Law

Social interaction as a source of law raises questions about the agency of humans who are socially interacting and generating law over time by their

⁸⁵ *Ibid.* at 51.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

conduct.⁸⁸ Napoleon's theory regarding social interactive law is that it can be categorized into two levels within the Gitksan legal order, including:

1. everyday background (e.g., reminiscences as a way of organizing lived experiences and constituting the present); and
2. the implicit part of the antamahlaswx and adaawk.⁸⁹

Both antamahlaswx and adaawk refer to different types of oral histories within the Gitksan legal order.⁹⁰ Antamahlaswx are the stories that are considered collective properties of all Gitksan.⁹¹ Adaawk refers to the private and exclusive property of the individual Gitksan Houses.⁹² It is through antamahlaswx and adaawk that in the Gitksan legal order that law is both informal, implicit, and formal, explicit.⁹³

(f) Natural Law

Natural law is an area of law informed by how people live their lives in relation to the natural world around them.⁹⁴ Many scholars have written about

⁸⁸ Napoleon, *Ayook supra* note 1 at 263.

⁸⁹ *Ibid.* at 269.

⁹⁰ *Ibid.* at 266.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.* at 269.

⁹⁴ Borrows, *Canada's Indigenous Constitution supra* note 71 at 28.

natural law and approaches to natural law theory. Borrows' interpretation is that natural law is derived from a set of rules of how to live one life in accordance with the earth in a way that "benefits us all and all other beings".⁹⁵

3. Jennifer Nedelsky's Four-Step Relational Approach

Lastly, Nedelsky's four-step relational approach (as outlined in *Law's Relations: A Relational Theory of Self, Autonomy, and Law*) is a guiding framework because it asks the preliminary question of how the law should construct relations based on this inquiry.⁹⁶ I ask why Ts'msyen women and LGBTQ2IAS+ people are excluded from holding the highest-ranking names based on sexism. Nedelsky's approach includes:

- (a) What are the values at stake?
- (b) What kinds of relations will foster the values in question? and
- (c) What kinds of relationships will a contested version of the right structure?⁹⁷

⁹⁵ *Ibid.* originally citing: Cree Elder Wayne Roan who speaks about nature's laws from the Cree perspective, see Chief Wayne Roan and Earle Waugh, PhD, "Nature's Laws" (2004), online: <www.abheritage.ca/natureslaws/index2.html>.

⁹⁶ Nedelsky, *Law's Relations supra* note 72 at 236–249; Van Wagner, *supra* note 72 at 276–281.

⁹⁷ Nedelsky, *Ibid.* at 241.

Instead of applying these questions, I have opted for an adaptation of Nedelsky's approach by environmental property law expert Estair Van Wagner, including the following:

- (a) how does law structure the relevant relations?
- (b) what values are at stake?
- (c) what relationships might foster these values? and
- (d) what kind of rights can foster these relationships?⁹⁸

Nedelsky's approach is important to my own work because I am interested in the practical applications of a critical inquiry in the issue of sexism for the highest-ranking name of chief within Ts'msyen society.⁹⁹ These questions allow for a generative discussion that also considers relationships within the institutional structure and the formal decision-making process.

For my LLM thesis, I have adapted Nedelsky's four-step relational approach in three ways.¹⁰⁰ I have changed the language of 'values' to 'Ts'msyen legal principles' contained in the second and third step. I have also changed 'values' to 'Ts'msyen laws' contained in the last step. I have adapted Nedelsky's

⁹⁸ I have adapted Nedelsky's language by using Van Wagner's adapted language with the relational approach to resolving conflict; Nedelsky, *Law's Relations* *supra* note 72 at 241–243.

⁹⁹ Nedelsky, *Ibid.* at 236; Van Wagner, Private Property *supra* note 72 at 45.

¹⁰⁰ Van Wagner, *Ibid.* at 276–281.

language of 'rights' to 'Ts'msyen legal principles'. I have also adapted the language of 'rights' to 'Ts'msyen legal principles and laws' because Nedelsky is writing about the Canadian law context. In the Canadian law context, it is reasonable to use the language of values and rights, but my research focuses on the Ts'msyen legal context. I will explain more below on why I have adapted Nedelsky's four step relational approach (next page):

Table 1. Comparison of Adaptations of Nedelsky's Four Step Relational Approach		
Jennifer Nedelsky's Approach	Estair Van Wagner Adapted Approach	Christina Gray Adapted Approach
(a) How the law should construct relations based on this inquiry?	(a) How does law structure the relevant relations?	(a) How does law structure the relevant relations?
(b) What are the values at stake?	(b) What values are at stake?	(b) What Ts'msyen legal principles are at stake?
(c) What kinds of relations will foster the values in question?	(c) What relationships might foster these values?	(c) What relationships might foster these legal principles?
(d) What kinds of relationships will a contested version of the right structure? ¹⁰¹	(d) What kind of rights can foster these relationships? ¹⁰²	(d) What kind of Ts'msyen laws can foster these relationships?

¹⁰¹ Nedelsky, *Law's Relations* *supra* note 72 at 241.

¹⁰² Van Wagner, *Private Property* *supra* note 72 at 276–281; Nedelsky, *Ibid.* at 241-243.

Nedelsky writes about values and rights in Canadian law. She writes that a core value of a society suggests some level of consensus, or at least, that is. It is relatively clear which views about values are dominant.¹⁰³ In the Canadian law context, Nedelsky illustrates that examples of core values include equality, liberty, freedom, collective and individual expressions of spirituality, and respect.¹⁰⁴ Whereas, rights are a particular institutional and rhetorical means of expressing, contesting, and implementing such values.¹⁰⁵ Equally important, she argues the understanding of these values, especially beliefs, about what the actions or institutions are most consistent with them.¹⁰⁶

Nedelsky states that in “Canada and the United States, there are aboriginal groups for whom the language of rights, and perhaps particularly private property rights, does not adequately express their understanding of core values”.¹⁰⁷ As such, I have adapted the language of values and rights to legal principles, in order to pay more attention to the interpretation and articulation of

¹⁰³ Nedelsky, *Ibid.* at 242.

¹⁰⁴ *Ibid.* at 241.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* at 242.

¹⁰⁷ *Ibid.* at 243. I have deliberately used the term Indigenous to refer to first peoples. There is not a legal definition relating to Indigenous people that I rely on in this LLM thesis. I, however, note that the term Aboriginal includes the ‘Indian’ (e.g. First Nation), Inuit, and Métis as defined in s. 35(2) of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 35(2). An older term to refer to Aboriginal is Indian, First Nation, or Native.

Ts'msyen laws.¹⁰⁸ Lastly, Ts'msyen legal principles help to address the issue in dispute that continues to impact Ts'msyen society today.¹⁰⁹

(a) Overstall's Three Types of Law

In "Encountering the Spirit in the Land: "Property" in a Kinship-Based Legal Order", Richard Overstall, a Canadian lawyer and scholar, writes that there are three types of laws in the Gitxsan legal order.¹¹⁰ There are differences between Gitxsan law and Ts'msyen law, but there are also many parallels. The three types of law that Overstall theorizes about in Gitxsan law include the following:

These requirements have led to three types of law in the Gitxsan order. Laws of the first type are often referred to as simple laws of respect and balance. These are primary laws, the rules that have to be followed to carry out one's reciprocal obligations to others. Examples include asking permission of an animal or plant before taking it, never taking more from the land than one needs, and always giving something in return.

The second type are secondary laws, rules that enable people to interpret the primary laws. These are the rules governing the feast hall, where the Houses, through their chiefs, validate and recreate the original relationships of the host House group, the succession

¹⁰⁸ Borrows, *Canada's Indigenous Constitution supra* note 71 at 139.

¹⁰⁹ Napoleon & Friedland, *Inside Job supra* note 28 at 733.

¹¹⁰ Richard Overstall, "Encountering the Spirit in the Land: "Property" in a Kinship-Based Legal Order" in John P McLaren, A R Buck, & Nancy E Wright, ed, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2003) at 44 [Overstall, Encountering].

of individuals within the host House to chiefly names, and the allocation of use rights to lands and resources.

The third type is what have been called “strict” laws. They are constitutional in nature, concerned with establishing and maintaining the legal framework of the society and its ability to maintain its obligations to the land. Examples mentioned in this chapter include the law against marrying within one’s own clan, the inalienability of territory, and the absolute liability for human actions on its territory.¹¹¹

Overstall’s theories of law as they relate to secondary laws are important to my work because his theories help to provide an analytic framework for understanding the Ts’msyen law regarding successorship. Through the second type of legal decision, Overstall illustrates the ‘rules’ that enable people to interpret primary laws (simple laws). Overstall’s three types of laws will be explored in the third step of Nedelsky’s framework regarding examining what relationships might foster these legal principles in the next chapter.

(b) Relational Approach to Law

I am interested in Kristen Rundle’s interpretation of Fuller’s theory regarding the relational approach to law. More specifically, my interest lies in her interpretations of Fuller’s eight principles that together comprise the internal morality of law.

Rundle illustrates through a reinterpretation of Fuller’s theory of internal morality of law that with relational theory, law is contained by an internal morality.

¹¹¹ *Ibid.*

Internal morality is necessary to convene and sustain lawful relationships based on the quality of the relationship.¹¹²

Rundle's work is important to the issue of sexism in Ts'msyen law regarding chiefs as it relates to the internal morality of law is based on the quality of human interactions, which is a necessary condition to convene law. Her theory regarding reciprocity is also important in examining the quality of relationships in Ts'msyen law. This will be applied in Nedelsky's framework, which I will discuss in the next chapter.

4. Conclusion

This chapter helped to lay the framework outlining six sources of law, including sacred, natural, deliberative, positivistic, customary, and interaction (or social interactive law). I will illustrate how these sources of law apply to the issue of exclusion of women from holding the highest-ranking name in Ts'msyen society. This issue in dispute will be illustrated within the context of Nedelsky's four-step approach to conflict resolution. Through the application of this approach, I engage with several sources of law and Rundle's relational theory to make sense of the issue of exclusion of women from holding the name of chief.

¹¹² Kristen Rundle, "Fuller's Internal Morality of Law" (2016) 11:9 Philosophy Compass 499 at 503 [Rundle, Fuller's Internal Morality of Law].

Chapter 3 – Sexism in Ts’msyen Law

1. Introduction

In this chapter, I apply Nedelsky’s four-step relational approach to law as it pertains to the relations related to the exclusion of women from the highest-ranking name of chief. Nedelsky’s relational approach seeks to “help clarify the nature of the disagreements among people about what ‘equality’ should mean in practice”.¹¹³ Through this methodological application, I attempt to understand the intellectual reasoning and processes regarding successorship of the highest-ranking name of chief in Ts’msyen law. Through this application, I reinterpret Rundle’s interpretation of Fuller’s relational theory to apply to Ts’msyen law.

2. Application of Nedelsky’s Four-Step Relational Approach to Law

(a) How does law Structure the Relevant Relations?¹¹⁴

The issue in dispute is that Ts’msyen women and 2SLGBTQQIA+ people are generally excluded from holding the highest-ranking name of chief within a house.¹¹⁵ There are limited written examples of women who have held the highest-ranking names in Ts’msyen society. Most of the examples of when women held the name of chief occurred in the late nineteenth and early twentieth

¹¹³ Nedelsky, *Law's Relations supra* note 72 at 84.

¹¹⁴ Van Wagner, *Private Property supra* note 72 at 276.

¹¹⁵ Throughout this chapter I refer to women, but I am inclusive of 2SLGBTQQIA+ people as well.

centuries. This was a time of greater church influence and strict control and authority of the settler state on reserves such as Lax Kw'alaams. Although there is now less church influence, the pattern of exclusion of women from leadership roles in Ts'msyen society persists; this may be slowly changing as the Ts'msyen law adapts to changing needs, desires, ideas, and concepts of society.

Currently, men generally hold the highest-ranking name of a house. The historic practice was that the name of chief generally transferred from a man to his sister's eldest nephew, but in the past, it may have been the practice that the highest-ranking name continues to pass from chief to nephew, it is not strictly followed now. Although the practice of transferring the name of chief to the eldest nephew of the sister of the chief is not commonly practised now, women continue to be excluded from holding the highest-ranking name of chief.

Many changes have occurred in Ts'msyen society during the colonial period. In the early twentieth century, American ethnographer, Viola Garfield, illustrated that women holding the name of chief is one among many examples that were part of the "disruptive influences of contact with white civilization in the last hundred years ...".¹¹⁶ She indicates that before the publication of *Tsimshian Clan and Society* in 1939 that it was not the practice for women to hold the chief names in Ts'msyen society, but colonialism had brought about 'rapid change' in

¹¹⁶ Garfield, *Tsimshian supra* note 15 at 184.

this regard.¹¹⁷ Arguably, Garfield's work was limited in terms of its scope and exploration concerning the issue of the gendered exclusion of women from holding the highest ranking name of chief in Ts'msyen society. Few anthropologists, including Garfield, have undertaken a gendered analysis on the societal structures and dynamics of Ts'msyen society in a detailed way.

Garfield's scholarship was concerned with concepts related to social organization in Ts'msyen society. She was working within the salvage ethnography paradigm in which there was a general trend towards creating an archive with the aim of recording the vanishing cultures of Indigenous people.¹¹⁸ For example, Brian Thom, a Canadian anthropologist, wrote that "oral traditions were integrated into salvage ethnographies by being summarized for the purpose of a description of their role in Native explanations for social institutions or beliefs".¹¹⁹ The recording of oral histories or narratives is only one example among many in which salvage ethnographic paradigms operate within the archive. Robin Gray, in "Ts'msyen Revolution: The Poetics and Politics of Reclaiming", argues that the archive also provides a space for the politics of dispossession of Ts'msyen people from our lands and as "culturally distinct

¹¹⁷ *Ibid.*

¹¹⁸ Aaron Glass, "From Cultural Salvage to Brokerage: The Mythologization of Mungo Martin and the Emergence of Northwest Coast Art" (2008) 29:1 *Museum Anthropology* 20 at 31 [Glass, Cultural Salvage].

¹¹⁹ Brian Thom, "The Anthropology of Northwest Coast Oral Traditions" (2003) 40:1 *University of Wisconsin Press* at 1–28 [Thom, Northwest Coast Oral Traditions].

peoples”.¹²⁰ Arguably, the idea of the archive is controversial among Indigenous scholars because of concepts relating to ownership, control, and power that institutions hold over Indigenous people’s knowledge, cultural belongings, and bodily remains. I have chosen to rely on archival material and related research as part of my LLM research because they serve to help illustrate issues related to Ts’msyen law and governance.

Below, I will share some of the narratives that involve women holding the highest-ranking name in Ts’msyen society.¹²¹

(1) The Narrative of Sudaat

A woman, whose Christian name was Victoria Young, assumed the role of chief of house of Giluts’aaw in the late nineteenth century.¹²² She held the highest-ranking name of Niesłgu-mik in the house of Giluts’aaw.¹²³ She also held

¹²⁰ The archive, Ts’msyen scholar, Robin Gray writes, is symbolic of “settler progression, market settler superiority, and promote Indigenous elimination”. Furthermore, she argues that anthropology plays an “pivotal role in the settler colonial project”: Gray, *Ts’msyen Revolution supra* note 29 at 53.

¹²¹ More examples might exist regarding women becoming chief, but my ability to conduct research was limited due to the restrictions relating to the COVID-19 pandemic.

¹²² Garfield, *Tsimshian supra* note 15 at 189; Thomas Crosby, *Up and Down the North Pacific coast by canoe and mission ship* (Toronto: Missionary Society of the Methodist Church, Young People’s Forward Movement Department, 1914) at 385 [*Crosby, Up and Down*].

¹²³ Susan Neylan, *The Heavens Are Changing: Nineteenth-Century Protestant Missions and Tsimshian Christianity* (McGill-Queen’s University Press, 2003) at 120 [Neylan, Heavens].

a high-ranking name of Sudaat (translates closely to dear woman) and was a member of the Gisbutwada clan.¹²⁴

Sudaat briefly married Ligeex, a Chief of the Gitwilgyoots Tribe.¹²⁵ After the marriage ended, she did not re-marry and adopted two children to continue her lineage.¹²⁶ She adopted her brother's son (who was Laxgibuu) and a girl (who was Laxskiik).¹²⁷ Her daughter's son inherited the name of Gislgumiik from his uncle.¹²⁸

Sudaat was involved in politics, church missionization, and warfare. In the 1850s, she engaged in warfare with other Ts'msyen people. She was said to wield a gun and knife in the battle.¹²⁹ After the arrival of Reverend Thomas Crosby at Fort Simpson in 1874, she converted to Christianity, and later participated in missionary work in the region.¹³⁰ She was involved in politics, as

¹²⁴ *Ibid.* at 120 and 123.

¹²⁵ *Ibid.*

¹²⁶ Neylan, *Ibid.*; Garfield, *Tsimshian supra* note 15 at 188.

¹²⁷ Neylan, *Ibid.* at 123.

¹²⁸ *Ibid.*

¹²⁹ There is a limited description of this battle in Crosby, *Up and Down supra* note 122 at 384.

¹³⁰ Crosby had sexist and patriarchal views of women while also relying upon them for missionization work. This tension regarding power and authority is evidenced in the photograph of Sudaat and Crosby at Figure 1: Neylan, *supra* note 123 at 120–123; Crosby, *Up and Down supra* note 122 at 385.

chief, and participated in the town council at times.¹³¹ After her death in 1898, her brother held the name Niesłgu-mik III.¹³²

(2) The Narrative of Nies-Wama’k

The son of the eldest daughter assumed the chief name of Nies-wama’k.¹³³ Nies-wama’k was spoken about as the brother of Ligeex and held the same right to crests and personal names as the head chief (Ligeex); Ts’msyen people thought that he would eventually hold the name of Ligeex, but those within the Gixpaxlo’ots tribe refused to recognize this informal intention. Upon the death of Nies-wama’k, his sister held the name and Garfield wrote that “[w]hen she dies the name will go to the eldest of her sons, if he cares to assume it”.¹³⁴

(3) The Narrative of Nies-We-Xs

A woman held the role of head of the Ginadoiks tribe but did not hold the name of Nies-we-xs.¹³⁵ The name of Nies-we-xs came from Gitxaala, but was succeeded by a house “nephew”.¹³⁶ The young son (e.g., nephew) was supposed to hold the chief name of Nies-we-xs belonging to the Ginadoiks

¹³¹ Crosby, *Ibid.* at 385.

¹³² *Ibid.* at 189.

¹³³ Garfield, *Tsimshian supra* note 15 at 186.

¹³⁴ The name in English for the woman who held the name Nies-we-xs is not known: Garfield, *Tsimshian supra* note 15 at 186.

¹³⁵ *Ibid.* at 191.

¹³⁶ *Ibid.*

tribe.¹³⁷ At that time, the son was too young to hold the name; instead, his mother assumed the role of leader of the tribe, but not the name.¹³⁸

(4) The Narrative of Martha Ligeex

Lastly, a woman by the name of Martha Ligeex, who was the highest-ranking chief of the Gixpaxlo'ots tribe. Ligeex was an infamous chief that is known to many Ts'msyen people for monopolizing trade along the Skeena River.¹³⁹ There are many oral histories about Ligeex, but this specific narrative occurred at the turn of the twentieth century.

At that time, the name Ligeex was known to come from the lineage of Gunhut, a southern branch of the Eagle Clan.¹⁴⁰ The last person to hold the name that came from the lineage of Ligeex was named Paul Ligeex.

During the nineteenth century, names in the Sm'algyax language belonging to the house (waap) became the last names of Ts'msyen people to connect a person to their relations. The names of people using the name belonging to their house is recorded on people's church records or other historic documents. By the early to mid-twentieth century, the practice of Ts'msyen people bearing their last name of their house discontinued. For an example of

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.* at 183.

¹⁴⁰ Garfield, *Tsimshian supra* note 15 at 184.

this practice is with the name of Martha Ligeex. Since then, names in English were passed on as a last name.¹⁴¹ When Paul Ligeex died in 1890, his sister Martha Ligeex became chief.

After Martha Ligeex's death in 1902, the Gixpaxlo'ots tribe chose not to select another chief to lead.¹⁴² Instead, the Gixpaxlo'ots tribe chose a successor of four leading house chiefs to serve as a council until a time when a person could be selected.

A man named George Kelly was later selected to hold the name Ligeex. George was a member of the house of Sqa-gwet, and not of the lineage of Ligeex. George's lineage on his mother's side was Ts'msyen and his father was white.¹⁴³ He lived most of his life in Victoria and returned to Ts'msyen territory in his older age. After his death, his tribe selected a council again to manage their affairs in 1938.¹⁴⁴ Since the death of George Ligeex (Kelly), the name of Ligeex has not been held by anyone in the Gixpaxlo'ots tribe.

I wanted to share these narratives of women holding chief names to act as evidence that Ts'msyen people have a history of naming women as chiefs. In the

¹⁴¹ Bolt, *Becoming Tsimshian supra* note 11 at 68.

¹⁴² Garfield uses the language of tribe rather than house to describe the selection of a council, but I am uncertain that she meant tribe as opposed to house in this circumstance. Garfield, *Tsimshian supra* note 15 at 184.

¹⁴³ *Ibid.* at 184.

¹⁴⁴ *Ibid.*

next section, I will discuss the sources of Indigenous law that are engaged with the issue of exclusion regarding women from holding the highest-ranking name.

(b) Legal Sources

I argue that the rule that women and 2SLGBTQQIA+ people cannot be chiefs primarily engages legal positivism as an authoritative source of law. Those in opposition to gender diversity in leadership positions in Ts'msyen law often rely on *ayaawx* (laws, customs, precedents) as an authority engage the sacred as a source of law; this is done in a fashion that thinly veils it as sacred and operates as a type of legal fundamentalism. Below, I will further discuss how sexism appears like legal positivism, but at its core is legal fundamentalism.

(1) Sexism as Part of Legal Positivism

The gender-based practice that women cannot hold the highest-ranking name is an example of a type of legal fundamentalism that appears like legal positivist rule in Ts'msyen society. Legal positivism in "Indigenous legal traditions may have been explicitly connected to a larger normative system, but the reasons underlying their original adoption might have been deliberately abandoned or forgotten as circumstance changed".¹⁴⁵

In this circumstance in which women are excluded from holding the highest-ranking name of chief, I argue that there is no valid legal reason based

¹⁴⁵ Borrows, *Canada's Indigenous Constitution supra* note 71 at 47.

on an actual interpretation of Ts'msyen law that can substantiate the exclusion of women from greater leadership positions. Instead, this exclusionary rule is an example of structural oppression that impacts women and 2SLGBTQQIA+ people; this exclusionary pattern further serves as an example of sexism and patriarchy, as it primarily benefits men in positions of power and authority.¹⁴⁶

(2) Structural Oppression and Ts'msyen Law

Structural oppression experienced by Ts'msyen women influences gender dynamics regarding power and authority in Ts'msyen society. For example, Ts'msyen women experience intersecting and overlapping oppression with respect to sexism, racism, classism, colonialism, ageism, and other forms of oppression. Sexism has and continues to exist in Ts'msyen society, as it does in other Indigenous communities,¹⁴⁷ but sexism is only one form of oppression impacting Ts'msyen women. Sexism cannot be viewed in isolation to other overlapping and intersecting forms of oppression.¹⁴⁸

¹⁴⁶ Sexism also benefits women and others in Ts'msyen society, I will discuss this further below.

¹⁴⁷ Emily Snyder, Val Napoleon, & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593-654 at 606 [Snyder et al., Gender and Violence].

¹⁴⁸ Kimberlé Williams Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" in *Public Nat Priv Violence* (Routledge, 1994) at 94-95.

Colonialism has and continues to impact the social, cultural, economic, and legal practices of the Ts'msyen people.¹⁴⁹ One of the ways that colonialism has impacted Ts'msyen law is through gender norms. In *Gender, Power, and Representations in Cree Law*, Snyder argues that gender norms are highly influenced by “the colonial imposition of heteronormative, patriarchal, Christian, Victorian notions of gender”.¹⁵⁰ Snyder is not suggesting that these social norms regarding sexism experienced by women did not exist prior to colonialism, but rather that they were intensified by overlapping systemic and structural oppression.¹⁵¹

(3) Dominant Gender Norms Impact the Power Dynamics of Ts'msyen Society

Within the context at issue in this thesis, I argue that the dominant gender norms impact the dynamics of power in Ts'msyen society.¹⁵² In “Gender and Violence: Drawing on Indigenous Legal Resources”, Snyder, Napoleon, and Borrows state that “power dynamics play out in legal practices and processes”.

¹⁴⁹ Joyce Green, “Taking Account of Indigenous Feminism” in Joyce Green, ed, *Making Space for Indigenous Feminism*, 2nd ed (Halifax & Winnipeg: Fernwood Publishing, 2017) at 14 [Green, *Indigenous Feminism*].

¹⁵⁰ Snyder, *Representations of Cree Law supra* note 8 at 16.

¹⁵¹ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, online: <<https://www.mmiwg-ffada.ca/final-report/>> [MMIWG Report].

¹⁵² Snyder et al., *Gender and Violence supra* note 147 at 605.

Dominant forms of behavior, like heterosexism, are embedded in Ts'msyen society as a gender norm. Arguably, Ts'msyen cis-gendered men and women who present as heterosexual benefit from the privilege, class, and status associated with their sexual orientation.¹⁵³

In Ts'msyen law, it is an accepted gender norm that it will be a man who will hold the name of a chief; this is exemplified by the gendered rule that nephews of the chief (e.g., sister's daughter) will become the chief of a house.¹⁵⁴ This pattern of patriarchy is problematic because it is a form of violence that is closely connected to and reinforced by gender norms related to colonialism and sexism.¹⁵⁵ The implication is that this pattern of patriarchy operates as a sexist ideology and practice that reinforces violence against Ts'msyen women;¹⁵⁶ the pattern of patriarchy is antithetical to the legal principle of equality, which I will discuss further in what legal principles are at stake.¹⁵⁷ I first turn to further discuss how gender roles support the exclusion of women from Ts'msyen society.

¹⁵³ Bonnie Moradi & Patrick R Grzanka, "Using intersectionality responsibly: Toward critical epistemology, structural analysis, and social justice activism" (2017) 64:5 *Journal of Counselling Psychology* 500-513 [Moradi & Grzanka, Intersectionality].

¹⁵⁴ See Garfield, *Tsimshian supra* note 15 at 191.

¹⁵⁵ Snyder et al., *Gender and Violence supra* note 147 at 609.

¹⁵⁶ *Ibid.* at 603, 605.

¹⁵⁷ *Ibid.* at 606.

(c) Gender Roles Support the Exclusion of Women

Specific gender roles for women are used as the basis of an argument to support the exclusion of women from other leadership positions in Ts'msyen society. This argument is used to justify the limitation of women in holding other leadership positions.¹⁵⁸ I argue that gendered roles reflect gender norms that benefit a select few regarding power and privilege in Ts'msyen society.

Women can also benefit from sexism related to the power of a chief or those in other leadership positions. One of the matriarch's obligations to her house include helping guide them in their collective legal decisions.¹⁵⁹ An example of the type of legal decision that a matriarch helps her house make includes choosing a name for a member of her house.¹⁶⁰ The obligation of the matriarch to assist the house in making legal decisions regarding names is related to the issue in dispute. Arguably, men are not only to blame for the issue, as women also contribute to the issue of sexism in Ts'msyen law, including matriarchs. For example, since matriarchs help choose names for people within a

¹⁵⁸ To my knowledge, I am not aware of any gender diverse people who are matriarch based upon my research. More research is required regarding gender diversity in Ts'msyen society, including legal and governance systems.

¹⁵⁹ Overstall, Encountering *supra* note 110 at 35.

¹⁶⁰ Gray, "Rematriation: Ts'msyen Law, Rights of Relationality, and Protocols of Return", *supra* note 29 at 7.

house, then they would also help with the selection process of a successor of a chief.¹⁶¹

(d) Women benefit from sexism in Ts'msyen law

Men occupy most leadership roles within Ts'msyen society, but women also benefit from these positions of power. It is fiercely competitive when it comes to securing names in Ts'msyen society similar to Gitksan society.¹⁶² Women may want their son, brother, or other closely related kin to hold a high-ranking name because she could benefit if he becomes chief or another high-ranking name (speaker or post, for example). I argue that one reason could be because Ts'msyen society is matrilineal meaning that women pass down her own house and clan to her children. The associated intellectual property rights of a house would similarly be available to her children, including names of the house. For example, a female house member may want to secure her children greater access to hold a high-ranking name within her house. In securing names (especially high-ranking names) for a woman and her children she is also securing the benefit of holding a place within Ts'msyen society for future generations.¹⁶³

¹⁶¹ Houses could include a variety of people that a house chief could choose his successor with and from, including by a chief alone, a chief, and a select few people (e.g., matriarchs, or family), or by the house.

¹⁶² Napoleon *Ayook supra* note 1 at 7 and 298.

¹⁶³ Napoleon *Ayook supra* note 1 at 154.

(e) Defending Sexism with Sacred Law

Some people argue that tradition is part of Ts'msyen ayaawx in defending the exclusion of women and 2SLGBTQQIA+ people from holding the highest-ranking name of chief in a house. In this context, ayaawx may be invoked as a method of disregarding any discursive discussion by the house, but this negates both the social interaction and deliberation (as sources of law) aspects of law. As I mentioned earlier, ayaawx in this context is reduced to operating as a type of legal fundamentalism.

(1) Ayaawx as Legal Fundamentalism

Legal fundamentalism is an aspect of the larger more general paradigm of societal fundamentalism. Several scholars write about legal fundamentalism in the Indigenous law context. Napoleon, in "Did I Break It? Recording Indigenous (Customary) Law", writes that fundamentalism and essentialism is seen today in Indigenous law as a type of declaration of Indigenous law that "actually foreclose legal reasoning and questions".¹⁶⁴ My interpretation of this explanation of fundamentalism and essentialism in Indigenous law relates to when a person(s) declares a belief or opinion without providing the reasoning or ideas concerning the issue. There are also other interpretations of fundamentalism that operate within the political sphere.

¹⁶⁴ Napoleon, Did I Break It? *supra* note 6 at 27.

Snyder, in *Gender, Power, and Representations in Cree Law*, illustrates that fundamentalism can more generally refer to the politics of the “right” way of living can play out in Indigenous politics.¹⁶⁵ Snyder builds upon Cree scholar and educator Verna St. Denis’ argument that “fundamentalism parallels the goals and strategies of cultural revitalization in Aboriginal communities, especially in the expectation of homogeneity, cultural preservation, unchanging traditions and historically anchored cultural values and conventions for governing social interactions”.¹⁶⁶ Fundamentalism is a more general framework for understanding how it functions within broader cultural contexts. In “Gender and Violence: Drawing on Indigenous Legal Resources”, Snyder, Napoleon, and Borrows have argued that culture can also be “‘hijacked’ by those in authority to create or replicate a male-dominated status-quo”.¹⁶⁷ I, therefore, argue that it is insufficient to refer more generally to fundamentalism in this specific Ts’msyen legal context regarding when *ayaawx* is invoked defensively, but to refer to it as a type of legal fundamentalism.

Ayaawx is often used as a broad term to connote law, customs, precedents, or protocols to varying degrees of specificity. In their article “Gender

¹⁶⁵ Snyder, *Representations in Cree Law supra* note 8 at 135.

¹⁶⁶ *Ibid*; Verna St Denis, "Real Indians: Cultural Revitalization and Fundamentalism in Aboriginal Education" in JoAnn Jaffe, Carol Schick, & Ailsa M Watkinson, ed, *Contesting Fundamentalisms* (Winnipeg: Fernwood Publishing, 2004) at 35 [St. Denis, Real Indians].

¹⁶⁷ Snyder et al., *Gender and Violence supra* note 147 at 595.

and Violence: Drawing on Indigenous Legal Resources”, Snyder, Napoleon and Borrows suggest that specificity is required when addressing issues of “gendered violence because culture can be used in ways that are harmful to societies as a whole and to women in particular”.¹⁶⁸ Arguably a reasonable degree of specificity is required when referring to ayaawx in relation to the exclusion of women from holding the highest-ranking name of chief because of “institutional violence” towards women in Ts’msyen society.¹⁶⁹

(2) Forms of Violence Impacting Ts’msyen Women

Ts’msyen women also experience other types of violence in Ts’msyen and Canadian society. Ts’msyen women, like many other Indigenous women, experience higher incidence of violence. The forms of violence include emotional violence, spiritual violence, physical violence, mental or psychological violence, economic or financial violence, verbal violence, neglect, sexual violence, symbolic violence, and structural violence (e.g., colonial, cultural, and institutional violence that together can lead to systemic or structural violence).¹⁷⁰ There are many forms of violence that impact Ts’msyen women on an individual (person to person level) but also structurally.

¹⁶⁸ Snyder et al., Gender and Violence *supra* note 147.

¹⁶⁹ *Ibid.* at 595.

¹⁷⁰ Snyder et al., Gender and Violence *supra* note 147 at 601.

Structural violence (or oppression) is a form of violence that forms the basis of oppression through institutions. The National Inquiry into Missing and Murdered Indigenous Women’s Final Report (“National Inquiry”) provides a definition of structural violence as being the “gap between a person’s or community’s potential well-being and their actual well-being, when that difference is avoidable. These gaps are due to the injustices, inequalities, and other forms of violence embedded in everyday life that privilege some people to the detriment of others.”¹⁷¹ The National Inquiry’s definition of structural violence is helpful in better understanding structural violence, but I do not agree that it fully fits within the context. Arguably the definition referring to the actual versus potential well-being places it within the framework of health. I am more concerned with the application of structural violence within the context of governance. The exclusion of women from holding high ranking names, such as chief, limit the potential of women in the Ts’msyen governance system.

Structural violence adds to the degree of oppression and dispossession that Ts’msyen women experience within Ts’msyen society. The overlapping and intersectional oppression creates multiple barriers for Ts’msyen women and make it challenging to develop a robust sense of legal agency. The limiting of legal agency of women within Ts’msyen society results from overlapping oppression and systemic violence. These forms of oppression may also limit the

¹⁷¹ MMIWG Report *supra* note 151 at 77.

ability of Ts'msyen women (and others) to openly discuss issues that challenge the status quo of legal and political power structures; but there may be other reasons why members of a house may not want to challenge ayaawx as well.

Members of a house may not want to challenge ayaawx because the term has come to connote a certain sacrosanct reverence. Referring to ayaawx as sacred makes it challenging to discuss varying interpretations of or anything specific concerning Ts'msyen law because it is relied upon as the sole, undisputable authority in this context. Challenging the ayaawx when it is characterized as sacred can be viewed as acting against the socially accepted norm and historic legal precedence. Furthermore, people may invoke ayaawx as a defence mechanism to uphold a rigid understanding of the legal system rather than critically inquiring into the legal issues.

Ts'msyen people are in a process of revitalizing Ts'msyen law and it could become easier to defend a pre-existing system rather than to ask about why ayaawx functions in this way. In this example, ayaawx functions as a defence mechanism that is as a method to silence other people's perspectives and opinions. Ayaawx when used in this way effectively acts in isolation to other sources of law, including deliberative laws, customary law, social interactive law, and natural law. Ayaawx, when invoked defensively, is a way of reinforcing the social norms of Ts'msyen men and women within their separate and distinct gender roles.

I argue that gendered roles within Ts'msyen society further perpetuate inequality. I will discuss the principle of equality in more detail in the next section.

(f) What Ts'msyen Legal Principles are at Stake?

For Ts'msyen women and 2SLGBTQQIA+ people, the legal principle of equality is at stake in their continued exclusion from becoming chiefs. The principle of equality might be expressed as the expectation that all people can expect to be treated equally under Ts'msyen law; this includes the necessary precondition of respect based on a person's gender, sex, and sexual orientation in the process of a house choosing a suitable successor as chief.

The legal principle of equality serves to provide greater respect and protections for women and 2SLGBTQQIA+ people in the process of successorship of a chief. I have provided only a few examples of when Ts'msyen women became chief. The narratives of the women are examples of when the house called on the leadership of women for the benefit of their house.

The legal principle of equality is also important when a house is interacting and deliberating with each other about who could become a successor. Arguably, a functioning house includes collective participation of all house members in

developing and voicing of legal reasons to make the decisions regarding the chief's successor.¹⁷²

For a decentralized legal society like Ts'msyen, equality also includes the opportunity to voice an opinion on matters regarding legal decisions that will impact them, such as succession.¹⁷³ For the Ts'msyen legal order, like other Indigenous legal orders, it is important that all members of a house understand the legal reasoning and deliberative processes of how they interact with each other and the practices or protocols that guide those deliberative legal processes.¹⁷⁴ I will discuss theories of relational relationships that assist in understanding those legal processes of succession in the next step in the dispute resolution framework.

(g) What Relationships Might Foster These Legal Principles?

The third step in Nedelsky's four-step relational approach asks what relationships might foster these legal principles. For the member of a house in Ts'msyen law, the witnessing of the feast regarding succession of a house

¹⁷² I found it very challenging to find any resources and literature regarding the process of decision-making with respect to when and how a house makes decisions that become public within a feast.

¹⁷³ Napoleon & Friedland, *Inside Job* *supra* note 28; Napoleon, *Thinking About Indigenous Legal Orders* *supra* note 35 at 234.

¹⁷⁴ Borrows, *Canada's Indigenous Constitution* *supra* note 71 at 35.

chief by guests makes it a public legal event.¹⁷⁵ This is after the decision is made regarding successorship during the process of selection regarding successorship. The process of selection for a successor may limit the Ts'msyen legal principle of equality regarding who is chosen as successor. I argue that sexism has continued with respect to the selection of men at the exclusion of women and 2SLGBTQQIA+ people is in the decision-making process regarding successorship.

(1) Three Types of Law in Ts'msyen Law like Gitxsan Law

In "Encountering the Spirit in the Land: "Property" in a Kinship-Based Legal Order", Overstall theorizes that there are three types of law that apply the Gitxsan legal order. All three types of laws are important for Gitxsan law, that enable it to function. For convenience, I am restating Overstall's three types of law in the Gitxsan legal order:

Laws of the first type are often referred to as simple laws of respect and balance. These are primary laws, the rules that have to be followed to carry out one's reciprocal obligations to others.

The second type are secondary laws, rules that enable people to interpret the primary laws.

The third type is what have been called "strict" laws. They are constitutional in nature, concerned with establishing and maintaining the legal framework of the

¹⁷⁵ Gisday Wa & Delgam Uukw, *The Spirit in the Land* *supra* note 56 at 8; Roth, *Becoming Tsimshian* *supra* note 41 at 131.

society and its ability to maintain its obligations to the land.¹⁷⁶

The secondary laws include rules that enable people to interpret the primary laws.¹⁷⁷ Primary laws are simple laws based on reciprocal relationships. Reciprocal relationships in Ts'msyen law, like Gitksan law, include reciprocal obligations to others within a person's kinship network of houses and clans.¹⁷⁸ The responsibility and obligations of the house to have reciprocal relations is also important in Ts'msyen law.¹⁷⁹ It is through the concept of reciprocal relations and obligations that the theories of relational law can be adapted to apply to Ts'msyen law. I now turn to Rundle's interpretation of Fuller's relational theory.

(2) Understanding the Dynamics of Ts'msyen Law

Rundle's interpretation of Fuller's relational theory relates to the interpretation of the internal morality of law that provides a useful analytic to understand the dynamics of Ts'msyen law. According to Rundle's interpretation of Fuller's internal morality of law is attentive to "how governing through law requires practices, conditions, and commitment conducive to that end".¹⁸⁰ Fuller

¹⁷⁶ Overstall, Encountering *supra* note 110 at 44.

¹⁷⁷ *Ibid.* at 44.

¹⁷⁸ Napoleon, Thinking About Indigenous Legal Orders *supra* note 35; Napoleon, Ayook: *supra* note 3 at 296.

¹⁷⁹ *Ibid.* at 301.

¹⁸⁰ Kristen Rundle, "Administrative discretion and governing relationships: Situating procedural fairness" in Denise Meyerson, Catriona Mackenzie, & Therese MacDermott, ed, *Procedural Justice and Relational Theory* (Routledge, Taylor & Francis Group, 2021) at 234 [Rundle, Governing Relationships].

provides the example of King Rex who failed in eight ways to make law.¹⁸¹ King Rex is a fictional character in Fuller's seminal text *The Morality of Law*. He is important as Rundle states that he was "designed to invite reflection on the constitutive demands of the enterprise that he had undertaken but failed to achieve" (e.g. making law).¹⁸² Together, the eight principles form the internal morality of law include:

- (1) a failure to achieve general rules at all,
- (2) a failure to publicise or make available the rules that citizens are required to observe,
- (3) the abuse of retroactive legislation,
- (4) a failure to make rules understandable,
- (5) the enactment of contradictory rules, or
- (6) rules that require conduct beyond the powers of the affected party,
- (7) subjecting the rules to too-frequent change, and
- (8) a failure of congruence between the rules announced and their actual administration.¹⁸³

Rundle's interpretation of the eight principles of Fuller's law emphasizes the relational commitments that Fuller sought to convey.¹⁸⁴ She illustrates that the relational demands of Fuller's jurisprudence includes the necessary

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ Rundle, Fuller's Internal Morality of Law *supra* note 112 at 500, originally citing Lon L Fuller, *The Morality of Law*, (New Haven: Yale University Press, 1965 at 39).

¹⁸⁴ Rundle, Governing Relationships *supra* note 180 at 235.

conditions for the authority of law.¹⁸⁵ The conditions of the authority of law are within the framework of mutual 'fidelity of law,' which must be sustained in part by both 'legal officials' and 'subjects' if a legal order is to be achieved.¹⁸⁶

Furthermore, legal officials take their authority to govern from that acceptance of the subject of their authority as lawgiver or other legal official. The concepts of 'lawgiver,' 'legal official,' and 'subject' do not fit exactly in Ts'msyen law.

The reciprocal relationships in Ts'msyen law operate in a less vertically hierarchal fashion. Ts'msyen society is a decentralized legal society and power, and authority is distributed vertically throughout a house (as opposed to hierarchically).¹⁸⁷ The power of the house is held in the name of the chief that the chief must maintain.¹⁸⁸ In this context, the chief is not the legal official and the house members are not the legal subjects. Arguably, due to the imposition of the Indian Act and its influence on Ts'msyen society, including legal and governance structures, chiefs (and other male leadership positions such as lik'agyet) are often mistakenly thought of as legal officials. Conversely, members of a house can similarly be seen as legal subjects due to the spectre of settler laws. I argue that legal 'official' and 'subject' are inaccurate conceptualizations of reciprocal relationships within the Ts'msyen governance structure but Rundle's theory on

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ Napoleon & Friedland, Inside Job *supra* note 28; Napoleon, Thinking About Indigenous Legal Orders *supra* note 35 at 234.

¹⁸⁸ Napoleon, Ayook *supra* note 1 at 298.

reciprocal relations is a helpful analytic tool to interpret the relationships that might foster Ts'msyen legal principles.

(3) Reciprocal Relations in Ts'msyen Law

Rundle's interpretation of relational authority is useful for the issue in dispute as relational theory provides that lawful authority requires a relationship of reciprocity. As I have articulated earlier, Ts'msyen law, like Gitksan law, includes reciprocal relationships and obligations to members within their house but also other houses in their kinship network.¹⁸⁹

(4) Reciprocal Relations in the case of *Yahaan v. Canada*

One way in which the governing ability of a house is limited is when reciprocal relations break down when chiefs or others in leadership do not follow Ts'msyen laws or protocols. When this happens, it calls into question the lawful authority of Ts'msyen law.¹⁹⁰ For an example of reciprocal relations, I turn to the Federal Court ("Court") case of *Wesley v Canada*.¹⁹¹

Yahaan (also known as Donald Wesley) brought an application for judicial review challenging the environmental assessment and decision-making approval process of the Pacific Northwest LNG Project ("LNG Project") near Lelu Island in

¹⁸⁹ Napoleon, Thinking About Indigenous Legal Orders *supra* note 35 at 15; Napoleon, Ayook *supra* note 1 at 296.

¹⁹⁰ Napoleon, Ayook *supra* note 1 at 213.

¹⁹¹ *Wesley v Canada*, [2017 FC 725](#) [*Wesley*].

the Prince Rupert area of British Columbia.¹⁹² Yahaan sought to quash the LNG Project based on the assertion that the Crown failed to consult him as head chief of the Gitwilgyoots tribe.

The *Yahaan* case is relevant to the issue, as Yahaan's claim to leadership of the Gitwilgyoots tribe was challenged in Court. Yahaan was unable to prove in Court that that he held the position of head chief of the Gitwilgyoots tribe, and the case was dismissed by the Federal Court and later at the Federal Court of Appeal.¹⁹³ Furthermore, the Court held that Yahaan's failure to ascertain the level of support he carried among members of the Gitwilgyoots also disqualifies him from purporting to act on their behalf.¹⁹⁴

Below, is an excerpt of the cross examination of Yahaan that shows a lack of necessary support from members of the Gitwilgyoots tribe:

Q All right. Before making the decision that's reflected in paragraph 35, did you take a vote of the members of your tribe?

A I went to every house in Port Simpson of Gitwilgyoots descent and they refused to meet. On one or more occasion I have done that.

Q They refused to meet with you?

A Yes.

Q Even though they were Gitwilgyoots members?

¹⁹² *Ibid.* at para 2.

¹⁹³ The Federal Court of Appeal dismissed the appeal, see *Yahaan v Canada*, [2018 FCA 41](#).

¹⁹⁴ *Wesley supra* note 191 at para 15.

A All these people on the affidavit. That's one family there. That's all it is. That's one family that you see there.

Q So did anyone -- any member of your tribe, other than yourself, agree that you have the power to stop them from getting benefits?

A Say it again.

Q Did anyone -- anyone in your tribe, any member of your tribe -- let me rephrase the question.

Before you made the decision reflected in paragraph 35 did you take a vote of the members of your tribe?

A Impossible because the members of the Gitwilgyoots tribe are spread out through the land.

Q Did you consult them?

A Impossible to do.

[Also see the exchange at questions 352-58.]¹⁹⁵

In the cross-examination of Yahaan, he said that members of the Gitwilgyoots tribe refused to meet with him on more than one occasion in Lax Kw'alaams. Furthermore, he could not consult with members of his own tribe because they were "spread out through the land".¹⁹⁶

The *Yahaan* case is an example under the Canadian law context in which Ts'msyen law is also at issue. In Canadian law, it is an example of a judicial review in which Yahaan was the applicant, as he brought an application to the Court to quash the decision of the LNG Project at Lelu Island. In judicial reviews, applicants must demonstrate that they have the necessary standing to act on

¹⁹⁵ *Ibid.* at para 16.

¹⁹⁶ *Ibid.*

behalf of a group of people. The *Yahaan* case is an unfortunate example of when a chief was unable to prove standing to represent the interests of the Gitwilgyoots tribe. Therefore, the *Yahaan* case puts at issue of lawful authority under Ts'msyen law because he was unable to demonstrate that he had the support of his tribe and demonstrate reciprocal relations with them.

The *Yahaan* case serves to illustrate the issue of lawful authority and reciprocal relations in the Ts'msyen legal context.¹⁹⁷ Through the application of Rundle's interpretation of reciprocal relations, reciprocity is between government and citizen that is built into the structure of governing through rules and how this causes the internal morality of law to include a relationship with persons generally.¹⁹⁸ Furthermore, the legal official must enter into a reciprocal relationship with the subject to secure the 'fidelity of law'.¹⁹⁹ Lastly, Rundle illustrates that the relationship of reciprocity is earned through relational conditions "between legal officials and legal subjects that are capable of generating and sustaining that fidelity".²⁰⁰

¹⁹⁷ I am not arguing that *Yahaan* did not engage in reciprocal relations but providing it as an example to further illustrate the necessity of reciprocal relations in Ts'msyen law.

¹⁹⁸ Rundle, *Governing Relationships* *supra* note 180 at 235, originally citing Lon L Fuller, *The Morality of Law*, (New Haven: Yale University Press, 1965) at 39–40.

¹⁹⁹ *Ibid.* at 235.

²⁰⁰ *Ibid.*

In the context of Ts'msyen law, the chief acting in the capacity as the central governance figure represents the power of a house (or tribe in this case) through the chief's name.²⁰¹ The chief has responsibilities and obligations to their territory, higher financial obligations for feasts, members within the house, greater responsibility to be knowledgeable about the *adaawx* of their territory, and uphold their relational kinship networks.²⁰² Arguably, it is also an obligation of the chief to maintain reciprocal relations in Ts'msyen law. The chief acting on behalf of a house must demonstrate that they have entered a relationship of reciprocity to secure the fidelity of law.²⁰³ Furthermore, reciprocal relations are necessary to foster the legal principle of equality in the process of successorship of a house chief's name.

In the next section, I will move on to the last question in Nedelsky's four-step relational approach to dispute resolution – what kind of Ts'msyen laws can foster these relationships.

(h) What Kind of Ts'msyen Laws can Foster These Relationships?

The last question focuses on the kinds of Ts'msyen laws that can foster these relationships. Nedelsky's language focused on the language of rights to ask the question, but I have chosen to focus on what kind of Ts'msyen laws can

²⁰¹ Napoleon, *Ayook supra* note 1 at 297.

²⁰² For an example see Roth, *Becoming Tsimshian supra* note 41 at 35.

²⁰³ Rundle, *Governing Relationships supra* note 180 at 235.

foster these relationships because my LLM thesis is focused on Ts'msyen law as opposed to Canadian law. Adapting the language of rights to Ts'msyen law further reinforces Napoleon's assertion that "Indigenous peoples were and are reasonable and reasoning peoples, and law is one of the ways we govern ourselves".²⁰⁴

I think the issue is quite simple to address what kind of Ts'msyen laws can foster these relationships. The law regarding sexism, regarding successorship of the chief name, is void as law. From my research, I could not locate any lawful authority or legal reasoning that substantiated why women and 2SLGBTQQIA+ people are excluded from holding the name of chief. I argue that if we were to re-shape this pattern of exclusion then it would be to communicate within the context of a feast that equality is an important legal principle in Ts'msyen law with respect to gender and sexual orientation as it relates to successorship of a chief.

It is the general practice that chiefs and matriarchs speak publicly on behalf of his or her house at a feast. Therefore, I argue that it is important that chiefs and matriarchs share their views publicly at feasts regarding the

²⁰⁴ Napoleon, Thinking About Indigenous Legal Orders *supra* note 35 at 231. Originally citing Hadley Louise Friedland, *The Wetiko (Windigo) legal principles: responding to harmful people in Cree, Anishinabek and Saulteaux societies-- past, present and future uses, with a focus on contemporary violence and child victimization concerns* (Master of Law Thesis, University of Alberta, 2010) [unpublished] at 15–16, online (pdf): <https://www.collectionscanada.gc.ca/obj/thesescanada/vol2/002/MR55729.PDF> >.

importance of the Ts'msyen legal principle of equality. Chiefs, matriarchs, and others of high status, carry a greater obligation to witness and record the legal event of a feast. Those in attendance at feasts such as chiefs, matriarchs, and members of houses, will be listening to the speeches at the feast and could communicate with their kinship networks what they heard about this important issue. By publicly discussing the legal principle of equality, members of the kinship network of those in attendance could engage in further private discussions about the subject matter.

I will discuss how discussions and social interactions will be of greater importance to bring about transformative change in the next chapter.

3. Conclusion

I started this chapter writing about how the law structured the relevant relations. I sought to find narratives related to when women had held the name of chief. There are limited examples of when women became chief and most occurred in the late nineteenth and early twentieth centuries. These are powerful examples of when houses or tribes have chosen chiefs that are women in the past. I thought by finding examples of when women became chief that I would find legal reasoning that led them to become chief that differed from when men become chief. However, through the application of Nedelsky's methodological framework, I found that there is no specific law or precedent that needs to be relied on to choose a woman to hold the name of chief. In fact, it is an unlawful

authority of law when exclusively men are chosen as successors, and it is also a form of sexism. Sexism, like other forms of oppression, is not a legal principle that can be relied upon to uphold Ts'msyen law, in fact it is not a law at all. On the contrary, equality is a legal principle that can be relied upon to uphold valid Ts'msyen laws.

In order for Ts'msyen law to function, it must take into account the lawful authority through reciprocal relations.²⁰⁵ Reciprocal relations including by the chief and members of the kinship network are an integral aspect of Ts'msyen law, including an aspect of feasts.²⁰⁶ I argue that chiefs and matriarchs could be more communicative at feasts about the importance of legal principle of equality when it concerns gender and sexual orientation in the decision-making process that guides successorship of the name of chief of a house. It is important that more discussions about the Ts'msyen legal principle of equality take place between members of a house, with people of other houses, and kinship networks more generally.

²⁰⁵ Rundle, *Governing Relationships supra* note 180 at 235.

²⁰⁶ For an example see Roth, *Becoming Tsimshian supra* note 41 at 35.

Chapter 4 – Transformative Changes in Ts’msyen Law

1. Introduction

I started my thesis sharing a personal story about my relatives who sat with my mother and I around the table drinking tea. They were discussing issues related to kinship ties in Lax Kw’alaams, including the revitalization of the Ts’msyen legal order and governance structures. It is becoming increasingly rare for people to sit down together and drink tea and visit as often as previous generations. Electronic devices replaced teacups and, with that, those deeply transformative conversations. For the issue in question in this thesis, I posit that transformative change is possible through deep conversations across generations, since it concerns the transference of power and authority between gender lines for the highest-ranking name of the Ts’msyen house groups.

Throughout much of my childhood, I remember sitting around the table drinking tea with my mom as she visited my aunties. It was always a pleasure for me to sit with them. I had to be quiet as they talked among themselves. The opportunity to participate in adult conversations was a treat and not only because I got to drink tea. They often would talk about issues going on in their life. The act of sitting around a table drinking tea together was an event that me like my mother observed her mother and grandmother doing together. Previous generations of women in my family sat around speaking in the Sm’alygax language together while drinking tea. My great-grandmother would speak to my

grandmother in the Ts'msyen language of Sm'algyax. My great-grandmother said that my grandmother could not speak many words of the language, although she understood her mother.

Somewhere along the way, my relatives stopped drinking tea together as often. I cannot remember when these habitual visits stopped; I only remember that it ended around the same time that we got the internet at home - or maybe it was due to the advent of the mass commodification of coffee shops in Vancouver. Either way, it is rare that we have tea together intergenerationally and talk across generations as was common with past generations.

Now, when I get together for tea with one of my aunties, we talk a lot about our Ts'msyen genealogy. I sit with my aunt and talk about our family tree going back many generations. I try to remember the names and dates of births of our ancestors for our future generations. But we also talk about who is alive today, how we are related, and who are house chiefs and matriarchs are in various Ts'msyen house groups from Lax Kw'alaams (and other reserves). In our way, we continue the conversations that previous generations started, but are no longer with us. We are assembling the pieces of the genealogical puzzle.

(a) Maintaining Complex Kinship Relations is Integral to Ts'msyen

Law

Maintaining complex kinship relations are important to Ts'msyen law.²⁰⁷ Kinship ties extend to our relatives and their relatives. I not only sit with older generations of my family, but also like to sit and listen to stories from older generations of people who are part of my kinship relations. It is important to listen to and discuss issues with other generations of people in a kinship network to better understand our own cultural identities, shared histories, and experiences in relation to others.

(b) Pathways to Intergenerational Relationships and Knowledge

Sharing

Activities like sitting around drinking tea, berry picking, or preparing fish together are pathways for intergenerational relationships to generate and share knowledge. There are other activities that are ubiquitously important for Ts'msyen people in the spring or summer. These activities could be berry picking or the preparation of fish.

In "Indigenous Knowledge of Ecological Variability and Commons Management: A Case Study on Berry Harvesting from Northern Canada", Brenda Parlee and Fikret Barkesin write "[k]nowledge generation has many faces".²⁰⁸

²⁰⁷ Napoleon, *Ayook supra* note 1 at 301.

²⁰⁸ Brenda Parlee, & Fikret Berkes, Teet'it Gwich'in Renewable Resources Council, "Indigenous Knowledge of Ecological Variability and Commons Management: A Case Study on Berry Harvesting from Northern Canada" (2006) 34:4 Springer at 516 [Parlee et al., Teet'it Gwich'in].

They illustrate that knowledge building is not a linear or one-dimensional process but is dependent on constant feedback between observation and interpretation in different places and by different people over time.²⁰⁹

Parlee and Barkes' observations are based on the Teetl'it Gwich'in women's participation in berry harvesting in the subarctic boreal-forest region. They observed themes with respect to berry harvesting and its distribution. For example, one of their observations was that the most complex trading relationships were among the berry harvesters and the women who prepared fish. The roles and responsibilities they note were "strongly integrated".²¹⁰ Parlee and Barkes theorize that the "[p]athways for resource sharing are crucial for social relationships and the well-being of families and communities".²¹¹

(c) Social Relationships and Well-Being Through Preparing Fish and Berry Picking

Social relationships and the well-being of families and communities are exemplified in activities such as picking and preparing fish. These activities provide a way for families to come together that can allow the law of social interaction to continue and develop. They further reinforce the well-being of

²⁰⁹ *Ibid.*

²¹⁰ *Ibid* at 525.

²¹¹ *Ibid.*

families and communities through the sharing of knowledge and distribution of harvested foods for families.

Fishing and berry picking are not directly related to feasting; but berries and fish are often part of the foods shared at a feast. I argue that participating in activities related to ecological knowledge is vitally important to the continuation of feasting practices. Social interactions, such as through fishing or picking berries, provide time for people to work cooperatively in a common practice.

(d) Social Interactions Maintain Relational Ties

I posit that through the continuation of social interactions, such as fishing, berry picking, and feasting, families can maintain relational ties with each other. As social interactions continue to grow, social interaction of Ts'msyen law and governance, could continue to transform and adapt to include principles of equality and fairness.²¹² As Ts'msyen society is changing to be more equitable with regard to women's visibility within the public sphere, there will come a time when it will not be necessary to explicitly ask why there are few women chiefs in Ts'msyen society, including legal and governance structures.

The discussions about why there are not many female chiefs are still required currently. They could be further facilitated through the process of activities related to starting small discussions over activities related to resources.

²¹² Napoleon, *Ayook supra* note 1 at 263.

But then the process expanded to discussions through house groups. Matriarchs already have the power and authority as the holders of names. Whether the house follows or the person holding the highest-ranking name objects to a person based on their gender is another issue. Sometimes it is looking past older and more constricted ways of being in the world that is required to build new opportunities for the next generation of leaders to flourish.

Ts'msyen law is not static and is meant to change over time. Napoleon writes that laws change as people and societies change "in order to be an effective part of governance – it has to be appropriate to new contexts and circumstances or it simply will not work. It also has to be appropriate to the experiences of the people, or it will have no meaning or legitimacy".²¹³ I argue that through social interaction and discussions, Ts'msyen society can continue to work through issues that affect society today through legal reasoning, sharing ideas, and learning from one another.²¹⁴ Social interactions and discussions maintain the dynamic nature of Ts'msyen law and can take into account principles of equality and fairness.

²¹³ Napoleon, Thinking About Indigenous Legal Orders *supra* note 35 at 232.

²¹⁴ Napoleon, *Ayook* *supra* note 3 at 263; Borrows, *Canada's Indigenous Constitution* *supra* note 71 at 38.

2. Conclusion

There were women in the past who held the highest-ranking name of a house. I have provided narratives in the previous chapter with limited examples of women becoming the holder of the highest-ranking name of chief in Ts'msyen society. Arguably, it is even more important to look beyond these limited examples to reimagine the possibilities in which we can see past gender binary within a house regarding leadership positions.

The revitalization of the Ts'msyen legal order and governance system is closely related to the well-being of our communities.²¹⁵ I think that the well-being of our communities is exemplified when families can sit down with one another to participate in activities, such as feasting, then we can begin to discuss how we can build more difficult conversations on the principles of equality and fairness in Ts'msyen law.

²¹⁵ Borrows, *Canada's Indigenous Constitution* *supra* note 71 at 36.

Chapter 5 – Conclusion

I wanted to write a thesis that explored an issue that is personally important to me as a Ts'msyen woman and citizen – why are women excluded from holding the highest-ranking name in Ts'msyen society including law and governance structures? This issue was and continues to be important to me because I was told by an Elder, whom I very much respect, that women cannot be chiefs because women would not be respected by men. I was told this statement while I was engaged in course work for my LLM thesis. I was confounded and confused by the statement because I had not explicitly considered or critically questioned why there were so few female chiefs. Furthermore, I had also not explicitly considered or critically questioned why there were women only occupying the designated gender role of matriarch in Ts'msyen society.

Throughout the course of writing this LLM thesis, I was quite fearful of examining the issue as to why women and 2SLGBTQQIA+ people are excluded from holding the highest-ranking name of chief in Ts'msyen society. There were many challenges that I personally had in overcoming my fear to complete writing this thesis. Much of my fear was centred on holding on to an anachronistic notion that it is wrong to question our Ts'msyen laws but also authority figures. There are old notions that no longer serve a purpose in Ts'msyen communities where asking questions could be perceived as an act of defiance against authority and

authoritative decision-makers; this is part of the intergenerational impacts of colonization resulting from residential schools and some church institutions.

There was a residential school located in Lax Kw'alaams that began as a school for girls run by the Methodist missionary Thomas Crosby and his wife Emma Crosby in 1879. The Crosby School for Girls was then funded by the federal government and operated as a residential school from 1892 to 1948. During the course of writing this thesis, I learnt that my great-grandmother, Elizabeth Gulbrandsen (née Wright), had attended Crosby School for Girls. My family had thought that she had attended residential school, and it was confirmed while writing this thesis. It helped to explain some of the ways in which I had learnt not to question authoritative figures that contributed to the limitations that I placed on my own research. It was necessary to engage in deliberative discussions with my family members, mentors, and supervisor to re-conceive the notion that it was also healthy to engage in dialogue about such issues. In writing this LLM thesis, I was able to come to apply legal reasoning through a theoretical and methodological framework.

Through the application of Nedelsky's four-step relational approach to law, I was able to examine the issue more critically. This thesis required an intersectional approach to examining oppression in Ts'msyen society including legal order and governance system. I engaged in a process of critically examining some of the past and current realities of sexism in Ts'msyen society that impact women and 2SLGBTQQIA+ people from holding leadership positions

in Ts'msyen society. Some Ts'msyen women have become chiefs throughout the past 150 years; however, it is only a small number of Ts'msyen women who have held the name of chief.

Some of the women who held the name of chief were at a time of increased presence of missionization for the Ts'msyen living on reserves in northern British Columbia. Some of the women included in this thesis are Niesłgu-mik or Sudaal (also known as Victoria Young) who assumed the role of chief of house of Giluts'aaw in the late 1800s. Other women such as Martha Ligeex, Nies-we-xs and Nies-wama'k from Lax Kw'alaams are all powerful examples of female leadership in Ts'msyen society. The narratives about these female chiefs serve as a reminder that Ts'msyen women were chiefs within recent history. They also serve as examples of strong female leadership in Ts'msyen society. I would interpret these narratives of Ts'msyen female leadership as precedential setting examples of women holding the name of chief within Ts'msyen law. Instead, through the application of Nedelsky's four relational approach, I found myself engaged in a legal reasoning process that questioned whether under Ts'msyen law it is not valid to exclude women from high-ranking names like chief. Part of the legal reasoning for invalidating the pattern as law is because gendered exclusion does not uphold the reciprocal relationships of Ts'msyen law that is based on kinship, nor does it uphold the legal principle of equality in Ts'msyen law in excluding women and 2SLGBTQQIA+ people.

Lastly, Rundle's interpretation of Fuller's relational law was instrumental in laying a framework for how relationships could foster Ts'msyen legal principles regarding equality. Rundle's theories and concepts of relational law were very difficult to understand and interpret, especially because I wanted to point to examples of when a house is involved in deliberation processes about succession. In my research, I found that there were very few examples of the house deliberation process on successorship. Unfortunately, there was more emphasis on the decision of who would become a successor or chief, but not the process of the decision-makers in the house.

I am interested in the principle of procedural fairness, an administrative principle under the common law. I began to consider that the administrative principle of procedural fairness could be applied to the decision-making process for the selection of successor as a result of reading Rundle's chapter on "Administrative discretion and governing relationships: Situating procedural fairness".²¹⁶ More research could be done to explore the issues of administrative decision making in the Ts'msyen legal context through an analysis of the house's process of deliberation and selection of chief.

Since the house is a governing body, another question to frame the issue is: how could an administrative decision be challenged with respect to the decision regarding the selection of a successor for the name of chief? I am aware

²¹⁶ Rundle, *Governing Relationships* *supra* note 180 at 234.

that there are examples throughout the history of the Ts'msyen and Gitksan people that challenged the validity of a name at feasts; but examining the issue with a lens to the process of selection and challenging the validity of a chief is an issue that could be further researched.

Lastly, I think much more scholarship is needed on the critical analysis of Ts'msyen law and gender. I was very disappointed that there was very little research on the issue of why there are so few female chiefs in the Ts'msyen society or rather the issue of the gendered exclusion of women and 2SLGBTQQIA+ people from holding the name of chief in Ts'msyen society. I look forward to the day when in my own house that we can have a female chief, the important discussions that I started with my relatives will continue and one day I hope to see the change.

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